October 23, 2020

VIA EMAIL

Mike Woliansky
CEO, No Evil Foods
108 Monticello Road, Suite 2000
Weaverville, NC 28787
mike@noevilfoods.com; preach@noevilfoods.com

Re: Improper Use of the DMCA Process to Take Down Recordings of No Evil Food's Anti-Union Efforts

Dear Mr. Woliansky:

The Electronic Frontier Foundation represents Andrew Miller, Rachel Pointer, and Industrial Workers of the World (IWW). This August, IWW published an article by Mr. Miller reporting on unionization efforts by No Evil Foods (NEF) employees and NEF's efforts to shut them down.[1] As part of this reporting, the article includes embedded audio of you and other NEF leadership speaking at various mandatory, all-staff meetings about the union drive.

Over the past several weeks, you or someone working on your behalf has sent a series of Digital Millennium Copyright Act (DMCA) takedown notices to various platforms involved in hosting this audio, including SoundCloud and HostGator. As a result of your claims, the audio file was removed from Ms. Pointer's SoundCloud account and SoundCloud issued a "strike" against her, while Mr. Miller's entire personal website was disabled for over two weeks.

DMCA takedown notices should be lodged only when a copyright owner has a good faith belief that the challenged material infringes their copyrighted works. You have no legitimate basis to hold such a belief and, therefore, these notices are improper.

As a threshold matter, it is unlikely at best that the recorded meeting segments include any material in which you own copyright, given the requirements of fixation and originality. 17 U.S.C. § 102(a). As to fixation in particular, an oral presentation is not copyrightable unless fixed in a tangible medium by the author. You cannot rely on the challenged audio recording to satisfy that requirement, because it was created by a third party not acting under your authority. 17 U.S.C. § 101.

[1] https://industrialworker.org/no-evil-foods/

The challenged audio recording is also protected by the fair use doctrine and therefore non-infringing, regardless of whether you may establish copyright ownership. 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . for purposes such a criticism, comment, [and] news reporting . . . is not an infringement of copyright.").

First, our clients' use of the recording was for non-commercial news reporting on a matter of public concern, in a free publication of a nonprofit labor organization. Their use was also transformative. Whereas the original purpose of the recorded material was to persuade NEF employees not to unionize, our clients used it to report on and criticize your company's anti-union tactics captured in the recording. Our clients thus placed the material in a new context and gave it new meaning, for purposes entirely different from the works' original purpose. *See Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) (secondary use is transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000) (publication of copyrighted photos with article about controversy over those photos was transformative). This type of public-purpose use is a paradigmatic example of what the fair use doctrine is meant to protect. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84–86 (2d Cir. 2014) ("purpose and character" factor favored fair use where news service published unauthorized recording of earnings call).

Second, the recorded material is at most only minimally creative and therefore merits only the thinnest copyright protection, if any. Indeed, the first speaker heard in the recording represents that he is merely communicating the law and that everything included in the presentation is taken from a guide to the National Labor Relations Act.

Third, the challenged audio recording uses no more of the original works than necessary for our clients' purpose of reporting and critiquing NEF's conduct.

Fourth, the challenged audio recording does not harm any market for your works—if any such market even exists, which we strongly doubt. The recording is not a substitute for the original, nor does it invade any licensing market for your works.

More broadly, our clients' reporting serves the public interest by advancing social criticism and debate. Nimmer on Copyright, § 13.05[b][5] ("[T]he public interest is also a factor that continually informs the fair use analysis."); *see also Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) ("[T]he public benefit in allowing . . . social criticism to flourish is great."); *Swatch*, 756 F.3d at 82, 92 (public interest in factual content of recording favored fair use).

Based on this legal analysis and your conduct, it appears that your use of DMCA takedown notices is motivated not by genuine concern for your copyrights but rather by your desire to shut down criticism and harass your critics.

Moreover, your DMCA notices contain obviously false information. For example, you submitted a DMCA notice targeting Mr. Miller's website under the name "Birdie Gregson"—a pseudonym used on Twitter by an employee whom NEF fired for organizing activity.[2] We are also informed that you have made numerous other specious attempts, through the DMCA process and otherwise, to shut down websites and social media accounts associated with the effort to unionize NEF. Under these circumstances, there is little doubt that your DMCA notices were submitted in bad faith.

Your abuse of the DMCA process must cease immediately. You are on notice that our clients' use of your videos constitutes fair use and that you can be held liable for any damages, including attorneys' fees and costs, that result from misuse of DMCA procedures to shut down lawful speech. 17 U.S.C. § 512(f). A number of other legal remedies are also available.

Sincerely,

Cara Gagliano
Staff Attorney
Electronic Frontier Foundation

[2] *See* https://twitter.com/birdiegregson