



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0404

January 31, 2025

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Braun IP Law, LLC

CLAIMANT

v.

Jessica Vazquez and Lily Marston

RESPONDENTS

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## FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board (“Board”) finds in favor of Respondents Jessica Vazquez (“Vazquez”) and Lily Marston (“Marston”) (collectively, “Respondents”) and dismisses the claim against Respondents with prejudice.

### I. Procedural History

This claim was filed on December 11, 2023, by Braun IP Law, LLC (“Braun IP” or “Claimant”). Claim (Dkt. 1). The Board found the Claim compliant and, on December 12, 2023, directed Braun IP to serve Respondents. (Dkt. 6). After service on Respondents, the Board did not receive an opt-out form from either of them.

On February 21, 2024, the Board notified the parties that the Claim had entered the “active phase” because the Respondents did not opt out, ordered Braun IP to pay the second filing fee, and ordered the Respondents to register for the Board’s online docketing system (eCCB). (Dkt. 11). Vazquez filed her Response on May 13, 2024. Vazquez Response (Dkt. 20). Marston filed her Response on May 14, 2024. Marston Response (Dkt. 21).

On August 29, 2024, the Board issued an order closing discovery as of September 6, 2024, and ordering the filing of written testimony. (Dkt. 27). For its written testimony, Braun IP filed evidence and an evidence list (Dkt. 28-36, 38-52, 54-59), as well as a Party Statement (“Braun IP Party Statement”) (Dkt. 37), but not any separate witness statements. Respondents filed evidence and an evidence list (Dkt. 60-79, 81-83), as well as a Party

Statement (“Respondent Party Statement”) (Dkt. 80), but not any separate witness statements.<sup>1</sup> Braun IP filed a Reply Party Statement (Dkt. 85) on January 2, 2025. This case is now ready for final determination.

## **II. Factual History**

The facts relevant to this Final Determination are largely uncontested.

Braun IP states, and Respondents do not dispute, that Braun IP is the copyright owner of a video of an approximately eight-minute and forty-second long video, titled “Bekah Day False Accusations” (the “Work”). Exhibit A (Dkt. 36); Braun IP Party Statement ¶ 5. The Work was first published by Braun IP on November 29, 2023, and was registered by the U.S. Copyright Office as a motion picture with an effective date of registration of December 5, 2023 (Reg. No. PA002443504). Exhibit D (Dkt. 34).

Claimant’s papers say little about the creative aspects of the Work, beyond saying it is a “scripted and produced video that comprises set design and other artistic elements.” Braun IP Party Statement ¶ 45. The Work itself, however, makes it relatively clear what it is.

A review of the Work establishes that Braun IP or Jeanette Braun (“Braun”) of Braun IP—the papers state that Braun created the video on behalf of Braun IP—was involved in an online dispute with a woman named Bekah Day (“Day”). Braun is an attorney who has filed takedown notices on behalf of clients to get material removed from online service providers (e.g., YouTube). It is unclear how far back the dispute between Day and Braun goes (and, from Respondents’ video in question, it appears without being clear that others may have also been involved in the accusations against Braun), but at some point, Braun felt the need to defend herself and posted her defense—the Work (Exhibit A)—to TikTok.

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<sup>1</sup> Both parties appear to have set forth any factual statements within their party statements. The Braun IP Party Statement is written in paragraph form and is submitted by its attorney, who signed the statement. Paragraph 1 says that the attorney “swears and asserts, under penalty of perjury, that all facts stated herein are true and correct to the best of Braun IP’s and the undersigned’s personal knowledge.” Braun IP Party Statement ¶ 1. An attorney signature on a Party Statement is not the same as a Witness Statement signed by the person with actual knowledge, and the majority of the Party Statement is legal argument, whereas a Witness Statement is intended to set forth facts. The Respondent Party Statement is electronically signed by Vazquez and Marston, although it makes no reference to any swearing to the truth under penalty of perjury and similarly conflates statements of fact with legal argument. In the interest of time and given that: (a) parties certify to the truth of filings on eCCB; (b) both parties have taken the same approach; and, (c) this case turns on undisputed facts and a review of the evidence, mainly Claimant’s work and the allegedly infringing work, the Board will take uncontested factual statements as true for the purposes of the Determination.

