

April 5, 2021

Stephen Percy
Office of the President
Portland State University
PO Box 751—POF
Portland, Oregon 97207-0751

Sent via Electronic Mail (president@pdx.edu)

Dear President Percy:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the state of free expression at Portland State University (PSU) in light of the university's recent claim that a YouTube video containing footage from a public meeting violates PSU's copyright. Manipulating copyright law to censor use of public footage in a video critical of PSU not only misapplies copyright jurisprudence, but also defies PSU's obligations under the First Amendment.

I. PSU Demands Removal of YouTube Video for Alleged Copyright Violation

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed a waiver, executed by Professor Bruce Gilley, authorizing you to share information with FIRE. However, if the facts here are substantially accurate, PSU has betrayed its constitutional obligations by abusing copyright law as a vehicle for censorship.

On March 8, 2021, the Oregon Association of Scholars (OAS), of which PSU professor of political science Bruce Gilley is president, posted a video to its YouTube account criticizing a recent PSU faculty resolution on academic freedom.¹ The resolution held that faculty "must be thoughtful in [their] exercise of academic freedom and guard against its cynical abuse that can

¹ OAS, The New Censorship in American Higher Education (on file with author) ("New Censorship Video"). The video is no longer available on YouTube due to a demand by PSU that it be removed.

take the form of bullying and intimidation.”² The New Censorship Video argued that the resolution will “deny academic freedom to all unWoke professors.”³ In making this criticism, the video included less than two minutes of footage from the March 1, 2021, PSU Faculty Senate meeting.⁴

Two days after the New Censorship Video was published on YouTube, Cynthia J. Starke, PSU General Counsel & Secretary to the Board of Trustees, emailed Gilley to demand that OAS remove the video.⁵ In her message, Starke argued that the use of Faculty Senate meeting footage violated PSU’s copyright, and threatened to issue a formal takedown notice under the Digital Millennium Copyright Act if Gilley did not remove the video by noon the following day.⁶ Gilley removed the New Censorship Video from the OAS YouTube account after receiving this demand. Gilley republished the New Censorship Video on the OAS YouTube channel on March 15, removing the Faculty Senate Footage.⁷

II. Usage of the Faculty Senate Footage to Critique PSU Is a Fair Use, and Clearly Does Not Violate Copyright

A copyright is not a complete bar on any other use of the copyrighted work, and a copyright cannot be used by government entities as a shield against criticism. To the contrary, Gilley’s use of PSU-owned footage to criticize PSU and its Faculty Senate’s decisions during the filmed meeting is undoubtedly a fair use.

A. *Fair use protects the right to use materials for criticism.*

Under 17 U.S.C. § 107, a use of copyrighted material “for purposes such as criticism [and] comment . . . is not an infringement of copyright.” *See also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450–51 (1984) (“But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.”); *Twin Peaks Productions, Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1375 (9th Cir. 1993) (“Inevitably, some identification of the subject matter of a writing must occur before any useful comment may be made about it, and it is not uncommon for works serving a fair use purpose to give at least a brief indication of the plot.”).

The fair use doctrine offers “breathing space within the confines of copyright” protection. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citations omitted). Fair

² Portland State University Faculty Senate Resolution: Academic Freedom, Portland State U. (Mar. 1, 2021), <https://www.pdx.edu/faculty-senate/sites/g/files/znlxhr3021/files/2021-02/2021.03.01%20E.4.pdf>.

³ New Censorship Video, *supra* note 1.

⁴ *Id.*

⁵ Email from Starke to Gilley (Mar. 10, 2021, 12:38 PM) (on file with author).

⁶ *Id.*

⁷ OAS, *The New Censorship in American Higher Education (Censored Version)*, YOUTUBE (Mar. 15, 2021), <https://www.youtube.com/watch?v=6a20-h765mo>.

use analysis takes into consideration four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect on the original work's potential market. 17 U.S.C. § 107. Where the purpose and character of the use is highly transformative, the other factors become less significant. *Campbell*, 510 U.S. at 579.

B. The New Censorship Video offers commentary on the faculty senate footage, and is therefore a fair use.

Transformation occurs when use of a copyrighted work “adds something new, with a further purpose or different character [than the original], altering the first with new expression, meaning, or message[.]” *Id.* at 579; *see also City of Inglewood v. Teixeira*, 2015 U.S. Dist. LEXIS 114539, *16–17 (C.D. Cal. Aug. 20, 2014) (holding that videos criticizing city government, including clips from city council meetings, were transformative fair use).⁸ Such uses are not copyright infringements.

