COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0404
March 7, 2025

Braun IP Law, LLC	*v.*	Jessica Vazquez and Lily Marston
BRAUN IP		**RESPONDENTS**

ORDER ON REQUEST FOR RECONSIDERATION

Claimant Braun IP Law, LLC ("Braun IP" or "Claimant") initiated this copyright infringement claim against Respondents Jessica Vazquez ("Vazquez") and Lily Marston ("Marston") (collectively, "Respondents") on December 11, 2023. Claim (Dkt. 1). The Copyright Claims Board (Board) issued the Final Determination in this proceeding on January 31, 2025 (Dkt. 86), finding for Respondents and dismissing the Claim with prejudice. As a review of the Final Determination reveals, this case was not close: Respondents' use of the work at issue was a textbook example of fair use. Many of the arguments made by Claimant were utterly meritless, some to the point that they undermined Claimant's credibility. Moreover, the Board did not take a cursory review of the Work[1] at issue and its use, but watched both works several times, detailed in the Final Determination's Factual History section, which lays out Respondents' clearly transformative use of the work for criticism and commentary.

Despite the detailed nature of the Final Determination, on March 2, 2025, Claimant filed a Request for Reconsideration. Request (Dkt. 87). A request for reconsideration of a final determination must identify a clear error of law or fact that was material to the outcome, or a technical mistake. 17 U.S.C. § 1506(w); 37 C.F.R. §§ 230.1-230.2. Just as importantly, the "request shall not merely repeat any oral or written argument made to the Board as part of the proceeding but shall be specific as to the purported error or technical mistake that is the subject of the request." 37 C.F.R. § 230.2. Notwithstanding that rule, the Request is simply a 12-page brief rehashing the greatest hits of the party statements Claimant filed in the written testimony phase.

[1] The Board uses the same definitions as in the Final Determination.

The Board could simply deny the Request on that basis. The arguments continue to be meritless and no clear error of law or fact or technical mistake is presented. However, rather than merely denying the Request in a cursory order, the Board will briefly rehash why the Episode so obviously qualifies for fair use for educational purposes.

I. Factual History

For a detailed factual history, including the many ways in which the allegedly infringing work (the "Episode") uses Claimant's Work to critique it, *see* the Final Determination at 2-7. Suffice it to say here that the entirety of Claimant's Work depicts Braun IP's owner, Jeanette Braun, sitting at her desk, recording on a computer or phone camera a generally factual recitation of her position in a dispute with an internet personality named Bekah Day. Braun did not like that Day accused Braun of filing "false copyright strikes" against "small creators" such as podcasters and influencers on the internet so that she can get things her clients do not like taken down. Braun's defense to Day's accusations in the Work is highly semantic: that *she* does not file a copyright strike, but rather files a *request* for a strike and the online service provider performs the strike.

The "tea and drama" referred to in the Work was squarely in the wheelhouse of Respondents' Podcast. In the course of discussing the Day-Braun fight and Braun's position related to that dispute, Respondents played a one-minute clip from the eight-and-a-half minute Work, and spent approximately an hour commenting on and critiquing it, completely dismantling all of Braun's arguments in the Work as well as expressing their displeasure with Braun's tactics on behalf of her clients. Respondents also discussed at length the concept of fair use and additionally argued that Braun engages in hypocrisy by sending takedown notices against instances of fair use and material potentially not protected by copyright even though she has previously educated the public in other videos she has published that a fair use analysis should be made before sending a takedown notice.

On December 3, 2023, Braun IP sent a takedown to YouTube regarding the Episode, and Respondents sent YouTube a counternotice. As previously noted, YouTube's opinion does not factor into the Board's decision, but YouTube unilaterally made the decision that (regardless of whether Braun IP filed a copyright infringement lawsuit concerning the Episode) they would not take the Episode down because YouTube independently determined that the Episode's use of the Work clearly fell within the category of fair use.