The entirety of the Work depicts Braun sitting at her desk in an office, and it appears to be recorded on a computer or phone camera. Not every detail is necessary to this Determination, but, generally, Braun goes through a factual recitation<sup>2</sup> of how Day (who Braun says describes herself as an “investigative reporter”) is spreading allegedly false information about Braun and Braun IP. Day’s main accusation is that Braun is 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 states in the Work that a purpose of creating the Work is to “talk through” how it is impossible for her to do that—although her main argument 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. Braun states in the video that because Day has chosen to bring their dispute into “social media court,” Braun is going to likewise respond over social media. In fact, she specifically says that the viewers of the Work are likely “here for the tea and here for the drama.” She also says that the Work was created to address the false copyright strike accusation and will not address some of the other drama in their dispute, saying that she is reserving her testimony “to be made under oath.” Exhibit A.

Respondents’ business revolves around, to use the words from the Work, “tea and drama.” See also Respondent Party Statement ¶ 14; Exhibit J. They run a video podcast (on at least YouTube) called “Do We Know Them?” (the “Podcast”). A standard episode of the Podcast is the two hosts, Vazquez and Marston, sitting in chairs (they are not in the same room but the video is shot to make it look more like they are), talking to each other about drama they find on the internet. The Podcast has over 100,000 subscribers—primarily young adults according to Respondents—who clearly enjoy watching Vazquez and Marston give their opinions on the petty fights of others. Respondent Party Statement ¶ 14. As such, the Day-Braun fight was fresh meat for the Podcast.

Because of Braun’s involvement with drama on the internet, the Podcast had already discussed Braun prior to the Work being published. Braun had represented another internet celebrity Respondents called “Lauren the Mortician” (“Lauren”), which also involved a dispute related to copyright takedown notices. In an episode prior to

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<sup>2</sup> Braun IP claims that the Work contains “opinions and perspectives,” as opposed to facts (Reply Statement ¶ 12), but that does not make a material difference here and many of the statements in the Work are clearly presented as facts.

the one alleged as infringing, the Podcast had gone into detail about how Lauren had allegedly hired Braun to take down content of anyone Lauren did not like and, according to the Podcast, Braun had taken certain other aggressive actions on Lauren's behalf, even threatening jail time in cease-and-desist letters. *See generally* Exhibit E1, E2 (Dkt. 58, 55).

Respondents had therefore been monitoring drama related to Braun when they filmed the allegedly infringing episode (the "Episode"), posted on YouTube on December 2, 2023. Exhibit E1-E6 (Dkt. 54-59). In the Episode, Respondents' main story is dedicated to Braun. The title of that one hour and 24-minute episode is "Lauren the Mortician's Lawyer is WAY WORSE Than We Thought + VLOG SQUAD: Where are they NOW?" After an approximately five-minute introduction discussing various things in their lives, they start discussing Braun by referencing their prior episode. They explain that they had gotten many comments and messages about Braun and that they had now realized she was "infamous, perhaps you could say, in the creator community" for going after "fellow drama commentators." Exhibit E1 at 5:30-8:00.

Respondents spend a lengthy amount of time discussing others in the "drama community," including images and clips from videos, to show the history of Braun and her actions on behalf of clients. *See generally* Exhibit E1, E2. In the Episode, Respondents make clear their distaste of Braun and what they view as Braun's lack of standards, going so far as to make the decision to call her "Janet," instead of her real name, "Jeanette." Exhibit E2 at 6:30-7:30 (Dkt. 55). At the 22:30 mark of the Episode (Exhibit E2 at 7:30), Marston decides to check Braun's TikTok account to see if she had posted anything more about her disputes and, upon seeing that there was a posting about Bekah Day (that is, the Work), Respondents proceed to give their "live reaction" to the posting—whether this was an actual immediate "reaction" to the Work, which is not live, but is taped in advance, or whether that was said to increase the drama is not material to this Determination.

