



250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

September 27, 2024

VIA ELECTRONIC MAIL

Justin T. Arnot
General Counsel
Billy Graham Evangelistic Association
1 Billy Graham Parkway
Charlotte, NC 28201
Email: jarnot@bgea

Re: Political Advertisement by Evangelicals for Harris

Dear Mr. Arnot:

Our firm represents Evangelicals for America PAC and its project, Evangelicals for Harris (“EFH”). We are in receipt of your letter September 27, 2024 regarding a video advertisement published by our client.¹ It is correct that the video uses several short snippets of a decades-old speech given by Billy Graham which has since been republished by numerous individuals and organizations, including the Billy Graham Evangelistic Association (“BGEA”).² However, there is absolutely no basis to assert that the use of this footage constitutes copyright infringement or any other violation of your rights. Our ability to publicly discuss the moral failings of Donald Trump and how his behavior comports with the values espoused by evangelical leaders, including Billy Graham, is essential First Amendment expression. Our communications, our references to Billy Graham, and this larger discussion of our community’s values are absolutely critical to a healthy democracy. Your efforts to stop us from bringing Billy Graham’s perspectives to bear on today’s challenges are meritless, disappointingly cynical, and very much at odds with his values. The call to repentance was a central pillar of the Billy Graham Crusades and his alter call, and it is inappropriate for BGEA to seek to shield Donald Trump from it or prevent Americans from hearing Donald Trump reject it.

As a formal legal matter, EFH’s limited use of Billy Graham’s speech falls squarely within the fair use protections afforded by Section 107 of the Copyright Act and numerous judicial decisions.³ EFH is legally entitled to use and comment on the short segments of this speech regardless of your

¹ The video, titled “Keep Clear” can be found at <https://www.evangelicalsforharris.com/ads>.

² Billy Graham Evangelistic Association, *Hope: Billy Graham Classic Sermon*, YOUTUBE (posted on Dec. 4, 2003) (originally given Sept. 11, 1988) https://youtu.be/Efc_LhQq_uY?si=voEC1H1Mctf8mAKm (hereinafter “Hope”). The speech may also be found in several other locations, e.g., Rochester TV Archive, *Billy Graham Greater Rochester Crusade*, YOUTUBE (posted on Oct. 19, 2022) <https://youtu.be/YG3UdlkpYeo?si=bbWvBrg6ORdrA-hW>.

³ 17 U.S.C. § 107.

position on the matter. The “Keep Clear” advertisement contains short clips from a speech given by Billy Graham thirty-six years ago. The advertisement uses these clips to comment on Graham’s message and contrast it with the statements and actions of former President Donald Trump. This is a paradigmatic example of fair use, which protects “criticism, comment, [and] news reporting”⁴ and provides “breathing space within the confines of copyright.”⁵ Importantly, the protections of fair use are “broader when the information relayed involves issues of concern to the public”⁶ because the “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”⁷

Section 107 provides four enumerated factors to evaluate whether the use of copyrighted material qualifies as fair use. These factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”⁸ Each of these factors weigh in favor of EFH and illustrate the strong protection enjoyed by material of this kind. We have set forth a thorough and detailed analysis of these issues below, and there can be no question that EFH’s videos constitute appropriate “fair use.”

First, a fair use inquiry examines “the purpose and character of the use,” which focuses in part on whether the new work is “transformative.”⁹ A work is transformative when it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁰ The central question “is whether the appropriation of the original leads to a new creation, either through changes to the work itself or through placement of the work in a different context” from which it was originally created.¹¹ Indeed, several courts have determined a work was “transformative” even when it reproduced an exact copy of the original work because the copy “serv[ed] a new purpose.”¹² Whether a work is transformative is greatly important and “the more transformative the new work, the less will be the significance of other factors ... that may weigh

⁴ *Id.*

⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁶ *Strom v. Petershagen*, No. 2:24-CV-00583-BAT, 2024 WL 3638056, at *3 (W.D. Wash. Aug. 2, 2024); *see also Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994), *City of Inglewood v. Teixeira*, 2015 WL 5025839 at *8 (C.D. Cal. Aug. 20, 2015).

⁷ *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959 (D.N.H. 1978).

⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994).