Related to potential damages and market harm, Braun IP stated that it uses a standard licensing agreement for videos it creates, for which it charges $7,500, and attached two sample licensing agreements. It was unclear what types of videos the licenses covered and whether those videos were anything like the Work, although Braun IP now admits that that the licenses were for very different types of videos as the Work was an outlier to Braun IP's typical material. Request, at 9.

II. Fair Use

Rather than trying to identify a specific "clear error of law," the Request is dedicated to rearguing the fair use principle, including the first, third, and fourth factors. Again, it would be easy for the Board to deny the Request on that basis alone since every point made by Claimant was already made by her in her party statements. However, it will briefly explain the fair use factors again with the hope that Braun IP might change its tactics in the future.

Four non-exclusive factors are considered when analyzing a fair use defense: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107; *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012).

As to the first factor, Claimant misunderstands the esteem that critique and commentary, explicitly called out in Section 107, holds in a fair use analysis. Braun IP argues that the commercial nature of the Podcast outweighs the transformative use of the Work, but the fact that the Podcast was commercial carries little weight when the purpose of the use was to critique the Claimant's Work. As the Supreme Court has said, "the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character," and if "commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (citation omitted). *See also* G*oogle LLC v. Oracle America, Inc.*, 593 U.S. 1, 32 (2021) ("There is no doubt that a finding that copying was not commercial in nature tips the

scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial. For instance, the text of § 107 includes examples like 'news reporting,' which is often done for commercial profit.").

Claimant quotes the syllabus (as opposed to the actual decision) in *Andy Warhol Foundation for Visual Arts v. Goldsmith*, 598 U.S. 508 (2023) for the proposition that when a secondary use is "transformative to some extent," the first factor can still weigh against fair use when the transformative elements are "outweighed by other factors, such as the use's commercial nature." However, the *Warhol* opinion noted that criticism and comment (the purposes of Respondents' use of the video clip) "are the sorts of copying that courts and Congress most commonly have found to be fair uses, and so may guide the first factor inquiry." *Id.* at 528 (citation and internal quotation marks omitted). The court also noted that "commentary or criticism that targets an original work may have compelling reason to conjure up the original by borrowing from it." *Id.* at 532. Respondents' use of Claimant's film clip was precisely for the purpose of commentary and criticism targeting Claimant's work, and therefore highly transformative. *See, e.g.*, *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF, 2015 WL 5025839, at *8 (C.D. Cal. Aug. 20, 2015); 4 Nimmer on Copyright § 13F.10 ("[C]onsider the nearly universal recognition of fair use in connection with the function of criticism and review. Here, it is permissible to quote substantial passages precisely because the review supplements, but does not replace, the function of the work being reviewed."). In short, Respondents' use was not merely "transformative to some extent"; it is precisely the type of highly transformative use that is fair even when done for profit.

Braun also raises a strange argument (while citing some of the cases finding fair use already cited by the Board), that the Episode "recreated" the Work's creative expression. As already stated by the Board, Respondents used the one-minute clip to accurately report on the story they were discussing and to allow their viewers to understand the context of the story and their critiques of Braun and of specific content in the clip. The "re-creation" argument is just a different way of stating Braun IP's meritless argument in prior written testimony that the clip was used for its original purpose, which was to "provide Jeanette Braun's (and Braun IP Law's) side of an online dispute between her and another online content creator." Braun IP Party Statement ¶¶ 34-35. (Dkt. 37).

As stated in the Final Determination, Respondents' use was for the opposite purpose of any possible creative expression in the Work: to go through a detailed critique of Braun's content and give reasons why Braun's side of the story did not hold water. There is no doubt that this use falls into the category of "criticism" and "comment[ary]."

