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October 14, 2020

**Via Email**

Alex H. Moss  
Staff Attorney  
Electronic Frontier Foundation  
815 Eddy Street  
San Francisco, CA 94109  
alex@eff.org

Re: Response to Letter re. Lindsay Ellis' video "Into the Omegaverse: How a Fanfic Trope Landed in Federal Court" (the "Video")

Dear Alex:

As your organization, the Electronic Frontier Foundation ("EFF"), is a close partner with the Organization for Transformative Works ("OTW"), and was clearly working with Lindsay Ellis on the Video, the EFF is aware that for over two years, my client, Addison Cain ("Ms. Cain") has been involved in two lawsuits in which the plaintiff (Quill Ink Books, Limited) was supported by the OTW, via cofounder and self-professed *fanfiction expert* Prof. Busse—who lacks any background in infringement analysis, yet sought to supply Court-rejected expert testimony.

The OTW has been at least tangentially involved in the litigation brought about due to DMCA's filed by Ms. Cain's former publisher against another author, Zoey Ellis (who previously also published as author [REDACTED] Zoey Ellis, using her proxy company, along with her corporate counsel (a former ARC reader of Ms. Cain's books, who is currently under investigation by the Chief Disciplinary Counsel in Texas [Case No: 202004421] for modifying evidence in regards to the Oklahoma case and lying in response to subpoena in Virginia), filed two separate lawsuits against my client. Then, in spite of my client's complete silence about the DMCA's (In contrary to your client's claims in the Video stating that a draft public statement turned over in discovery had been posted, when it had not), Zoey Ellis made the DMCA's public on her social media pages and via a website she created to dox my client and spread a false narrative. The Virginia Court censured Zoey Ellis and her counsel, who appeared on the website, for this behavior. Indeed, every last claim made by Zoey Ellis lacked any supporting evidence, despite the Court's orders that Quill produce it. For example, Quill was ordered by the courts to provide legitimate proof of damages due to the DMCA's in both Oklahoma (where Quill settled to avoid court order and conceal the lack of damages) and Virginia (where *Quill had no damages*

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*to report*). Regardless of what really happened during the two lawsuits, it is clear that you and your client were intent on spreading false allegations and outright lies about my client and the litigation in the monetized Video, which the EFF received a portion of the proceeds to help produce.

Zoey Ellis and her attorneys utilized numerous methods to obtain their objective to smear Ms. Cain's name, but one common denominator has been their utilization of the OTW, of which the EFF is a close partner. First, Zoey Ellis hired Professor Busse (the co-founder, editor, and a former board member of OTW) to write an "expert opinion" about how there was no infringement using her unrelated background in fanfiction to support her faulty opinion. However, Quill's counsel later failed to timely identify Ms. Busse as an expert in the Virginia case, and the Court held she could not be used as an expert at all.

Second, Zoey Ellis and her attorneys mislead a reporter for the New York Times, who has historically cited the OTW and interviewed Busse for many articles, in order to, despite the Virginia Court's warning to stop litigating via the media, spread their false narrative about the case. And, now, your organization, using your client, has clearly decided to continue where Zoey Ellis and her attorneys left off by posting a Video containing infringing and defamatory content, and in which Lindsay Ellis credits the EFF and claims a portion of the proceeds will be donated ("a portion of the profits of this video are going to be donated to the EFF." the Video at 62:49).

Though you failed to directly address our allegations of defamation in your letter, it is our opinion that defamation exists, and because the EFF worked in collusion with Lindsay Ellis to create the monetized Video, the EFF is also culpable for the copyright infringement and the defamation. Of note, Lindsay Ellis clearly states, "*thanks especially to Stacy Lantane of the University of Mississippi School of Law and Katharine Trendacosta with the Electronic Frontier Foundation.*" (Video at 62:40).

Lindsay Ellis goes on to further claim, "*The EFF is the leading non-profit defending digital privacy....*" However, the relationship between the EFF and the OTW in this instance makes this statement shaky at best. The OTW previously partnered with Zoey Ellis and her agents, who went to great lengths to expose my client's real name, home address, and photos of her child in relation to her real name and home address, which is the opposite of "digital privacy." As the EFF colluded with Lindsay Ellis to infringe my client's copyrighted works, supported her in creating new work product used in the Video, and monetized spreading false information and defamation for financial gain, the EFF is equally responsible for not only the defamation but for misleading Lindsay Ellis as to the interpretation of legal documents.

The EFF's objective to destabilize copyright law failed when Quill, the plaintiff that its partner, the OTW supported, was repeatedly caught lying to the courts, was twice sanctioned for failing to follow court orders, was continuously reprimanded for bad behavior including litigating via social media and the media, and ultimately abandoned the case to avoid turning over discovery and paying court ordered sanctions. Quill's own local counsel filed a motion to withdraw stating:

“In this instance, the Firm believes that Rule 1.16(b)(3) (imprudent objective), (b)(4) (failure substantially to fulfill responsibility to counsel), and (b)(5) (unreasonably difficult representation) are implicated.”