⁹ 17 U.S.C. § 107.

¹⁰ *Campbell*, 510 U.S. at 578-79.

¹¹ *Peterman v. Republican Nat’l Comm.*, 369 F.Supp.3d 1053, 1060 (D. Mont. 2019) (quoting *Wall Data Inc. v. L.A. Cty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006) (internal quotations omitted). In *Peterman*, the Court found there was fair use when the Republican National Committee used a photograph posted by a Democratic Party campaign after making “two minimal alterations” to the photograph because the changes “altered the original” and “changed the purpose and function” of the photo. *Id.* at 1060-61. *See also Cariou v. Prince*, 714 F.3d 694, 708 (arguing “[the] original must be employed in the creation of new information, new aesthetics, new insights and understandings” to be transformative).

¹² *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at *4-5 (N.D. Cal. Feb. 25, 2014) (stating the republication of plaintiff’s unedited headshot photo was transformative because plaintiff used the photo as a “positive marketing tool” while defendant used it “as part of its criticism of, and commentary on, the plaintiff’s politics.” *See also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–19 (9th Cir. 2002) (finding the use of thumbnail images to be transformative because they “serve[ed] a different function than [the original] use—improving access to information on the internet versus artistic expression.”).

against a finding of fair use.”¹³ These principles extend across media types, including video content, where courts have consistently found that using portions of existing videos in a montage, with added commentary, or for a different use was transformative because it serves a different purpose or conveys a new message from the original.¹⁴ In addition, the “purpose and character” factor also considers whether the new work is for commercial or non-commercial purposes.¹⁵ A new creation for noncommercial purposes is more likely to receive the fair use protection, while a commercial recreation is less likely to be protected.¹⁶

Applied to this matter, EFH’s use of the footage is unquestionably transformative and non-commercial, which strongly supports the fair use protections. First, “Keep Clear” does not merely “supersede” the original speech, but rather “adds something new” by incorporating seven clips of former President Trump.¹⁷ The Trump clips are interspersed between segments of the original speech, thus making an entirely “new creation.”¹⁸ Cases dealing with short excerpts of longer videos have consistently found the new creations to be transformative, even when the new work fails to include *any* new “commentary or video.”¹⁹ Second, use of the Graham footage is for an entirely new purpose than when the speech was first given. The sermon, given in 1988, was intended to spread theological teachings and encourage people to have “hope” in various areas of their life.²⁰ In contrast, “Keep Clear” provides a critical application of Graham’s words to Trump and a commentary on how those words should be understood today, illustrating how Trump’s words and actions are fundamentally incompatible with Graham’s teachings and wider Evangelical thought. EFH unquestionably transformed the video by giving it a “new meaning and message through political criticism.”²¹ Third, to the extent “Keep Clear” uses direct footage, it is “justified because copying is reasonably necessary to achieve the user’s new purpose.”²² The purpose here is clear: Graham’s teachings do not align with the words and actions of former President Trump.

EFH’s use of the Graham footage is also strictly noncommercial. EFH is a political committee and a non-profit corporation organized and registered in the District of Columbia. Thus, use of the Graham footage is “primarily for public benefit” and not “for private commercial gain.”²³ In addition, courts across the United States have, for decades, consistently found political speech to

¹³ *Campbell*, 510 U.S. at 579.

¹⁴ *See, e.g., Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 977 (C.D. Cal. 2012).

¹⁵ *Campbell*, 510 U.S. at 580.

¹⁶ *Id.*

¹⁷ *Id.* at 579.

¹⁸ *Peterman*, 369 F.Supp.3d at 1060.

¹⁹ *See, e.g., Hughes v. Benjamin*, 437 F.Supp.3d 382, 388 (S.D.N.Y. 2020) (finding transformative use where a right-wing content creator created a video comprised entirely of clips from a left-wing content creator’s video without any additional commentary or alterations).

²⁰ BGEA, *supra* note 2. For example, beginning at approximately 19:12, Graham preaches that “there’s hope for the poor people ... hope for the people that have been discriminated against.”)

²¹ *Galvin* at 1192 (internal quotes omitted). *See also Nat’l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-CV-00044-ODW, 2012 WL 4052111, at *3 (C.D. Cal. Sept. 14, 2012) (stating that “[d]efendants’ voiceovers, editing, and overall production adds something new to the underlying works”).

²² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 511 (2023).

²³ *Hustler Mag. Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986).

be noncommercial.²⁴ “Keep Clear” does not solicit funds – its goal is to “discuss[] public issues and challenge[] the qualifications of a political candidate” by providing timely political commentary related to its purpose of promoting Christian values.²⁵ The fact that EFH’s website contains a donation button is immaterial to this analysis because a solicitation of contributions “is properly classified not as a commercial transaction at all, but completely noncommercial, political speech.”²⁶ In short, EFH did not use the footage for their own monetary benefit, but rather as an essential part of their noncommercial, political messaging.

Second, the fair use inquiry assesses the “nature of the copyrighted work.”²⁷ However, courts generally do not place significant weight on this factor, noting “the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”²⁸ Additionally, the publication status of the work is important – the use of a widely published or publicly available work undermines the protection afforded to a creative work.²⁹ In contrast, the use of unpublished materials may undermine a fair use claim, as “unpublished works [] are the favorite sons of factor two.”³⁰ Here, the speech’s wide dissemination diminishes the weight placed on this factor because the “work was previously published by distribution of recordings of” the speech.³¹ Indeed, BGEA’s posting currently shows 112,000 views of the “Hope” sermon.³² BGEA also has more than one-million subscribers to their YouTube channel, on which “Hope” is posted.³³ The same speech is also posted on non-BGEA channels, highlighting its widely disseminated nature.³⁴ Furthermore, the speech was widely distributed the very day it was made to an audience of thousands. Overall, EFH used short segments of a video that was already widely disseminated and publicly available, thus “the scope of fair use in this context is” wider “than it would be if it had been unpublished.”³⁵

Third, the statutory framework under Section 107 analyzes whether “the amount and substantiality of the portion used in relation *to the copyrighted work* as a whole... are reasonable in relation to the purpose of the copying.”³⁶ To assess the amount and substantiality of the portion used, “courts

²⁴ See, e.g., *Peterman*, 369 F.Supp.3d at 1060 (deeming Republican Party mailer to be noncommercial). *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, 2004 WL 434404, at *12 (S.D.N.Y. 2004) (finding advertisement on behalf of Ralph Nader’s presidential run to be noncommercial); *Keep Thomson Governor Comm.*, 457 F.Supp. at 957 (finding political ad appropriating part of opponent’s political ad to be noncommercial).

²⁵ *Am. Fam. Life Ins. Co. v. Hagan*, 266 F.Supp.2d 682, 697 (N.D. Ohio 2002).

²⁶ *Id.*

²⁷ 17 U.S.C. § 107(2).

²⁸ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

²⁹ See, e.g., *Kienitz v. Sconnie Nation LLC*, 965 F.Supp.2d 1042, 1052 (W.D. Wis. 2013), *aff’d*, 766 F.3d 756 (7th Cir. 2014).

³⁰ *Higgins v. Detroit Educ. Television Found.*, 4 F.Supp.2d 701, 707 (E.D. Mich. 1998).

³¹ *Higgins*, 4 F.Supp.2d at 707.

³² BGEA, *Hope: Billy Graham Classic Sermon*, YOUTUBE (posted on Dec. 4, 2003) https://youtu.be/Efc_LhQq_uY?si=voECIH1MctI8mAKm.

³³ BGEA, BGEA YouTube Channel, YOUTUBE (last accessed September 27, 2024).

³⁴ See, e.g., Rochester TV Archive, *Billy Graham Greater Rochester Crusade*, YOUTUBE (posted on Oct. 19, 2022) <https://youtu.be/YG3UdlkpYeo?si=bbWvBrg6ORdrA-hW>.

³⁵ *Hughes*, 437 F.Supp.3d at 393.

