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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **SOUTHERN DIVISION**

19 NORTHLAND FAMILY PLANNING
20 CLINIC, INC.,

21 Plaintiff,

22 vs.

23 CENTER FOR BIO-ETHICAL
24 REFORM, *et al.*,

25 Defendants.

Case No.: 8:11-cv-00731-JVS-AN

**DEFENDANTS' STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW
PURSUANT TO L.R. 56-1**

Date: June 4, 2012

Time: 1:30 pm

Courtroom:

Hon. James V. Selna

Pursuant to L.R. 56-1, Defendants hereby submit the following "Statement of Uncontroverted Facts and Conclusions of Law."

1 **STATEMENT OF FACTS**

2 1. Plaintiff Northland Family Planning Clinic (hereinafter “Plaintiff” or
3 “Northland”) is a Michigan-based clinic that provides abortion services. (First
4 Am. Compl. at ¶ 5 [Doc. No. 27]).

5 2. In 2009, Plaintiff produced a video entitled, “Everyday Good
6 Women Choose Abortion” (hereinafter “Northland Video”). (R.C. Dep. at 99-
7 100 at Ex. A; R.C. Dep. Exs. 8 & 9; R.C. Dep. at 101-02 [under seal]).¹

8 3. The Northland Video is publicly available on YouTube, and it is
9 currently posted on Northland’s website. (R.C. Dep. at 60 at Ex. A).

10 4. To this day, Plaintiff refers its patients to view the Northland Video
11 on the Internet, and Plaintiff shows the Northland Video to its patients when they
12 come in for counseling. (R.C. Dep. at 60 at Ex. A).

13 5. Plaintiff does not use, post, or show to its patients any of the
14 allegedly “infringing videos” produced by Defendants. (R.C. Dep. at 79 at Ex.
15 A).

16 6. Plaintiff never sold the Northland Video to anyone. (R.C. Dep. at 38
17 [under seal]).

18 7. The purpose of the Northland Video was to “de-stigmatize” abortion.
19 (R.C. Dep. at 78-79 at Ex. A; R.C. Dep. at 36-37 [under seal]).

21 ¹ R.C. Deposition Exhibits 8 and 9 are DVDs containing the Northland Video.
22 Therefore, these exhibits will be manually filed in this case. Additionally,
23 significant portions of the R.C. Deposition were designated as confidential by
24 Plaintiff’s counsel. Consequently, the deposition transcript will be filed under
25 seal pursuant to the court order entered on December 6, 2011 (Doc. No. 30). The
redacted / non-confidential portions of the deposition transcript have been filed
via ECF and are marked as Exhibit A.

1 8. Northland’s Video did not serve any commercial purpose. (R.C.
2 Dep. at 37 [under seal]).

3 9. The purpose of the Northland Video—to “de-stigmatize” abortion—
4 is also the reason why it is posted on Plaintiff’s website for the public to view.
5 (R.C. Dep. at 79 at Ex. A).

6 10. The Northland Video conveys the message that abortion is normal
7 and good in an effort to “de-stigmatize” abortion. (R.C. Dep. at 78-79 at Ex. A;
8 R.C. Dep. Exs. 8 & 9; R.C. Dep. at 36-37 [under seal]).

9 11. The Northland Video conveys its message not only through the
10 words of its narrator, but through the narrator’s attire, demeanor, and syntax as
11 well as her setting, which includes the flowers on her desk, the soft background
12 music, and the framed art on the surrounding walls. (R.C. Dep. Exs. 8 & 9;
13 Cunningham Decl. at ¶ 13 at Ex. B).

14 12. Defendant Eric Holmberg is the president and founder of Reel to
15 Real Ministries (d/b/a The Apologetics Group) (hereinafter referred to as “TAG”)
16 (Holmberg Dep. at 17, 18-19 at Ex. C).

17 13. In early January 2011, Defendant Eric Holmberg “stumble[d]
18 across” the Northland Video on the Internet while he was working on another
19 project; he came across “the phrase good woman abortion,” clicked on the link,
20 and was taken to the Northland Video. (Holmberg Dep. at 38-39 at Ex. C).

21 14. The same day that he first came across the Northland Video,
22 Defendant Holmberg made the decision to point out what he considered to be the
23 fallacies of the video by creating his own video. (Holmberg Dep. at 40-41 at Ex.
24 C).

1 15. Defendant Holmberg spent about an hour, maybe two, capturing
2 Northland’s video, editing it down to the segments that were most pertinent to the
3 “goodness” narrative that Defendant Holmberg, on behalf of TAG, wanted to
4 parody, and then edited in some stock abortion footage he had received from
5 CBR and some explanatory words at the end (“Northland Family Planning
6 Center, 1-800-447-7354” over a picture of the body parts of an in-utero baby
7 aborted at 10-12 weeks, with “Your Dead baby at 10 to 12 weeks”—based upon
8 his understanding that this age range is when the majority of abortions take
9 place). Defendant Holmberg then compressed the video to a 3 MPS WMV file
10 and uploaded it as a private video on his main YouTube channel. (TAG
11 Amended Answers to Interrogs at 4-5 at Ex. D). This video, referred to here as
12 the TAG Video, is marked as Holmberg Deposition Exhibit 39.² (Holmberg Dep.
13 at 37 at Ex. C).

