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Via Email

October 28, 2016

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Dear Mr. Compton,

I represent ComicMix LLC. From August 31 through September 30, 2016, ComicMix ran a Kickstarter campaign to raise funds for its *Oh, the Places You'll Boldly Go!* book project, which was promoted in Kickstarter's "Projects We Love" section. On October 7, 2016, you sent a notice to Kickstarter PBC, falsely claiming that the project infringes Dr. Seuss Enterprises' copyright in Dr. Seuss' *Oh the Places You'll Go!* Your unfounded infringement claim is directly and materially damaging my client. At your behest, Kickstarter removed the campaign's page from public view, impeding my client's ability to promote the project and solicit further sales. Andrews McMeel Publishing had agreed to publish the book and planned to rush it out for release in time for Christmas, but has pulled out entirely because of your notice. Also anticipating Christmas sales, one vendor ordered 5,000 copies of the book as long as printing and shipping are completed by November 11, but ComicMix expects to lose that order because, thanks to your notice, Kickstarter is withholding all \$29,575 that the campaign raised, so ComicMix cannot use that money to cover the printing costs as intended.

You had no legitimate grounds to interfere with the campaign and derail ComicMix's project. The new book is not a mere plagiaristic copy of any work protected by copyright, but a radical alteration that constitutes fair use under the Copyright Act. As the campaign page explained, "we firmly believe that our parody, created with love and affection, fully falls within the boundary of fair use," while it recognized that "there may be some people who believe that this might be in violation of their intellectual property rights." Your belief is unfounded. Notwithstanding a copyright owner's exclusive rights, "the fair use of a copyrighted work ... is not an infringement of copyright." 17 U.S.C. § 107. "As a statutory doctrine, however, fair use is not an infringement. ... [I]nstead, it is logical to view fair use as a right." *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016) (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996)). With no infringement at issue, your takedown notice is not

only invalid but also a violation of ComicMix’s fair use rights. You must cease and desist any further interference.

The statute sets out four factors to consider in determining fair use: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for the value of the copyrighted work. 17 U.S.C. § 107. Taken together, those factors support ComicMix’s fair use, in its book, of images repurposed and transformed from Dr. Seuss’ work.

The first factor concerns the nature of the alleged infringing work. Its commercial character is “‘not conclusive,’ but rather a fact to be ‘weighed along with other[s] in fair use decisions[.]’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 & n. 32 (1984)). “The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, *Folsom v. Marsh*, [9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841)] ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Id.* at 579. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.*

ComicMix’s book is wholly transformative of Dr. Seuss’ work. Before you suppressed it, the Kickstarter page to support the book project noted, “*Oh, The Places You’ll Boldly Go!* is a parody mash-up from the mind that brought you ‘The Trouble With Tribbles’ that brings together two of the most beloved creations in history in a joyous celebration that will inspire you to join the high fliers who soar to high heights!” Though called a parody, the book may be more accurately described as a pastiche. It is a mash-up drawn in the vein of Dr. Seuss’ work while transposing Seuss-like images into the *Star Trek* universe, making extensive allusions to specific episodes of the television series. In the process, it reveals and highlights many surprising similarities between those two seemingly disparate imaginary spheres. Dr. Seuss’ *Oh, the Places You’ll Go* depicts an audacious traveler exploring alien landscapes, encountering unusual creatures, taking flight and confronting challenges. The child-like figure cutting a path through his dreamlike world is analogized, in the new book, with the adult *Star Trek* crew and all they encountered on their mission, described in the series’ familiar opening narration: “Space, the final frontier. These are the voyages of the starship Enterprise. Its five-year mission: to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no man has gone before.” (Of course, the new book title mashes up that narration with Dr. Seuss’ title.) ComicMix’s recombinant work amplifies the thematic resonances between Dr. Seuss and *Star Trek*, embracing and winking to both with a light, parodic touch. The book pays direct tribute to the creators of its source material (the dedication page reads, “for Gene [Rodenberry] and Ted [Geisel, a/k/a Dr. Seuss] who went before”), commenting on and giving new life to both sources.