³⁶ *Campbell*, 510 U.S. at 586 (quoting 17 U.S.C. §107) (emphasis added). See also *Bill Graham Archives*, 448 F.3d 605 at 613 (stating that courts “review this factor with reference to the copyrighted work, not the infringing work.”).

consider not only the quantity of the materials used but also their quality and importance.”³⁷ Fair use is much more likely to be found where “no more content was taken than necessary, given the purpose and character of the allegedly infringing use.”³⁸ Thus, a fair use claim stands on solid ground when a “more limited use would not serve the defendant's intended purpose.”³⁹

This factor strongly supports EFH’s fair use claim. First, “Keep Clear” uses approximately 25 seconds of the footage reflected in BGEA’s “Hope” video, which is 27 minutes and 31 seconds long. This constitutes less than two percent of Hope’s total length. Courts have consistently found that such limited use supports a fair use claim.⁴⁰ In fact, fair use claims are regularly upheld with much more extensive use than in “Keep Clear,” including claims involving a complete reproduction.⁴¹ The clips used in “Keep Clear” also do not constitute the “heart” of “Hope,” – the video would still have substantial value to a viewer that only saw the selected clips in “Keep Clear.”⁴² Second, the “Hope” video is one of 2,034 videos published on BGEA’s YouTube channel as of today’s date, further underscoring the miniscule nature of EFH’s use. Third, EFH used no more content than was necessary for the intended purpose – to draw a contrast between the teachings of Billy Graham and the actions of Donald Trump. In order to make this contrast, “some conjuring up of the copyrighted work is necessary.”⁴³ To use less footage of Graham in making the comparison “would have made the [footage] useless to the story.”⁴⁴ In sum, EFH used only as much content as was needed to make a comparison between Graham’s teachings and Trump’s actions. This amounted to less than two percent of the content displayed in “Hope,” and an infinitesimally small amount of the total content on BGEA’s channel. This insignificant use weighs heavily in favor of fair use protections.

Fourth, the fair use inquiry analyzes “the effect of the use upon the potential market for or value of the copyrighted work.”⁴⁵ This factor “is undoubtedly the single most important element of fair use”⁴⁶ and “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited.”⁴⁷ In evaluating this fact, courts focus on whether the new use “tends to diminish or prejudice the potential sale of the work, tends to interfere with

³⁷ *Peterman*, 369 F.Supp.3d at 1064 (internal quotations omitted).

³⁸ *Hughes*, 437 F.Supp.3d at 393 (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (internal quotations omitted). See also *Bill Graham Archives*, 448 F.3d at 98 (stating that “the third-factor inquiry must take into account that the “the extent of permissible copying varies with the purpose and character of the use.”).

³⁹ *Peterman*, 369 F.Supp.3d at 1064.

⁴⁰ See, e.g., *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 448 (S.D.N.Y. 2001) (finding “20 seconds of footage excerpted from the 70 minutes” film to be a fair use), *Keep Thomson Governor Comm*, 457 F. Supp. at 961 (finding fair use when defendant used fifteen seconds of plaintiff’s three minute recording).

⁴¹ See, e.g., *Higgins*, 4 F.Supp.2d at 708 (supporting a fair use claim where defendants used 35 seconds of a 3 minute, 35 second music composition); *Huges*, 437 F.Supp.3d at 393 (finding fair use where defendant copied twenty percent of plaintiff’s video). See also *Kelly*, 336 F.3d at 818–19 (9th Cir. 2002).

⁴² See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564–66 (1985) (denying fair use claim where the Nation published a previously unpublished manuscript from President Gerald Ford because the content published was the “heart” of the book).

⁴³ See *New Era Publications Int’l, ApS v. Carol Pub. Grp.*, 904 F.2d 152, 159 (2d Cir. 1990).

⁴⁴ *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

⁴⁵ 17 U.S.C. § 107(4).

⁴⁶ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

the marketability of the work, or fulfills the demand for the original work.”⁴⁸ In short, a use that “substitutes for the original” is unlikely to be a fair use, while a use that is “complementary,” which includes “negative complements” such as book reviews, is more likely to be protected.⁴⁹ A use with a different purpose than the original work is unlikely to be a substitute for the original.⁵⁰