Initially, the Episode plays just twenty seconds of the Work (22:40-23:00 of the Episode, found in Exhibit E2 at 7:40-8:00), the part of the Work in which Braun states that Day is making false accusations and that it is impossible for Braun to have filed false copyright strikes. The Episode pauses the Work before Braun further explains her reasoning in the Work. This is because Respondents were confused by Braun's statements given that, according to

the Respondents in the Episode, they recalled Braun herself previously discussing people filing false copyright strikes; and, as discussed in the prior episode, the core of Day's issue with Braun was her threats and other aggressive tactics to content creators (and Day had read Braun's cease-and-desist letter to a third-party on Day's video). Exhibit E2 at 8:00-9:05. Respondents note their belief that Day and Braun are going back and forth with each other because Braun "is pissed" that Day is calling out her tactics. *Id.* The Episode then shows a video from Day (in a faster speed than typical) where Day goes through some of the history of her dispute with Braun, although the Day video is stopped when Respondents are struck with the realization that Day has made a reference to someone who had emailed Respondents after their prior episode (about that person's dispute with Braun and claims that Braun was filing false takedown notices against her with respect to various material). *Id.* at 9:05-10:00. Respondents then discuss that drama as well. *Id.* at 10:00-12:00.

Respondents continue with a lengthy exposition of the drama and history of various internet celebrities and Braun's actions on their behalf, including one celebrity who was so pleased with Braun's tactics that she recommended Braun to others, which eventually caused a fight between many people with Braun at the center. *See generally* Exhibit E2; Exhibit E3 (Dkt. 56). The history uses different clips, including one from one of Braun's clients saying that she has Braun take down material, including when anyone "tries to defame" the client or "talk[s] shit" about the client and that the client "love[s] when they get upset about it." Exhibit E3 at 1:00-2:00 (Dkt. 56). During their exposition, Respondents make clear their disgust with Braun and creators who they believe "harass" and "bully" those who say things they do not like. Exhibit E3 at 2:00-4:00.

As part of the Episode, Respondents discuss the concept of fair use at some length as they believe that the tactics Braun is defending in the Work involve going after creators engaging in fair use, and Respondents' business and many others on the internet rely on that legal principle to discuss and critique various personalities and influencers and report on the drama between them. Exhibit E3 at 7:30-9:00; Exhibit E4 at 00:10-1:10 (Dkt. 59). Respondents state in the Episode that podcasts like theirs engage in "commentary" and use videos in a "transformative" manner to give accurate context to their critiques, so the audience understands why they are agreeing or disagreeing with the content. Exhibit E3 at 7:45-8:30. They also call out Braun and her clients as being

hypocrites for sending takedown notices on content very similar in nature to the content those clients are also creating (that is, content using the works of others to give context to critiques and analysis). *Id.*

Within the fair use discussion, Respondents show (at the 45:40-46:10 mark) thirty seconds of a different video that Braun created (not at issue in this proceeding, and supposedly a year earlier) where Braun tells her viewers that anyone wanting to submit a takedown notice “must consider” fair use first. Exhibit E4 at 00:40-1:10. Respondents call out Braun for being hypocritical and perhaps changing her tune when she can make money from takedown notices. *Id.* at 1:10-1:30. Respondents discuss how Braun’s statement in the Work that she herself does not perform a copyright strike but merely presents a request for a copyright strike and the strike is performed by the platform is mere “semantics.” *Id.* at 1:30-2:03. It is at this point that the Episode plays a precisely one-minute clip of the Work (which includes the twenty seconds played earlier in the Episode) to show and criticize how, as explained above and as referred to at various points in the Episode, Braun used what Respondents consider to be very technical and disingenuous semantics to defend her actions with Day. *Id.* at 2:03-3:03. No other portion of the Work is shown in the Episode.