The Plaintiff and OTW’s objective failed in litigation. However, it is our belief that the OTW, through the EFF and Lindsay Ellis have responded by attempting to continue to undermine the credibility of Ms. Cain, an author who defended her copyright in good faith. The tie between the OTW and the EFF and the history of abuse my client has faced the last two years, makes the use of Lindsay Ellis, a YouTube/Patreon personality with public sway, suspicious in the least, particularly where you assisted in the creation of a monetized Video where both the EFF and Lindsay Ellis could profit off copyright infringement and defamation.

We have reviewed your letter regarding the Video and disagree with your conclusions. As you are clearly aware, the Fair Use Doctrine is highly subjective, and we find your analysis of Ms. Ellis’ use of Ms. Cain’s book erroneous and incomplete. Further, in spite of your assertions, the Video includes clear defamatory commentary about Ms. Cain and our reporting of the same as a violation of Patreon and YouTube’s terms of service was entirely appropriate. We address both defamation and fair use below.

#### **I. Defamation.**

Regardless of whether Ms. Cain is a public figure, we believe that your client’s Video includes several instances that are not mere opinion, but are defamatory per se.

First, Lindsay Ellis states as fact that my client committed perjury in the Oklahoma case. A motion to show cause regarding allegations of perjury was filed by Quill (Zoey’s proxy company) on a Friday, and on the following Monday, Quill and Blushing notified the Oklahoma court that they had settled and presented a consent judgment for the Court to sign. Quill settled to avoid trial, to avoid producing evidence of damages (which had been ordered by the Court) and other evidence ordered by the Court to be produced, and to reduce their expenses, as they had separately sued Ms. Cain in Virginia. Blushing Books, no longer representing my client as publisher due to legal action my client took behind the scenes to have her rights returned, had no reason to continue to defend their case.

The perjury filing was a last minute potshot by Quill to smear my client’s name and a sorry attempt to encourage my client to answer the motion. Had my client answered, she would have opened herself to Oklahoma jurisdiction, which we believe was Quill’s ultimate goal. However, the Court brushed the filing off his desk. The case was closed. Nevertheless, it is clear from looking at the documents submitted, that my client did not commit perjury. My client never directed DMCA’s into the state of Oklahoma. No vendors who received DMCA’s are located in that state. The third party upload service, Draft2Digital, *which is located in Oklahoma*, never received a DMCA. They were forwarded DMCA’s from Barnes & Noble. This is where both

Quill's claim of perjury and the EFF and Lindsay Ellis' continuing defamation on the topic, are crippled. That claim cannot stand up to fact.

Despite a subpoena to Draft2Digital, Quill could find no correspondence directed to either my client or Blushing Books. As your client is unaware of legal procedure, she must also not understand that simply because a motion/complaint was filed in court does not mean the statement is true. However, there is no excuse for your lack of due diligence on this topic. Litigation exists to separate fact from fiction. And fact is not on your side. Accusing someone of committing a crime **is** defamation, and your client's statements were clearly made with at least reckless disregard of the truth. *See e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990).

Other examples of defamation in the Video include the following:

1. Lindsay Ellis' regurgitated claim that Ms. Cain had claimed to own a genre (or at least M/F Omegaverse). This claim arose solely because Zoey Ellis was attempting to deflect from her plagiarism by trumpeting this lie. No evidence has *ever* been provided to support that statement. Quite a bit of evidence to the contrary has. Ms. Cain, a former fanfiction author, has throughout her career attributed Omegaverse to <sup>text</sup>fanfiction and supports numerous authors who write Omegaverse. Yet, you and your client decided to spread the false narrative in collaboration with the EFF despite the total inability of Quill to provide any such statement in a further attempt to undermine my client's victory in Court.

2. The Video treats as true Quill's claim that vendors refused to work with it due to the label plagiarist. However, the Virginia Court documents clearly show this is false. When compelled to turn over proof, Quill could provide no evidence and retracted the statement.

3. The Video again states that Ms. Cain attempted to blackmail Zoey Ellis. However, Zoey Ellis [REDACTED] and Quill were unable to produce a single piece of evidence supporting that claim.

None of these statements are true and in fact are provably false and made with at least reckless disregard of the truth. In fact, your client went further, claiming my client had harassed several published authors via Twitter. Yet, she never provided names or evidence—only general, salacious statements one could assume were shared to drive traffic to her Video and line her pockets and potentially increase the donation to the EFF.