14 16. Consequently, no one could view the TAG Video unless Defendant
15 Holmberg sent them the URL, which he did send to Defendant Cunningham. As
16 a result, the TAG Video was never seen by the public. The video remained
17 private until YouTube took it down, which was almost immediately. (TAG
18 Amended Answers to Interrogs at 4-5 at Ex. D; *see also* Holmberg Dep. at 41-42
19 at Ex. C).

20 17. Defendant Holmberg sent the URL to Defendant Cunningham and
21 CBR because to his “understanding,” CBR and Defendant Cunningham “are
22 primarily focused on educating people as to the reality of abortion” and so he
23

24 ² Holmberg Deposition Exhibit 39 is a DVD containing the TAG Video.
25 Therefore, it will be manually filed in this case.

1 thought the video “was more suited for [their] particular area of focus.”
2 (Holmberg Dep. at 59 at Ex. C).

3 18. Defendant Holmberg and TAG created and produced the TAG Video
4 for “[e]ducational” purposes so as to educate people about “[t]he factual
5 inaccuracies in the Northland video.” It was created and produced for non-
6 commercial, nonprofit, educational, and parodic purposes only. (Holmberg Dep.
7 at 56-57, 76-78 at Ex. C; Holmberg Dep. Ex. 39).

8 19. Defendant Holmberg summarized the process by which he created
9 the TAG Video as follows: “I stumbled across the Northland video, watched it,
10 was flabbergasted by it, by both the inaccuracies, the factual inaccuracies,
11 concerning the goodness of abortion and the way it characterized both the
12 procedure and the women who choose to abort their children, decided to produce
13 a response for the express purpose of pointing out the inaccuracies, an educational
14 response, realized that I had no way to distribute it because of the nature of
15 YouTube and prohibitive materials, did not have access to any alternative means
16 to distribute it, so sent the idea to [Defendant Cunningham] thinking that he may
17 have some alternative method of distributing it, and that was the extent of it.”
18 (Holmberg Dep. at 76-77; *see also* 78 at Ex. C; Holmberg Dep. Ex. 39).

19 20. About a month or two later, Defendant Holmberg learned of the
20 video (“The Most Shocking (Graphic Imagery), Four-Minute Abortion Debate
21 You Will Ever See”) that was posted on AbortionNo.org and the Pro-LifeTube
22 channel. (TAG Amended Answers to Interrogs at 4-5 at Ex. D).

23 21. AbortionNo.org and the Pro-LifeTube channel websites are focused
24 entirely on an anti-abortion, pro-life message and publish only anti-abortion, pro-
25 life content. (Cunningham Decl. at ¶ 9 at Ex. B).

1 22. This video, the CBR Video, was produced by Defendant
2 Cunningham and CBR based on CBR's own edits, music, and images. Neither
3 TAG nor Defendant Holmberg had anything to do with the actual creation,
4 production, posting, or distribution of any CBR Video. (TAG Amended Answers
5 to Interrogats at 4-5 at Ex. D; *see also* Holmberg Dep. at 68-70 at Ex. C).

6 23. Like the TAG Video, the CBR Video was created and produced for
7 non-commercial, nonprofit, educational, and parodic purposes only.
8 (Cunningham Decl. at ¶ 10 at Ex. B; *see also* Holmberg Dep. at 76-78 at Ex. C;
9 Holmberg Dep. Ex. 39).

10 24. Other than briefly producing the TAG Video as a concept that was
11 never shared with the general public, neither TAG nor Defendant Holmberg had
12 any other involvement with the CBR Video or the Northland Video. (Holmberg
13 Dep. at 68-70 at Ex. C).

14 25. In his capacity as Executive Director of CBR, Defendant
15 Cunningham was the person responsible for creating, producing, and publishing
16 CBR's "Angel of Light" video (as well as the pre-release version), which is the
17 video that Plaintiff is claiming violates its copyright in this case (referred to as the
18 CBR Video). The CBR Video in its pre-release and then final form was
19 previously marked as Exhibits 5 and 6 to the Bullis Deposition.³ (Cunningham
20 Decl. at ¶ 3 at Ex. B; Bullis Dep. Exs. 5 & 6).

21 26. Neither Defendant Don Cooper nor Defendant Seth Gruber, an
22 intern, had any authority to create, produce, or publish the CBR Video. At all
23

24 ³ Bullis Deposition Exhibits 5 and 6 are DVDs containing the CBR Video.
25 Therefore, these exhibits will be manually filed in this case.

1 times, Defendants Cooper and Gruber were working under Defendant
2 Cunningham's direction and control as the Executive Director of CBR.
3 (Cunningham Decl. at ¶ 4 at Ex. B).

