

PUBLIC CITIZEN LITIGATION GROUP

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March 28, 2012

Don Garber, Commissioner
Major League Soccer
Seventh Floor
420 Fifth Avenue
New York, New York 10018

Re: MLS' copyright claim against video "Colin Clarke lashes out at ball boy"
http://www.youtube.com/watch?feature=player_embedded&v=gQ3taEpptgg

Dear Mr. Garber:

I write on behalf of Joshua Vega, an ardent Major League Soccer supporter who has a serious grievance against MLS. Recently, Mr. Vega posted to YouTube a very short clip from a telecast of a game between the Seattle Sounders and the Houston Dynamo, which showed misconduct by MLS player Colin Clark. While playing the game, Mr. Clark approached the sideline to take a throw-in, and used a homophobic slur to berate the ball boy who, apparently, did not deliver the ball to Mr. Clark as Mr. Clark believed he should do. Specifically, the video clip shows that the ball boy let the ball fall to the ground, and Mr. Clark called him a "faggot."

The incident received widespread attention among fans, and Mr. Clark eventually apologized for his terminology. However, fans continued to debate the incident, addressing such questions as (1) how the incident compares to widely publicized racist name-calling in European soccer games; (2) what action the league should take against Clark; (3) whether regardless of the terminology Mr. Clark was justified in being angry at the ball boy; (4) whether the ball boy's actions reflected a lack of proper training or even an attempt to slow down the game (Mr. Clark's team was playing away from home, and was losing); and (5) whether home teams should be required to provide training for ball boys. All of these questions could best be discussed by those who had actually seen the clip so they could judge both the actions of the ball boy and Mr. Clark's reaction.

However, inspection of the URL where Mr. Vega posted the clip reveals that it was taken down at some point between Monday morning (when I first saw it) and Tuesday afternoon, "due to a copyright claim by mls." That copyright claim is absolutely baseless. We assume that MLS owns the copyright in the telecast from which the clip was taken, but Mr. Vega's posting was unquestionably protected by fair use. His posting was entirely non-commercial, and was made for the transformative purpose of showing misconduct by league personnel, and implicitly by the league if it doesn't do enough in response. Second, it is doubtful that there is a market for this clip, or,

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indeed, that MLS would be selling excerpts from telecasts that show misconduct by its players (or, by the apparent view of some fans, by the ball boy); hence posting the clip could not have interfered with the market for copies of the telecast. Third, Mr. Vega posted only a 20-second clip from a two hour telecast, and he included just enough to let viewers form their own judgments about what happened. And the telecast is simply a factual depiction of what transpired during the match; Mr. Vega made no effort to take advantage of any creative efforts by the film crew. All or virtually all of the fair use factors favor Mr. Vega.

Moreover, it is sadly apparent that the purpose of the takedown was to suppress public criticism of the league and its player. To be sure, MLS may have decided that, once its player apologized for his slur, he had been punished enough. But it is not up to the league to prevent its fans from continuing a legitimate discussion about issues of public concern by suppressing access to the raw data that they need to continue their discussion. Or, at the very least, it appears that MLS issued its DMCA takedown without any consideration of fair use.

Wholly apart from the merits of his claim, MLS proceeded with its takedown in an offensive manner. Mr. Vega is an ardent supporter of the Seattle Sounders and attends several games each year even though he lives much too far away to be a season ticket holder. He subscribes to the MLS television package to make sure that he never has to miss a game, and belongs to a team supporters group. He is just the sort of person to whom the league should be appealing. And yet the league issued a takedown notice without the slightest effort to contact him, even though it could easily have reached out to him through his YouTube account to explain its concerns and ask him to remove the material.

This posting was so obviously fair use that it is apparent that whatever staff or outside contractors you have assigned to effectuate DMCA takedowns have either been instructed to ignore fair use, or at least have not been instructed to consider fair use. And yet the law is clear that the league is obligated to consider fair use before executing a DMCA takedown. *Ouellette v. Viacom Intern.*, 2012 WL 850921 (D. Mont. March 13, 2012), at *3; *Shropshire v. Canning*, 809 F. Supp.2d 1139, 1148 n.3 (N.D. Cal. 2011); *Lenz v. Universal Music Corp.*, 572 F. Supp.2d 1150, 1154 (N.D. Cal. 2008); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp.2d 1195, 1204-1205 (N.D. Cal. 2004). Consequently, Mr. Vega has the option of suing MLS for wrongful takedown under 17 U.S.C. § 512(f); in the alternative, he could just sue MLS for a declaratory judgment of non-infringement. He could also bring a class action to force MLS to adopt procedures to ensure that short video clips are not taken down without considering fair use.

But Mr. Vega supports MLS and does not want to put it to such expense. (On a personal note, I have been a season ticket holder since the league began in 1996 and do not want MLS to have to spend more money on lawyers instead of on developing the league and paying the players). Instead, he wants MLS to correct its behavior and make sure that it does not issue such inappropriate takedowns in the future. For that reason, we ask MLS to do the following:

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1. Explain how it made the decision to issue a DMCA takedown notice to YouTube.
2. Promptly inform YouTube that it is withdrawing its takedown notice.
3. Express regret to Mr. Vega for the takedown notice.
4. Put procedures into place to ensure that fair use receives full consideration before any takedown notice is issued.
5. Disclose publicly both what procedures have been adopted, and what standards MLS is providing to its representatives to ensure that they give proper consideration to fair use before issuing takedown notices in the future.

I hope that the league will take these ameliorative steps and thus avoid the need to ask a federal judge to address its copyright claim and, indeed, its lack of basis for issuing the takedown notice.

Sincerely yours,


Paul Alan Levy

cc: Mr. Dan Courtemanche
William Z. Ordower, Esquire