The Episode continues discussing more of Braun’s activities against internet commentators and influencers, including doing enough to get pages banned, and including, according to Respondents, trying to take down material that could not possibly be protectable under copyright law. *Id.* at 3:15-6:00. Respondents also state that they fully expect Braun to file a takedown notice against them and that they would have no problem issuing a counternotice given their confidence that their uses of works constitute fair use. *Id.* at 8:30-9:00. At the almost 70-minute mark of the Episode, after further discussions of Braun’s clients and her activities on their behalf, Respondents again discuss the importance of the fair use principle (and the difference between using a takedown for alleged defamation and copyright infringement) and then end their discussion related to Braun and Braun’s clients. Exhibit E5 at 9:45-10:50 (Dkt. 57).

There is no dispute regarding the Respondents’ lack of permission to use the Work in the Episode. On December 3, 2023, Braun IP sent a takedown to YouTube regarding the Episode, and Respondents sent YouTube a counternotice. Respondent Party Statement ¶ 20; Exhibit R (Dkt. 66). Although YouTube’s opinion does not

factor into the Board’s decision, YouTube sent Braun IP an email on December 8, 2023, and Respondents an email on December 12, 2023, stating that they had 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. Respondent Party Statement ¶¶ 19-24; Exhibit O, P, Q, R. (Dkt. 64, 82, 81, 66).

Regarding Respondents’ potential profits attributable to the alleged infringement, Braun IP states that Respondents made \$4,226.61 in revenue from the Episode on YouTube and \$1,236.24 from audio-only versions of the Episode on other platforms. Braun IP Party Statement ¶ 21; Exhibit J (Dkt. 39); Exhibit K (Dkt. 44). Regarding possible losses of Braun IP, Braun IP states that it uses a standard licensing agreement for videos it creates, for which it charges \$7,500, and attaches two sample licensing agreements—although it is extremely unclear what types of videos the licenses cover and whether those videos are anything like the Work. Braun IP Party Statement ¶ 20; Exhibit I (Dkt. 48). Respondents state that: the number for their revenues is overstated; there is no evidence that anyone has paid Braun IP’s claimed license rate; one of the two sample agreements allows services in lieu of payment; and the Work is extremely different from any of Braun IP’s past content. Respondent Party Statement ¶¶ 25-37.

Braun IP seeks statutory damages of “no less than \$12,962.85.” Braun IP Party Statement ¶ 23.

### **III. Defenses**

To succeed on a claim for copyright infringement, a claimant must establish: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Respondents do not contest Braun IP’s ownership of the Work (which is documented in the certificate of registration, Exhibit D, and which acts as a prima facie presumption of copyrightability and ownership of the Work), nor do they contest that they copied constituent elements of the work (which is clearly evidenced by a comparison of the works at issue). However, Respondents claim that their use of the Work qualifies for the fair use defense.

As the proponent of the affirmative defense of fair use, Respondents have the burden of proof on the issue. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020), *cert. den.*, 141 S. Ct. 2803 (2021).

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). Based on the evidence in the record, the weight of the factors overwhelmingly favors a finding of fair use.

As to the first factor, while the use of the Work was for a commercial podcast, there is no question that the use was to comment on and criticize the content of the Work. 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 the precise content in the clip. Braun IP suggests 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. However, Respondents’ use was literally for the opposite purpose: namely, to give reasons why Braun’s side of the story did not hold water. To do that, Respondents needed to present Braun’s reasoning, and they used no more of her content than was reasonable to critique it. There is no doubt that this use falls into the category of “criticism” and “comment[ary]” explicitly set forth in 17 U.S.C. § 107. To be clear, while Respondents could be accused of insulting or belittling Braun, the Episode is far more than that: it is a lengthy and comprehensive history, review, criticism, and dismantling of the arguments presented by Braun in the one-minute clip of the Work shown in the Episode.