“Among the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it.” *Author’s Guild v. Google Inc.*, 804 F.3d 202, 215 (2d Cir. 2015). But commentary about the source material is not required. “A taking from another author’s work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification.” *Id.* “The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.” *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). “Instead, ... to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’” *Id.* (quoting *Campbell*, 510 U.S. at 579). Thus, “the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.” *TCA TV Corp. v. McCollum*, No. 16-134-cv, slip op. at 26 (2d Cir. Oct. 11, 2016). ComicMix’s détournement adds something new and transformative. “It is not simply a quotation or a republication.” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013) (finding fair use). “[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent.” *Id.* at 1177. “From the earliest days of the [fair use] doctrine, courts have recognized that when a second author uses another’s protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1259 (2d Cir. 1986). This first factor weighs strongly in support of ComicMix’s fair use.

The second factor considers the nature of the original work. Dr. Seuss’ work is indisputably creative, but this factor is less significant when “the creative work of art is being used for a transformative purpose.” *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)). The fact that all of the new book’s source material was already published further mitigates any significance of this factor. *Seltzer*, 725 F.3d at 1178. “Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.” *Id.* (quoting *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003)).

The third factor weighs the amount of the original work used. Even full reproduction “does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.” *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives*, 448 F.3d at 613); accord *Seltzer*, 725 F.3d at 1179 (finding use of most of original work “not excessive in light of its transformative purpose”). And the new book has not taken any source material unaltered. The artist, Ty Templeton, drew each of the new book’s images by hand, alluding to Dr. Seuss’ style while transforming the images in the new context of *Star Trek*. This factor should not weigh against fair use.

“The fourth factor asks what effect the allegedly infringing use has ‘on the potential market for or value of the copyrighted work.’” *Seltzer*, 725 F.3d at 1179 (quoting 17 U.S.C. § 107(4)). “Where the allegedly infringing use does not substitute for the original and serves a ‘different market function,’ such factor weighs in favor of fair use.” *Id.* (quoting *Campbell*, 510 U.S. at 591). As a pastiche, *Oh, the Places You’ll Boldly Go!* does not perform the same market

function as any Dr. Seuss works. It depends on a reader's intimate knowledge of storylines, characters, dialogue, costumes, props, and other minutiae from *Star Trek*, making visual and textual references to the series on every page, as Dr. Seuss never would. By the same token, it relies on and appeals to readers already fully familiar with *Oh, the Places You'll Go*. The new book does not substitute for the Dr. Seuss original, but supplements it, in a complementary market of readers who have already consumed Dr. Seuss. The books will not compete for the same readers at the same time. Nor will this new book supplant the original in any other "traditional, reasonable, or likely to be developed markets." *Id.* (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)). There was no market for a Seussian *Star Trek* book until my client created it. "It seems more reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work; it is difficult to see any decrease in its value." *Time Inc. v. Bernard Geis Assocs.*, 293 F.3d 130, 146 (S.D.N.Y. 1968) (finding fair use in book making unauthorized use of the copyrighted Zapruder pictures); accord *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000). The new book likewise stands to spark significant renewed attention to Dr. Seuss' work, spurring new business. The new book should inspire readers who have not yet read the original to rectify the matter. It poses no risk of a harmful market-substitution effect but only potential benefits for your client, so the fourth factor weighs in favor of fair use as well.

Courts considering fair use may not treat the four factors "in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578. In that analysis, the four factors are not equally significant. The second and third factors have little weight. *See Authors Guild*, 804 F.3d at 220 ("courts have hardly ever found that the second factor in isolation played a large role in explaining a fair use decision"). The first and fourth factors are by far the most important. The first factor is often called the "heart of the fair use inquiry," *Cariou*, 714 F.3d at 705 (quoting *Blanch v. Koons*, 467 F.3d , 251 (2d Cir. 2006)). Transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more 'transformative' the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579. "Although 'transformativeness' is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis." *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00-3802, 2001 WL 1111970, at *3 (S.D.N.Y. Sept. 20, 2011). And the fourth factor has been called "undoubtedly the single most important element of fair use." *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). The centrally important first and fourth factors both heavily favor construing the new book as a fair use, and case law construing the four factors in tandem supports our understanding that the new book exemplifies fair use and is wholly legal.