There is no conceivable argument that “Keep Clear” harmed the market for BGEA’s content. The advertisement merely used a few short clips which were set between clips of former President Trump.⁵¹ A individual interested in BGEA’s work is unlikely to be satisfied by watching twenty-five seconds of footage in a television ad. In fact, it is far much more likely that viewers of “Keep Clear” would be *more interested* in Billy Graham’s sermon’s after watching the advertisement and bring more traffic to BGEA’s YouTube channel.⁵² The advertisement used several captivating moments from a decades-old speech and highlighted their relevance to today by juxtaposing them with modern issues.⁵³ Second, there is no indication that BGEA ever intended to “develop or license others to develop” the same market as EFH. The advertisement is intended to target politically active Evangelicals. As you are aware, “BGEA is a registered 501(c)(3) non-profit organization.”⁵⁴ 501(c)(3) organizations may not “participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office.”⁵⁵ Thus, BGEA may not legally participate in the same types of activities or use its works for the purposes that EFH is using them.⁵⁶ In addition, any claim that EFH may impact BGEA’s “potential to develop a derivative market” though the licensing of their work is unfounded.⁵⁷ The Supreme Court has clearly stated that “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”⁵⁸ As discussed, BGEA would not – and legally could not – “develop” a market involving political activities. In sum, the advertisement categorically does not “diminish or prejudice the sale of” BGEA’s work, “interfere with the marketability” of BGEA’s work, or “fulfill[] the demand for” BGEA’s work.⁵⁹ Like the

⁴⁸ *Hustler Mag. Inc.*, 796 F.2d at 1155-56.

⁴⁹ *Ty, Inc. v. Publications Int’l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002).

⁵⁰ See *Kienitz* 965 F. Supp. at 1054.

⁵¹ *Hofheinz*, 146 F. Supp. 2d at 449 (finding that the video clips used were “too few, too short, and too small in relation to the whole to undercut the market for plaintiff’s copyrighted works ... If anything, they likely spurred interest in the film.”) (internal quotations omitted).

⁵² *Id.* See also *Ty, Inc.*, 292 F.3d at 517 (noting that book reviews, even negative book reviews, “increase the demand for copyrighted works.”).

⁵³ See *Galvin*, 130 F.Supp.3d at 1196 (noting that flyers containing an altered picture of a candidate for office, “may have increased market demand for the Photograph given the attention it ostensibly brought to the election and political campaign.”).

⁵⁴ BGEA, *About*, <https://billygraham.org/about> (last accessed September 27, 2024).

⁵⁵ 26 U.S.C. § 501(c)(3).

⁵⁶ *Ty, Inc.*, 292 F.3d at 518 (7th Cir. 2002). See also *Kienitz*, 965 F.Supp.2d at 1054 (noting that “the market for [plaintiff’s] photograph and the market for defendants’ ... shirts are skew, as in nonintersecting and not even parallel,” thus there was no market substitution).

⁵⁷ *Bill Graham Archives*, 448 F.3d at 614-15 (finding that the defendant’s use of plaintiff’s images “falls within a transformative market, [thus plaintiff] does not suffer market harm due to the loss of license fees.”).

⁵⁸ *Campbell*, 510 U.S. at 592 (further stating that “the law recognizes no derivative market for critical works.”).

⁵⁹ *Hustler Mag. Inc.*, 796 F.2d at 1155-56.

three factors before it, the fourth factor weighs strongly in EFH's favor and supports a claim of fair use.

In short, EFH's use of the short segments of Billy Graham's speech is legal, fully appropriate, and well within our rights. EFH will not be removing the "Keep Clear" advertisement in response to your demand. The advertisement is a transformative, noncommercial use of less than two percent of a widely disseminated video, aimed at a market that BGEA was prohibited from targeting. Thus, use of this footage qualifies for the protections of the fair use doctrine under 17 U.S.C. § 107. Under the aforementioned statutes and the First Amendment, whether BGEA approves of EFH's use is irrelevant.⁶⁰ The adaption of this footage provides integral commentary, criticism, and perspective regarding Donald Trump, the upcoming election, and the Evangelical community.

Regards,

A handwritten signature in blue ink, appearing to read "Graham M. Wilson".

Graham M. Wilson
Jonathan A. Peterson
Counsel to Evangelicals for America PAC

⁶⁰ See *Kienitz*, 965 F.Supp.2d at 1045, 1054 (finding fair use when plaintiff opposed his photograph being used "for the purpose of criticizing" a political figure, because defendants use of the photograph was far the "from [plaintiff's] original purpose, character and audience" and thus "a substitute for the copyrighted creation.").