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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., Plaintiff, vs. CENTER FOR BIO-ETHICAL REFORM, *et al*., Defendants.	Case No.: 8:11-cv-00731-JVS-AN **DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: June 4, 2012 Time: 1:30 pm Courtroom: 10C Hon. James V. Selna

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On May 24, 2012, the court invited the parties to address the question of whether this case is suitable for summary judgment. (Doc. No. 83). Defendants answer that this case is ripe for judgment in their favor on the fair use question as a matter of law. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (holding that where the *material facts* are not subject to dispute summary judgment on the fair use question is appropriate). Indeed, Defendants contend that in light of the videos themselves, Plaintiff's fatal admission that Defendants' videos are transformative, and *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003), which is controlling precedent, it is not even a close call: Defendants' use of Plaintiff's video was fair use. *See* 17 U.S.C. § 107.

ARGUMENT

I. THERE IS NO REASONABLE DISPUTE THAT DEFENDANTS' VIDEOS ARE TRANSFORMATIVE, CRITICAL PARODIES.

When this court analyzes the first factor of the fair use defense—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"—it considers whether each video at issue "merely supersedes" the Northland Video, "or whether and to what extent the new work is 'transformative,' i.e., altering [the Northland Video] with new expression, meaning or message." *Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

Here, there is no fact dispute that Defendants' videos specifically *target* the Northland Video, *hold it up to ridicule*, and *transform its essential meaning and message*. That is, Defendants videos are critical parodies as a matter of fact and law. *Id.* at 1400-01. As both the videos and Plaintiff's testimony make plain, Defendants' videos criticize and ridicule both the substance and style of the

Northland Video. And there can be little doubt that Defendants' parody is a form of social criticism that "has socially significant value as free speech under the First Amendment." *Id*.

The fact that Plaintiff may *claim* that Defendants' videos are not transformative does not make it so, nor does it create a material fact dispute. Indeed, this court need only view the videos themselves to see that they are transformative in every sense of that word. And if that alone were not enough, the court need look no further than the deposition testimony of Renee Chelian, who was testifying on behalf of Plaintiff pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. During this testimony, Plaintiff admitted that the purpose of its video was to "de-stigmatize" abortion, while Defendants' videos plainly "stigmatize" abortion and seek to "shame and anger and disgust anyone who's watching [them]." (SMF at ¶ 42). As Plaintiff admits, Defendants' videos "changed," "ruined," and "distort[ed]" "every bit" of the intent, meaning, and message of the Northland Video. (SMF at ¶ 41).

Indeed, "the more transformative the new work, the less will be the significance of <u>*other*</u> factors, like commercialism, that may weigh against a finding of fair use." *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 577 (1994) (emphasis added); *see also Mattel, Inc.*, 353 F.3d at 803 (same). Given the extremely transformative nature and parodic quality of Defendants' videos, the question of its commercial qualities becomes less important. Nonetheless, the undisputed facts show that each of the videos in question was created, posted, and used exclusively for nonprofit, non-commercial, educational, and parodic purposes. There was no consideration or anything of any value received for any allegedly infringing video. And none of the videos was ever sold, licensed, or

published commercially. (SMF at ¶¶ 37, 38, 45, 46). Plaintiff's effort to shoehorn this case into the facts and holdings of *Worldwide Church of God v. Phil. Church of God*, 227 F.3d 1110, 1117-19 (9th Cir. 2000) and *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010), is unavailing in that neither case involved a transformative work, and Defendants' videos in this case were not directly used for publicity, profit, fundraising, or any other gain that is relevant to this inquiry. Indeed, this case is factually similar to *Righthaven, LLC v. Jama*, 2:10-CV-1322 JCM (LRL), 2011 U.S. Dist. LEXIS 43952, at *7-*8 (D. Nev. Apr. 22, 2011), in which the court found that the nonprofit "defendants' solicitation of donations on their website is immaterial, and no reasonable jury could conclude that the defendants used the disputed article for a commercial purpose."

