



March 25, 2021

Lisa J. Hammer

[Email Redacted]

Re: Legal Threat to OpenBeta.io

Dear Ms. Hammer,

The Electronic Frontier Foundation represents Viet Nguyen, the creator of OpenBeta, a not-for-profit initiative to promote open source software in the rock climbing community. I write in response to your February 23 letter alleging that my client has infringed copyrighted works held by Adventure Projects. Your claims are meritless and should be withdrawn immediately. First, any rights in the data files contained in OpenBeta, to the extent they are copyrightable at all, are held by the users who created them, not Adventure Projects. Second, OpenBeta is a lawful fair use.

Mr. Nguyen created Open Beta as a resource for coders who want to serve the climbing community. The project provides tutorials, coding examples, raw data, and free API access as building blocks that others can develop further. The data files do not contain Adventure Projects “Company Content,” or indeed any material authored by Adventure Projects or onX. Rather, they simply contain information about climbing routes, such as names, descriptions, and GPS coordinates, that is largely or purely factual. As you know, facts are not copyrightable. To the extent that there is some expressive content, such as in some of the route descriptions, that expression was authored by the users who contributed it. Your Terms of Use does not create an assignment of rights in that expression—indeed such a requirement would likely alienate many of your users—and thus it is not “Company Content.” Your claim that your client “owns all rights and interests” in that user-generated work is simply false.

Moreover, Mr. Nguyen’s project is a clear fair use.

First, it is transformative and noncommercial. See *Sony v. Universal Studios*, 464 US 417, 451 (1984) (noncommercial purpose weighs in favor of fair use); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (transformative uses are likely to be fair uses). The original purpose of the material was to contribute to the general knowledge of the climbing community. The OpenBeta data files do something more: Mr. Nguyen uses it to help others to learn about Machine Learning, making climbing maps, and otherwise using software to generate new insights about rock climbing. Thus, his use “adds something new, with a further purpose or different character.” *Campbell*, 510 U.S. at 579. Mr. Nguyen makes the information available free of charge and does not even use advertising to help pay the bills.

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Second, as noted, the works in question are largely factual. Facts are not protected by copyright, and the protection of factual works is famously “thin.” *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 349 (1991).

Third, Mr. Nguyen has used only what is necessary to achieve his purpose. The amount of an original work used must be evaluated in light of the purpose of the use. *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811, 821 (9th Cir 2003). Mr. Nguyen seeks to promote the use of software-based data analysis to aid the rock-climbing community. The user-generated content used in OpenBeta is necessary for precisely that. Mr. Nguyen has expressly excluded superfluous information, such as photographs and user comments, that are not necessary to his purpose.

Finally, Mr. Nguyen’s use cannot cause any market harm to Adventure Projects. Again, the data files do not contain any of your client’s copyrighted material. Even if they did, this purely noncommercial project does not substitute for the material and context available on the MountainProject website, such as route finders, images, community discussion of climbs and so on.

Accordingly, Mr. Nguyen will not comply with your demand and requests that you withdraw it immediately, as well as your improper DMCA notice to Github. If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Corynne', with a long horizontal line extending to the right.

Corynne McSherry
Legal Director