Your decision to issue a takedown notice to Kickstarter, despite this fair use, violated 17 U.S.C. § 512(f). "[T]he statute requires copyright holders to consider fair use before sending a takedown notification" and to "form[] a subjective good faith belief that the use was not authorized by law." *Lenz*, 815 F.3d at 1148. A proper takedown notice must declare that the appropriated material is not "authorized by the copyright owner, its agent, or *the law*." 17 U.S.C.

§ 512(c)(3)(A)(v) (emphasis added). Your notice told Kickstarter that my client’s work is “without Dr. Seuss’s authorization,” but it does not show that you sufficiently considered fair use (i.e., authorization by law) beforehand. You have sent three letters to my client, on September 28, October 7, and October 25, 2016, none of which mention fair use. Your first letter mentioned “the parody defense,” contending that it does not apply on the grounds that my client’s work “fails to make any comment related to the original work *Oh the Places You’ll Go*[.]” While the new work has undeniable parodic elements, parody is only one safe harbor within the realm of fair use; a wide range of non-parodic works qualify, including works that never “comment on the original or its author.” *Cariou*, 714 F.3d at 706. Your evaluation of the degree of parody in the new book was not a sufficient consideration of fair use overall. And your assertion that *Oh, the Places You’ll Boldly Go!* “fails to make any comment related to the original work” was not just wrong. It was based on nothing more than a hunch. You denounced as infringing a work that you had not yet seen, so you had no opportunity to assess the work as a whole. The new book was not yet finished at the time of your takedown notice, so you had no basis to contend that it was not a fair use. Your notice was a knowing, material misrepresentation in violation of Section 512(f). Highly illogical.

Your letters have raised the specter of not just copyright infringement but also trademark infringement and unfair competition. Those concerns are illusory. Two disclaimers are given on the book’s copyright page, the usual place for such information. The first, in a larger-size typeface than any other publishing information on the page: “This is a work of fair use, and is not associated with or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.” The second: “Copyright Disclaimer under section 107 of the Copyright Act 1976, allowance is made for ‘fair use’ for purposes such as criticism, comment, news reporting, teaching, scholarship, education, research, and parody.” The Kickstarter campaign page likewise explained that the book is “a parody mash-up” and “within the boundary of fair use,” dispelling any question that it was licensed or authorized. The campaign page did not mention Dr. Seuss at all. The book’s cover, spine, and title page all name the author and illustrator, but not Dr. Seuss. The book only mentions Dr. Seuss in the first disclaimer and, on the same page, the dedication to “Gene and Ted.” There is no likelihood that any consumer would confuse the book with any of Dr. Seuss Enterprises’ trademarked goods, so there can be no cognizable trademark or unfair competition injury. While the title *Oh the Places You’ll Go* is referenced in the new book’s title, that reference is not mere trademark use but an expressive, artistic, creative use entitled to First Amendment protections that must be balanced against any trademark rights. *See Parks v. LaFace Records, Inc.*, 329 F.3d 437, 449 (6th Cir. 2003). Specifically, the new book’s title, by employing the famous *Star Trek* “boldly go” split infinitive, steers consumers away from any confusion by pointing them toward the defining characteristics of the new work’s creative combination. This direct artistic relevance minimizes any trademark concerns. *See id.* at 452-58 (*construing and applying Rogers v. Grimaldi*, 875 F.2d 994, 999-1000 (2d Cir. 1989)).

We will be serving a counter-notification to Kickstarter requesting that it restore the campaign page in its entirety. Our hope is that, on reflection, Dr. Seuss Enterprises will recognize that the book and the campaign do not violate or infringe on any of its intellectual property

rights. If your client accedes to the campaign's prompt reinstatement, and you cease any further interference on your client's behalf, we will have no need to pursue any claims against it for tortious interference, unfair business practices, or violations of Section 512(f).

Please feel free to contact me to discuss the matter. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Booth". The signature is written in a cursive, slightly slanted style.

Dan Booth

cc: James K. Stewart
james.stewart@dlapiper.com