Many courts have found that copying of a work in the context of commentary or criticism on the subject within the work, or use of a work to enhance a movie or video discussing the subject of the work, qualifies for the fair use defense—and, at the very least, it strongly tilts the first factor analysis towards a defendant. In fact, in similar situations, courts have specifically said that 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(b) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 519-20 (S.D.N.Y. 2022) (quashing subpoena related to YouTube video because using the original video, which had been created to support the Jehovah’s Witness religion, in order to criticize the religion was clearly fair use); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (finding a “strong presumption” that the first factor favors the defendant if the allegedly infringing work fits into one of the uses specifically described in Section 107 such as “criticism, scholarship or research” and that typically, the “assessment of the first fair use factor should be” over once one of those stated uses is established) (quotations omitted); *Hughes v. Benjamin*, 437 F. Supp.3d 382, 392 (S.D.N.Y. 2020) (granting motion to dismiss with prejudice and finding factor one in defendant’s favor: “a reasonable observer who came across the video would quickly grasp its critical purpose”); *Thicc Boy Prods. Inc. v. Swindelle*, No. 22-CV-00090-MSM-PAS, 2024 WL 733425, at \*3 (D.R.I. Feb. 22, 2024) (factor one favored fair use because “reaction videos used the copyrighted works to criticize or comment upon them rather than to supersede the work’s original objects”); *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp.3d 1094, 1105 (C.D. Cal. 2015) (YouTube show’s use of videos was either to criticize or make fun of them and thus transformative; commercial nature of the show is outweighed by the transformative nature of the use). *See also Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544-45, 143 S. Ct. 1258, 1284 (2023) (“[T]he meaning of a secondary work . . . should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original.”); *Campbell*, 510 U.S. at 578-79, 583 (the fair use inquiry may be guided by the specific examples stated at the beginning of Section 107, including criticism and commentary, with the “central purpose” of the first factor to see whether the new work “merely supersedes the objects of the original creation,” that is, “supplanting the original,” or instead transforms the original to add a new meaning or message; “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”) (quotations and citations omitted).

As to the second factor, there is some question as to whether the Work is creative in nature. The Work was not

made for entertainment purposes, but rather for Braun to go through the factual history of her dispute with Day and her position related to that dispute. Courts have found that when the original work is informational in nature, more leeway is given towards a finding of fair use. *See, e.g., In re DMCA Section 512(b) Subpoena*, 581 F. Supp. 3d at 521-22 (citations omitted); *Thicc Boy Prods. Inc.*, 2024 WL 733425 at \*3 (podcast discussing current events, popular culture and their lives found to “fall closer to the factual end of the copyright spectrum than the creative end”). However, even assuming that the Board viewed this as a creative work, the weight of this factor is almost negligible when the use of the creative work is for a clear transformative purpose such as criticism or commentary. *See, e.g., Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (finding this factor neutral, in part because taking “too narrow a view of the fair use defense” where the work used is creative “could materially undermine the ability of . . . biographers to tell” an important story); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006) (recognizing “that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose” and finding limited weight where the “use was to emphasize the images’ historical rather than creative value”); *Red Label Music Publishing, Inc. v. Chila Productions*, 388 F. Supp. 3d 975, 985 (N.D. Ill. 2019) (finding this factor neutral where the use of the work was “not related to its mode of expression but rather to its historical facts”); *Campbell*, 510 U.S. at 586 (this factor “is not much help” in the fair use analysis when, for instance, a transformative use must take the original to achieve its purpose); *Hughes*, 437 F. Supp.3d at 393 (same). As such, this factor is neutral in the analysis here, or at best, slightly weighs against fair use.