Where an individual uses copyrighted video footage in order to criticize the footage, this is a transformative fair use. *Equals Three, Ltd. Liab. Co. v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1105 (C.D. Cal. 2015); *see also SOFA Entm't, Inc. v. Dodger Prods.*, 709 F.3d 1273, 1278 (9th Cir. 2013). For example, in *Equals Three*, the U.S. District Court for the Central District of California determined that videos that used footage from another content creator in order to criticize and comment on the original videos did not violate copyright. 139 F. Supp. 3d at 1104. The court explained that “the host's narration [did] not simply recount what is shown in [the original] videos,” but instead used the original videos as “the butt of” the jokes in the new videos. *Id.* at 1105. Because the new videos had a different purpose from the original videos, the use was not a copyright infringement. *Id.*

The purpose and character prong of the fair use test also considers whether the use is commercial in nature or is for a noncommercial purpose, where noncommercial uses are weighed in favor of fair use. 17 U.S.C. § 107(1).

Here, Gilley's use of the faculty senate meeting footage is not only wholly noncommercial—supporting the nonprofit OAS—but is clearly a criticism of PSU, making his use of the footage transformative. Just as in *Equals Three*, Gilley did not merely recount the faculty senate meeting, but offered criticism of the meeting, making clear that the purposes of the New Censorship Video and the faculty senate footage differ vastly.⁹ For this reason, Gilley's use of the footage is a transformative fair use and does not violate PSU's copyright.

⁸ In *City of Inglewood v. Teixeira*, 2015 U.S. Dist. LEXIS 143380 (C.D. Cal. Oct. 8, 2015), the U.S. District Court for the Central District of California awarded more than \$135,000 in attorney's fees to the defendant content creator after Inglewood unsuccessfully sued the defendant for using city council footage in videos critical of the city government.

⁹ The disparate purposes of the faculty senate footage and the New Censorship Video were made all the clearer by the fact that the New Censorship Video linked to a lengthy report by OAS further criticizing the faculty senate's decision.

C. Gilley's use of the New Censorship Video satisfies every other prong of the fair use test.

Transformative uses are rarely held to be unprotected by fair use, but transformation is not necessarily dispositive of the fair use analysis. Nonetheless, Gilley's use of the faculty senate footage satisfies every other prong of the fair use analysis.

The second prong of the fair use analysis—the nature of the copyrighted work—considers whether the original work is creative or if it conveys merely factual information. *Campbell*, 510 U.S. at 586. Here, PSU can make no serious argument that a screen recording of a public meeting automatically taken by video conferencing software is a creative work. Thus, the nature of the copyrighted work—a highly factual, public record—does not undercut Gilley's fair use claim.

The third prong of the fair use test—the amount and substantiality of the portion used—considers “the quantitative amount and the qualitative value of the original work used.” *SOFA Entm't*, 709 F.3d at 1279. Usage of large portions or the “heart” of a copyrighted work will cut against a finding of fair use. *Campbell*, 510 U.S. at 586–87.

Here, Gilley did not use a large part of the faculty senate footage in producing the New Censorship Video. In fact, the New Censorship Video used less than 125 seconds of footage from what was certainly a robust discussion at the PSU faculty senate. The footage used was neither a quantitatively high amount of the faculty senate meeting footage, nor the “heart” of that footage. The third prong supports a finding of fair use.

The fourth prong of the fair use analysis questions whether the use causes a market harm. In other words, does the use affect “the *potential market* for or value of the copyrighted work”? *Monge v. Maya Magazines*, 688 F.3d 1164, 1180 (9th Cir. 2012). Here, given that the footage is a public record subject to disclosure to any member of the public under Oregon’s public records law, Or. Rev. Stat § 192.314(1), it is unlikely that PSU plans to sell copies of the faculty senate meeting footage or derivative works. Gilley, then, drew no buyers away from PSU’s original work by way of his transformative use. Accordingly, the fourth prong also supports a finding of fair use.

Each prong of the analysis supports a finding that Gilley’s use of the faculty senate footage in the New Censorship Video constitutes a fair use. Thus, PSU cannot claim that Gilley violated the university’s copyright by creating and publishing a video critical of the institution.

