



Electronic Frontier Foundation

Protecting Rights and Promoting Freedom on the Electronic Frontier

April 30, 2009

VIA EMAIL

Jamie McClelland
May First/People Link
461 54th Street
Brooklyn, NY 11220

Re: DMCA Notice re: shelljazzfest.com

Dear Mr. McClelland:

I represent Oil Change International, a nonprofit corporation dedicated to raising public awareness about the harm it believes the Shell oil company has caused to human rights and the environment. Outreach via the Internet is an important part of that effort, including the website, www.shelljazzfest.com, which the New Orleans Jazz and Heritage Festival ("Festival") has alleged infringes its copyrights. Shell is the major sponsor of the Festival, and my client believes that people interested in the Festival might also be interested in knowing more about its major sponsor. As the site puts it: "In New Orleans, Shell is sponsoring Jazz Fest. In Nigeria, Shell sponsored murder & torture."

There is no merit to Festival's allegations. The site is obviously designed for purposes of criticism and comment and is protected by the fair use doctrine. 17 U.S.C. § 107 ("the fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright."). Any use my client may have made of material copyrighted by the Festival is highly transformative. *See generally Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) ("[Transformative] works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"); *Castle Rock Ent. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (A transformative work "is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.").

Further, the site copies no more than necessary for purposes of the criticism. *Campbell*, 510 U.S. at 588; *see also Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 803 n.8 (9th Cir. 2003) (holding that "entire verbatim reproductions are justifiable where the purpose of the work differs from the original."). For example, the dancing figures "logo" is placed against the backdrop of gas flares, bringing into sharp relief the sad irony that Shell is sponsoring dancing in New Orleans (and the Festival is accepting that sponsorship) while also, my client believes, sponsoring environmental and human degradation in Nigeria and elsewhere.

Finally, critical transformative uses rarely if ever supplant markets for the original material. *Campbell*, 510 U.S. at 591-92; *see also Harper & Row v. Nation Enters.*, 471

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U.S. 539, 567-69 (1985). In this case, the website is plainly not a substitute for the original, nor does it invade any licensing market for the Festival's copyrighted works.

More broadly, the website serves the public interest by advancing political criticism and debate about pressing social issues, e.g., the propriety of Shell sponsoring the Festival in light of Shell's human rights and environmental record. Nimmer on Copyright, § 13.05[B][4] ("the public interest is also a factor that continually informs the fair use analysis."); *see also Sony v. Universal*, 464 U.S. 417, 431-32 (1984) ("courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."); *Mattel*, 353 F.3d at 806 ("the public benefit in allowing . . . social criticism to flourish is great.").

However, my client has no wish to prolong this matter. Therefore, in an excess of caution and without conceding that the Festival's allegations are valid—which they are not—my clients have removed the "tickets," "travel" and "info" pages and links identified in the Festival's notice. Therefore, the Festival has no conceivable basis for complaint.

If you have any further questions or concerns, please do not hesitate to contact me.

Regards,



Corynne McSherry
Senior Staff Attorney

cc: Stephen Kretzmann
Alfredo Lopez