The “amount and substantiality” factor weighs somewhat in favor of fair use. In terms of the clip’s relation to the Work as a whole, 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). While Claimant objects that what was taken was the “heart,” of the Work, there is no evidence to support that position. Braun IP Party Statement ¶ 50. Braun IP also says that “the fact of the matter is that Respondents did not need to display any of the portion of the Work at all.” *Id.* ¶ 51. That argument is meritless and undermines Claimant’s credibility. As discussed above, Respondents clearly used the Work to provide context so that they could properly

critique it. Furthermore, it does not appear that Respondents used any more than was reasonable to use, 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) (“The fair use doctrine does not obligate the Film to use the shortest possible snippet to convey its message of commentary and criticism. . . . [The amount used] was reasonably necessary to convey the Film’s message.”); *Red Label*, 388 F. Supp. 3d at 986 (factor favored fair use where insubstantial use amounting to 2 percent of the music and 17 percent of the video was made and “was no more than necessary to serve as a historical reference point”); *Campbell*, 510 U.S. at 589 (where “no more was taken than necessary” for a fair purpose, copying cannot be considered excessive); *Hofbeinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127, 139-40 (E.D.N.Y. 2001) (defendants took no more “than was necessary in light of the subject matter of their Documentary”); *Hughes*, 437 F. Supp. 3d at 393-94 (defendant “copied as much of [the original work] as was deemed reasonably necessary for him to convey his critical message”). Furthermore, this is not a case where Respondents used a work and made minimal commentary: they spent over an hour criticizing a one-minute clip and the events surrounding it.

Finally, as to factor four, there is no meaningful evidence that the use of the Work affected the market or value of the Work. Respondents took a small portion of the Work to criticize its content. To suggest that Respondents’ use interfered with Braun IP Law’s ability to monetize the Work on online platforms, Claimant states that “both parties operate within the same online content market.” Braun IP Party Statement ¶ 60. Claimant even appears to argue that because other Braun IP videos discuss legal issues on the Internet, including issues related to her firm, Braun IP’s typical videos can also “be classified as ‘internet drama.’” Reply Party Statement ¶ 20. That argument also lacks any credibility. Claimant is a law firm. While Claimant may also post content online and get paid by TikTok depending on Braun’s viewership, there is no evidence that Claimant’s typical genre is internet drama or that the Work did not greatly deviate from Braun’s typical posts, which are legal in nature to promote Braun IP’s business. The one prior clip Claimant created (on fair use) that was also shown in the Episode supports the notion that Claimant’s typical videos—predictably—are aimed at a discussion of copyright law generally. Exhibit E4 at 00:40-1:10.

While it is true that a copyright owner can be harmed by not being allowed to decide who gets to use or not use

their work, 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 Braun’s market for the Work—to the extent one existed—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) (“Where the secondary use is not a substitute for the original and does not deprive the copyright holder of a derivative use, the fourth factor weighs in favor of fair use.”) (citations omitted); *Brown*, 855 Fed. Appx. at 64 (“[T]he intended audience for the Song would be unlikely to purchase the Film in preference to the original.”) (citations omitted); *In re DMCA Section 512(h) Subpoena*, 581 F. Supp. 3d at 523 (finding “no danger” that a critical work will usurp the market for the original work or that the markets would be the same).

Braun IP submits two sample licenses for prior works of hers, showing there may be some market for licensing some of her works, but as mentioned previously, the Work appears to be far different than Braun IP’s other videos, and there is no evidence that there is any market for the licensing of short clips from the Work or licensing activity for critiques of Braun IP’s works. Exhibit I. *See Brown*, 855 Fed. Appx. at 64 (“Because fair use always results in some loss of royalty revenue, however, we consider only the challenged use’s impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.”) (citation omitted); *Bill Graham*, 448 F.3d at 614-15 (same principle, and also stating that copyright owners cannot “preempt exploitation of transformative markets” regardless of whether there may be a loss of license fees) (citation omitted); *Campbell*, 510 U.S. at 592 (“the law recognizes no derivative market for critical works” even if demand for the original work is suppressed (as opposed to usurped)).

In sum, the weight of the fair use factors clearly favors fair use in this case. Accordingly, the Board dismisses the claim against Respondents with prejudice.

#### **IV. Conclusion**

The Board dismisses the claim against Jessica Vazquez and Lily Marston with prejudice.

Copyright Claims Board