

GREY2K USA

December 7, 2012

To Whom It May Concern:

My name is Christine Dorchak and I am general counsel for the non-profit greyhound protection organization, GREY2K USA. The notice received yesterday regarding the removal of a video from our channel is a clear attempt to infringe on our rights of free expression and public participation.

The subject video is an original transformative work that has been improperly removed from our channel. 1) All of the claimant's photographs incorporated into our larger video production were made publicly available on the internet by the claimant herself. 2) The claimant's web site was not then and is not now password protected. 3) The images used (and more) continue to be offered on the claimant's site.

The material in question consists of 36 seconds of original text and our organizational logo, and 23 photographs that document the greyhound breeding industry. These images depict greyhound puppies being born, young greyhounds being raised in outside dirt pens, greyhound puppies being tattooed, and breeding greyhounds living in small cages. 20 of these photographs were publicly released by individuals participating in the dog racing industry, and the other 3 were obtained from Tillman County, Oklahoma. The purpose of offering the footage was, and is, non-commercial, educational and protected by fair use.

Further, the fair use doctrine, codified in 17 U.S.C.S. § 107, provides that even unauthorized uses of copyrighted works will be permitted when general cultural and other benefits outweigh the interest of copyright owners. This is particularly true when matters of public interest or political matters are at stake. In *Carney v. Coakley and Galvin*, a Massachusetts Court specifically affirmed that "parimutuel dog racing ...constitutes a matter of Statewide concern" and was a proper matter for full public consideration through the voter process. SJC-10158 (2008). The non-profit mission of this organization is to educate the public about dog racing.

The fair use exemption consists of a four factor test. Evaluation of these factors depends on an examination of the facts in each case. *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970). In determining whether the use of a work is fair, the following must be considered:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

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The fourth factor, though not conclusive, is the single most important element of fair use. *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539 at 566. If an activity is found to be commercial, a presumption is set regarding which way the fourth factor points in a fair use analysis. *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). The crux of the distinction between non-profit and for-profit use is whether the user stands to profit from exploitation of the copyrighted material without paying the customary price, not whether monetary gain is the sole motive of the use. *Roy Export Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F.Supp. 1137 at 1144 (D.C.N.Y. 1980).

Analysis of the fourth factor requires courts to consider whether the allegedly infringing work is a market substitute for the original work, both in terms of "the extent of market harm caused by the particular actions of the alleged infringer" and also "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original." *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 589 (1994) at 590. Although on its face, some use may seem to constitute infringement, the interest of a copyright holder must be weighed against the public's interest in dissemination of information affecting areas of widespread concern. *Wainwright Securities, Inc. v. Wall St. Transcript Corp.*, 558 F. 2d 91 (C.A.N.Y. 1977). The policy is a way of balancing the need to provide individuals with sufficient incentives to create public works with the public's interest in the distribution of information. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

A Sixth Circuit case, *National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559 (6th Cir.1994), examined the question of whether or not the Handgun Control Federation's (HCF) conduct in photocopying, and sending to its members, a list of state legislators which had been distributed by the National Rifle Association of America (NRA) to its own members, represented "fair use" of the list under the copyright statute. The court found that HCF's use of the NRA legislator list was noncommercial as they made no attempt to sell the list and the list was only used to further its own lobbying goals. The list was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to petition the government regarding legislation. The court widened the scope of the fair use doctrine because the use in question related to issues of public concern. *Id* at 562.

This case is relevant to the issue at hand because the desire of GREY2K USA to use photographs that document the greyhound breeding industry is 1) non-commercial and 2) relates to issues of public concern. Further, our non-profit's limited use of the materials, as in the HCF case, would not negatively affect any copyright owner's value. The materials in question are offered to inform citizens about the health and safety of greyhound dogs used for racing -- which is now an issue of great public concern. Withholding video from the public would have a chilling effect on the public dialogue and deprive voters and lawmakers of relevant information upon which to make an educated decision regarding an important issue.

In conclusion, as long as the copyrighted materials are being used for proper purposes, such use does not constitute copyright infringement and should not supersede GREY2K USA's right to fully participate in the political process. The images in question were already part of the public domain before being incorporated into our video, use was limited, material used was transformed into a wholly new production, and was offered for proper purposes. As you may know, the bullying tactic used by Ms. Brotherton in this instance is hardly a novel one. In 2008, another animal protection organization won a judgment of \$25,000 after a commercial rodeo organization falsely and maliciously complained of copyright infringement on YouTube. *Rodeo group to pay \$25,000 for YouTube takedown requests, Professional Rodeo Cowboys Association*

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agrees to pay anti-cruelty organization to settle suit, CNET News, http://news.cnet.com/8301-1023_3-10163337-93.html. The false claims here must be set aside as well. It is worth noting that dog track operator Charlie Sarkis of the former Wonderland Greyhound Park, was also found to have engaged in improper conduct when challenging use of video of himself by greyhound racing opponents. *Sarkis v. Grey2K*, 21 Mass.L.Rptr. 173 (Suffolk Superior Court (2006) (dismissed as SLAPP suit, attorney fees paid to our predecessor organization).

I consent to the jurisdiction of the Federal District Court for the district in which my address is located, or if my address is outside of the United States, the judicial district in which YouTube is located, and will accept service of process from the claimant.

I swear, under penalty of perjury, that I have a good faith belief that the material was removed or disabled as a result of a mistake or misidentification of the material to be removed or disabled.

Please respond to the registered account address of grey2kcarey@yahoo.com as well as to me directly at christine@grey2kusa.org.

Sincerely,



Christine A. Dorchak, Esq
President

cc: Carey M. Theil, Executive Director



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