II. WHETHER PLAINTIFF'S VIDEO IS "CREATIVE" WEIGHS LITTLE IN THE OVERALL FAIR USE BALANCE.

The Ninth Circuit has recognized that "the nature of the copyrighted work" factor "has not been terribly significant in the overall fair use balancing." *Mattel, Inc.*, 353 F.3d at 803 (internal quotations omitted). Consequently, even if there is a factual dispute as to whether Plaintiff's video is a "creative" work, or, as Defendants contend, an "informational or functional" work, *see Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr. Seuss Enters., L.P.,* 109 F.3d at 1402), this dispute does not prevent this court from weighing the fair use balance in Defendants' favor as a matter of law.

III. THE AMOUNT AND SUBSTANTIALITY USED WERE APPROPRIATE AS A MATTER OF FACT AND LAW.

The third factor "asks 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 copying." *Mattel, Inc*., 353 F.3d at 803 (quoting *Dr. Seuss Enters., L.P.*, 109 F.3d at 1402) (emphasis added). Contrary to Plaintiff's claim, the courts "do not require parodic works to take the absolute minimum amount of the copyrighted work possible. . . . '[O]nce enough has been taken to assure identification, how much more is reasonable will depend . . . on the extent to which the [work's] overriding purpose and character is to parody the original, or, in contrast, the likelihood that the parody may serve as a market substitute for the original.'" *Mattel, Inc*., 353 F.3d at 803 (quoting *Campbell*, 510 U.S. at 587).

Here, there is no fact dispute that the overriding purpose of Defendants' videos was to parody Plaintiff's video. Defendants added words and music and juxtaposed graphic images of abortion against the "goodness" narrative of Plaintiff's video. Approximately half of Defendants' videos are comprised of content taken from the Northland Video. This percentage, however, is the content quantum minimally required to meaningfully criticize, parody, and rebut Northland's most misleading claims (*i.e*., its "dramatic focal points"). Specifically, the quite obvious use of each segment of the Northland Video—*as evidenced by Defendants' videos themselves*—was to directly counter the "goodness" messaging in that segment with the harsh and revolting reality that is abortion. And there is *no likelihood* that Defendants' videos will serve as a market substitute for Plaintiff's video. Therefore, this factor favors Defendants as a matter of law.

IV. NO MARKET HARM AS A MATTER OF FACT AND LAW.

As the *undisputed factual* record shows, Plaintiff has never sold the Northland Video, nor has it ever licensed the video. Plaintiff has no draft licensing agreements, contracts, or any other writings whatsoever evidencing any

intent to sell or license the Northland Video. Plaintiff never had any substantive discussions about selling or licensing the Northland Video, Plaintiff continues to use the video as a counseling and educational tool, and Plaintiff continues to make the video available to the public on the Internet at no charge. (Chelian Dep. at 38:16-17; 39:14-25; 42:3-16; 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (Doc. No. 73-2). Also, Plaintiff's "expert" testified that she knew of not a single instance where a similar video was licensed to another abortion provider or anyone else for that matter. (R.A. Dep. at 110:1-11 at Ex. 2) (Doc. No. 73-3). And there was not a single document evidencing any discussion whatsoever of the use, much less the sale or license, of the Northland Video *by anyone* prior to the appearance of Defendants' videos, much less any kind of an agreement from Plaintiff to any third party. (Chelian Dep. at 38:16-17; 39:14-25; 42:3-16; 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (Doc. No. 73-2). In sum, there is no market harm as a matter of undisputed fact.

And perhaps most important is that given the transformative and critical parodic nature of Defendants' videos, there is *no* cognizable market harm in this case as a matter of law. In short, *harm caused by effective criticism or disparagement is not cognizable injury under the Copyright Act*. *Campbell*, 510 U.S. at 590-92. Therefore, this factor weighs in Defendants' favor as a matter of law.

CONCLUSION

This case is ripe for summary judgment in Defendants' favor on the question of fair use, which is a complete defense to Plaintiff's claim of copyright infringement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2012, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record. Parties not on ECF system and requiring postal service: none.

Respectfully submitted,

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