III. The New Censorship Video is Protected by the First Amendment

It has long been settled law that the First Amendment is binding on public colleges like Portland State University. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms’”

is nowhere more vital than in the community of American schools.”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

As a public institution bound by the First Amendment, PSU cannot hide behind erroneous application of copyright law to silence its detractors.

This First Amendment protects the right to criticize government actors, including decision-making bodies like the faculty senate. “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Bridges v. California*, 314 U.S. 252, 270 (1941). So central is this ability to criticize officials that the Supreme Court, affirming that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” determined that a higher standard of fault applies to speech-related torts where a public official is the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

The First Amendment also preserves the right of faculty to speak as private citizens on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 150 (1983). When a government employee, such as a faculty member of a state institution, speaks outside the scope of his normal job duties, that expression cannot be restricted unless the institution demonstrates that the speech rights of the employee are overcome by its interests “as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*

Here, Gilley created the New Censorship video to criticize PSU, as is his First Amendment right. He did so as a private citizen, not as an employee of PSU; it is highly unlikely that PSU employs Gilley for the purpose of criticizing the university.¹⁰ The university cannot demonstrate that its interest in preventing such criticism, or its interest in preventing dissemination of a public record (that is, the faculty senate footage) overcomes Gilley’s interest in exercising his constitutional rights.

To the extent that PSU aims to silence Gilley’s speech because it is controversial or offensive to some, these attempts are misplaced. By using copyright as a means of quelling First Amendment-protected expression, PSU simultaneously misuses copyright and violates Gilley’s right to free speech.

IV. PSU Must Rescind Its Demand and Produce Public Records

PSU’s attempt to use copyright law to burden its critics’ speech would be an abusive act if it originated from any government institution, but PSU’s status as a public university makes the

¹⁰ The “critical question” in determining whether speech is that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Lane v. Franks*, 573 U.S. 228, 240 (2014).

abuse all the more shocking. Because Gilley's use of faculty senate footage is clearly a fair use, PSU must immediately rescind its demand that Gilley remove the New Censorship Video from OAS's YouTube account and allow Gilley to repost the uncensored version of the video without reprisal.

Further, as the faculty senate footage is a public record subject to Or. Rev. Stat § 192.314(1), PSU must release the video to FIRE, pursuant to the public records request attached to this letter. We trust that PSU will ensure that this record is produced expeditiously.

We request receipt of a response to this letter no later than the close of business on Friday, April 16, 2021.

Sincerely,



Lindsay Rank
Program Officer, Individual Rights Defense Program

Cc: Cindy J. Starke, PSU General Counsel & Secretary to the Board of Trustees

Encl.

Authorization and Waiver for Release of Personal Information

I, Bruce Gilley, do hereby authorize Portland State University (the “Institution”) to release to the Foundation for Individual Rights in Education (“FIRE”) any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my “personnel records” under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

Bruce Gilley

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Signature

4/1/2021

Date



Office of the General Counsel

PO Box 751
Portland, OR 97207-0751
503-725-8050 office tel
503-725-2657 fax

Request for Public Records

Date April 5, 2021

Name Lindsie Rank Mr. Ms. Other _____
Organization Foundation for Individual Rights In Education (if requesting on behalf of a company)
Address 510 Walnut Street, Suite 1250
Philadelphia, PA 19106

Phone 215-717-3473

Preferred method of delivery:

Email lindsie.rank@thefire.org *(please print clearly)*

Fax _____

Regular mail _____

Personal inspection _____

Require disability accommodation as follows: _____

Is this request related to a civil or judicial matter to which PSU is/may be a party?

Yes No

Description of Records Requested: *(Please be as specific as possible. Include names, timeframes, places, events, subjects, file designations or descriptions.)*

(1) A copy of the complete video recording of the Portland State University Faculty Meeting that occurred on March 1, 2021.

(2) A copy of any notice, demand, or other communication sent by Portland State University asserting any copyright interest in the video mentioned in Request No. 1.

(3) A copy of any correspondence or response received in response to a communication mentioned in Request No. 2.

Fee Waiver Request: Yes No If yes, please explain reason: This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties in higher education. This request concerns a matter of public interest, namely, the state of free expression for faculty at a public university.

The records are not sought for a personal or commercial interest.