## II. Fair Use

First, while the Video overall did include commentary on the underlying lawsuits involving my client, it was not necessary for Ms. Ellis to read entire portions of my client's book for over two minutes at the beginning of the Video. This portion of the Video does not include any commentary, comparison, or historical analysis. Instead, it is a clear derivative of large portions of my client's book and not transformative or historical in the slightest.

Second, it is our opinion that the Video includes much more of Ms. Cain's book than necessary. Ms. Ellis could have easily condensed use of Ms. Cain's book into a few paragraphs for illustration instead of reading from the book for over two minutes. Again, this use in the Video does not tie in with the remainder of Ms. Ellis' commentary. We disagree that the amount used is protectable. Ms. Ellis clearly creates her videos and publishes them on YouTube and Patreon for profit, and the EFF profited as well in this case, a factor that strongly cuts against your fair use argument.

As for harm, you are again mistaken. The Video and the use of Ms. Cain's content have caused Ms. Cain harm. Since the Video was posted, Ms. Cain has received numerous ugly comments through social media and other venues, the ratings on her books have dropped (as a direct result of the Video - *See Exhibit 1* showing evidence of a twitter user who states he gave 1 star reviews to my client's books), and the sales of Ms. Cain's books have taken a direct hit. And, neither Patreon nor YouTube made a finding whether the Video was fair use or not. They merely requested that we file a lawsuit before they would take further action.

### **III. Lindsay Ellis's claims that the counts were not dismissed with prejudice**

As counsel for Lindsay Ellis, we suggest that you explain the Court documents to your client so that she may no longer claim ignorance as to how the final count against my client was dismissed. On July 1<sup>st</sup>, 2020 Judge Liam O'Grady in the Eastern District of Virginia signed an order granting our motion to dismiss for lack of prosecution (Doc #86). As your client may not have read this order, or may have been misled about how a court order works when referencing a motion. In fact, the Court's order on the motion (Doc. #95), clearly references the motion (Docs. #86 and #87), in which we requested a *with prejudice* dismissal. These documents are attached as **Exhibit 2** for your reference. These documents are clear and your client's ignorance and spreading of false information is untenable.

### **IV. Ongoing harassment**

Despite my client's current public silence regarding Lindsay Ellis, her ongoing accusations, the defaming Video, and verbal attacks of her child, your client has gone to great lengths to continue to spread baseless accusations and misinformation—the latest as recently as October 11th. *See Exhibit 3*. Lindsay Ellis' fans have gone to great lengths as well to attempt to spam Ms. Cain's social media with the defamatory Video and inappropriate comments. Ms. Cain has diligently removed all posts/comments, despite ongoing trolling from Ms. Ellis' fan base. *See Exhibit 4*.

Furthermore, in spite of your client's claims to the contrary, a simple search of Amazon shows that your client has received only two 1-star reviews since the Video went live on September 3rd. *See Exhibit 5*. Neither review mentions the Video, the lawsuit, Addison Cain, or YouTube. Her accusations that Ms. Cain is whipping up her fans to attack her rankings is unfounded, preposterous, and defamatory—as are all of Lindsey Ellis' claims.

**V. In conclusion**

Professor Busse, the OTW, and Quill and its agents were unable to affectively disrupt authors' copyright protection via *Quill vs. Soto*, a case where the plaintiff clearly lost. Regardless of this failure, it is clear that the EFF, through Lindsay Ellis, is now attempting to drag the battles' corpse over the finish line by making a defamatory Video and misleading the public about your agenda—using a legally ignorant layman to do your dirty work in exchange for donations.

Because your client's Video is not clearly fair use with respect to its use of Ms. Cain's works, and because it contains several instances of defamation, we again request that your client remove or modify the video accordingly. We request a public apology from both the EFF and Lindsay Ellis for knowingly spreading false information for profit. You and your client should note that because this is an ongoing dispute, all correspondence relating to this matter is discoverable, and we demand that you avoid modifying or destroying evidence that relates to this matter.

Lastly, if we believe that Lindsay Ellis or other parties have infringed my client's work, we will continue to file good faith DMCA's on that basis. We also reserve the right to respond to YouTube and Patreon, regarding whether the Video violates their TOS. We demand that Lindsay Ellis cease using social media, or any platform, to harass my client, to continue to make false accusations, and to further instigate her fan base to attack my client. And finally, we request that Lindsay Ellis and the EFF donate all proceeds made from the defaming video to the anti-bully charity, <https://www.kindcampaign.com/>.

Our client asserts other rights, claims and defenses with respect to this matter. Thus, reference to specific rights, claims and defenses of our client set forth above is not a waiver of any other rights, claims and defenses available to our client under the facts and applicable law; all such rights, claims and defenses being specifically reserved by our client. If you have any questions, please do not hesitate to write or call.

Sincerely,

s/Tynia W. Watson

Tynia A. Watson  
For the Firm

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