Braun IP does not seem to have learned a basic lesson from the cases cited by the Board: when one video is used to present a point of view and the second video uses the first to criticize that position, the use is "fundamentally at odds with [the] original purpose" of the first work and, therefore, inherently transformative. *See, e.g.*, *In re DMCA Section 512(h) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 519-20 (S.D.N.Y. 2022); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991); *Hughes v. Benjamin*, 437 F. Supp.3d 382, 392 (S.D.N.Y. 2020); *Thiccc Boy Prods. Inc. v. Swindelle*, No. 22-CV-00090-MSM-PAS, 2024 WL 733425, at *3 (D.R.I. Feb. 22, 2024); *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp.3d 1094, 1105 (C.D. Cal. 2015); *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544-45, 143 S. Ct. 1258, 1284 (2023); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

As Braun IP does not challenge the Board's findings on the second factor (including that where a work is used to critique that specific work, this factor is of little relevance), the Board moves to factor three, the "amount and substantiality" of the Work taken.

On this third factor, the Request is certainly no more than a rehashing of Claimant's prior argument, rejected by the Board, that the "heart" of the Work was taken. Braun IP does not dispute the Board's finding that a small amount of the Work was taken: Respondents took only one minute out of an eight-and-a-half minute video, which amounts to approximately 11-12 percent of the Work (and it made up approximately 1-2 percent of the Episode). However, Braun IP suggests that, unless Respondents could affirmatively prove that the portion taken was *not* the heart of the Work, the Board should take Claimant's argument as fact, even if there was no evidence to support it. In so doing, Braun IP cites cases not dealing with criticism and where a plaintiff actually proved what was taken was the heart of the work. Request, at 5-7. This is preposterous as is Claimant seemingly suggesting that this factor must *always* go against a finding of fair use by arguing that the mere fact that Respondents chose this portion of the

Work to critique it is "prima facie evidence that these clips were the most important moments of the work." Request, at 7. Again, Claimant only serves to undermine its credibility by making such arguments.

As discussed in the Final Determination, Respondents used the Work to provide context so that they could properly critique it, using no more than was reasonable and limiting their use of the Work to the specific parts they were criticizing. *See, e.g.*, *Brown v. Netflix, Inc.*, 855 Fed. Appx. 61, 64 (2d Cir. 2021); *Red Label Music Publishing, Inc. v. Chila Productions*, 388 F. Supp. 3d 975, 986 (N.D. Ill. 2019); *Campbell*, 510 U.S. at 589; *Hofheinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127, 139-40 (E.D.N.Y. 2001); *Hughes*, 437 F. Supp. 3d at 393-94.

Finally, the Request fares no better as to factor four. As an initial point, the Request assumes that the Board's finding that Respondents' use was transformative and used for criticism and commentary was incorrect. It was not, and Claimant has certainly not shown a clear error of law. The Request seems to—in order to reargue that Claimant and Respondents were competitors and Respondents usurped Claimant's market for the Work—admit that the Work was an outlier from Braun IP's typical videos about copyright law in general. Regardless, as stated in the Final Determination, and as not challenged by Braun IP in the Request, Braun IP presented no meaningful evidence that Respondents' use of the Work affected the market or value of the Work; and, with this admission, the licenses Braun IP presented with its written testimony go from practically meaningless to absolutely meaningless.

Respondents took a small portion of the Work to criticize its content, full stop. As stated in the Final Determination, there is no rational argument here that Claimant and Respondents were competitors or that use of a small portion of the Work to criticize Braun and her position in the Day-Braun dispute would have replaced any possible market Braun had for the Work and thus acted "as a substitute for the original." *See SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013); *Brown*, 855 Fed. Appx. at 64; *In re DMCA Section 512(h) Subpoena*, 581 F. Supp. 3d at 523; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006); *Campbell*, 510 U.S. at 592.

In sum, Braun IP, which promotes itself as a law firm knowledgeable about and experienced in intellectual property law, has not presented any argument that would amount to an error of law or fact, never mind a clear one or one material to the Final Determination.

III. Conclusion

The Request for Reconsideration is denied.

Copyright Claims Board