



May 14, 2019

**Via U.S. Mail**

Hunter Campbell  
Chief Legal Officer  
Ultimate Fighting Championship  
6650 S Torrey Pines Drive  
Las Vegas, NV 89118

Dear Mr. Campbell:

We write on behalf of John MacKay, operator of the “Boxing Now” channel on YouTube, regarding a series of unlawful takedown notices the Ultimate Fighting Championship (“UFC”) has sent to YouTube under the Digital Millennium Copyright Act. Mr. MacKay creates videos consisting of his original audio commentary and a small number of still images from UFC events and posts them on the Boxing Now channel. Mr. MacKay only posts his commentary videos after UFC events occur. Mr. MacKay’s videos consist overwhelmingly of content he creates. To the extent any protected UFC material is included in those videos in the form of still images, Mr. MacKay’s uses are self-evident fair uses as a matter of law.

“[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107; *see also Golan v. Holder*, 565 U.S. 302, 329 (2012) (citing *id.*). The four factors that are “especially relevant” to the fair use analysis are: “(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560–61 (1985).

All four factors favor fair use here.

First, Mr. MacKay’s use of still images is highly transformative. The original images were displayed as part of a live video broadcast of a sporting event; by contrast, Mr. McKay used still images and displayed them for the purpose of commenting and reporting on an event that had *already* happened. He juxtaposed those images with his own original audio commentary, creating a new work consisting overwhelmingly of content Mr. MacKay independently created. And while Mr. McKay’s purpose was partially commercial, the highly transformative nature of Mr. MacKay’s work nonetheless tilts this factor firmly toward fair use. *See Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (2000) (“The more ‘transformative’ the new work, the less the



significance of factors that weigh against fair use, such as use of a commercial nature.”) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

Second, Mr. MacKay used still images to reference facts about the fight itself. Courts have made clear that when the “use of the copyrighted work is not related to its mode of expression but rather to its historical facts, then the creative nature of the work matters much less than it otherwise would.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 943 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (internal quotation marks and citation omitted); *see also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13 (2d Cir. 2006) (finding fair use was where creative works were used “to emphasize the images’ historical rather than creative value”).

Third, Mr. MacKay uses just a few frames from video broadcasts, and no more than is necessary for his transformative purpose. Indeed, the Ninth Circuit has held that a screenshot of a video game “is such an insignificant portion of the complex copyrighted work as a whole” that “the third factor will almost always weigh against the [plaintiff],” and in favor of fair use. *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028–29 (9th Cir. 2000), *amended on denial of reh’g* (July 10, 2000).

As for the fourth factor, Mr. MacKay’s post-fight commentary could not and did not affect the market for a live broadcast or recording of the entire fight. *See Nunez*, 235 F.3d at 24 (explaining that the fourth fair use factor is “concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder” (quoting *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998))). If anything, Mr. MacKay’s use of still images for commentary purposes would likely *increase* demand for the original. *See Nunez*, 235 F.3d at 25 (finding fair use where “the only discernible effect of the publication [of a widely-distributed modeling photograph] . . . was to increase demand for the photograph”).

All of these facts are apparent from the face of the videos and/or well within UFC’s knowledge. Nevertheless, the UFC has now submitted five takedown notices to YouTube, affirming each time that it had a good faith belief Mr. MacKay’s videos infringe UFC’s copyright. On each occasion, Mr. MacKay has responded by submitting a counter-notice to YouTube, explaining the fair and non-infringing nature of the screenshots included in his commentary videos, and UFC’s apparent failure to consider the fair use made of any UFC still images. Following each counter-notice, the UFC has not taken any action to indicate any objection or response to Mr. MacKay’s counter-notice. YouTube has therefore re-posted the videos in due course.

A copyright holder must consider fair use before sending a DMCA takedown notice. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1135 (9th Cir. 2015). UFC’s repeated takedowns of Mr. MacKay’s videos indicate that UFC has failed to meet this obligation, and thereby harmed Mr. MacKay. Mr. MacKay’s videos are widely viewed in the days following the fights on which he comments, and Mr. MacKay earns significant revenue from advertising during that time period. Unjustified takedowns during that time period cause him to lose significant revenue. We note that UFC also produces YouTube videos containing post-fight commentary, and that Mr.



McKay's videos and UFC's videos may compete for viewership and advertising revenue. This further suggests that UFC's takedowns of Mr. McKay's videos were done in bad faith.

Accordingly, we demand that you cease sending takedown notices for Mr. McKay's videos that make fair use of still images from UFC fights. Please confirm your agreement to do so by May 28, 2019.

Regards,

A handwritten signature in black ink, appearing to read 'Alex H. Moss'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Alex H. Moss

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