4 27. Defendant Todd Bullis had no role whatsoever in the creation or
5 production of the CBR Video. (Cunningham Decl. at ¶ 5 at Ex. B).

6 28. Upon Defendant Cunningham's urging and insistence that the CBR
7 Video did not infringe any copyright because it was "fair use," Defendant Bullis
8 permitted the video to be posted on Pro-LifeTube, which he owned and operated
9 at the time. (Cunningham Decl. at ¶ 5 at Ex. B).

10 29. At that time, Defendant Bullis and Defendant Cunningham were
11 discussing whether Defendant Bullis would consider selling the Pro-LifeTube
12 website to CBR. They were finalizing their discussions when they both received
13 letters on or about March 21, 2011 from Plaintiff's counsel demanding that they
14 take down the CBR Video from the website. (Cunningham Decl. at ¶ 5 at Ex. B).

15 30. Defendant Cunningham urged Defendant Bullis not to remove the
16 video since CBR would soon be purchasing the website and this would then
17 become CBR's issue alone. (Cunningham Decl. at ¶ 5 at Ex. B).

18 31. Defendant Bullis obliged Defendant Cunningham's request and
19 subsequently sold the website to CBR for \$6,000. (Cunningham Decl. at ¶ 5 at
20 Ex. B).

21 32. As a result of the sale, which was finalized in mid-April 2011,
22 Defendant Bullis no longer has any control over the Pro-LifeTube website.
23 (Cunningham Decl. at ¶ 5 at Ex. B).

24 33. As noted above, the idea for the CBR Video was introduced to
25 Defendant Cunningham by Defendant Holmberg sometime in early January 2011.

1 Defendant Holmberg sent Defendant Cunningham a link to a concept video (the
2 TAG Video) that was briefly (and privately) posted on YouTube. (Cunningham
3 Decl. at ¶ 6 at Ex. B).

4 34. The TAG Video was removed from YouTube within 24 hours, and
5 Defendant Cunningham has never seen that video posted anywhere else.
6 (Cunningham Decl. at ¶ 6 at Ex. B; *see also* TAG Amended Answers to Interrogs
7 at 4-5 at Ex. D).

8 35. Defendant Holmberg had no other involvement with the CBR Video.
9 The CBR Video was created and produced by CBR. All of the editing and every
10 posting of the CBR Video was done under Defendant Cunningham's supervision,
11 direction, and control as Executive Director of CBR. All abortion video segments
12 originated from the CBR video archives, and the musical score was sourced from
13 an anonymous (name not disclosed by the source) public domain score. There
14 was no cost to CBR to produce the video. (Cunningham Decl. at ¶ 7 at Ex. B).

15 36. During the creation of the CBR Video, there was a first, rough cut,
16 proof-of-concept mockup. The refined version of the CBR Video was circulated
17 briefly in various forms during production for the purpose of soliciting comments
18 before editing was finalized for posting on Pro-LifeTube and abortionNO.org.
19 AbortionNO.org is CBR's main website. (Cunningham Decl. at ¶ 8 at Ex. B).

20 37. The CBR Video was made exclusively for nonprofit, non-
21 commercial, educational, and parodic purposes. There was no consideration or
22 anything of any value received for the video. CBR did not sell, license, or
23 publish the video commercially. (Cunningham Decl. at ¶ 10 at Ex. B).

24 38. The CBR Video was posted on Pro-LifeTube and at abortionNO.org
25 for nonprofit, non-commercial, educational, and parodic purposes only, and

1 CBR's use of the video is exclusively for nonprofit, non-commercial, educational
2 parody. (Cunningham Decl. at ¶ 10 at Ex. B).

3 39. CBR's critical parody is available only for viewing on the internet.
4 It employs a minimalist approach to production and is not offered for download
5 or sale on any distribution medium. (Cunningham Decl. at ¶ 10 at Ex. B).

6 40. The CBR Video transforms the Northland Video by adding graphic
7 images of aborted fetuses to certain parts of the video, a jarring music score, a
8 scripture citation to 2 Corinthians 11:13-14, which warns viewers that Satan
9 masquerades as "an angel of light," and an introduction quoting George Orwell,
10 which condemns the use of lies to obscure murder, so as to criticize, comment
11 upon, disparage, parody, mock, and disagree with the message conveyed by the
12 Northland Video. (Cunningham Decl. at ¶ 11 at Ex. B; Bullis Dep. Exs. 5 & 6).

13 41. During the deposition of Plaintiff pursuant to Rule 30(b)(6) of the
14 Federal Rules of Civil Procedure, Plaintiff admitted that Defendants' videos
15 "changed," "ruined," and "distort" "every bit" of the intent, meaning, and
16 message of the Northland Video. (R.C. Dep. at 116, 129, 139 at Ex. A).

17 42. Plaintiff admitted that the purpose of its video was to "de-stigmatize"
18 abortion, while Defendants' videos plainly "stigmatize" abortion and seek to
19 "shame and anger and disgust anyone who's watching [them]." (R.C. Dep. at 66
20 at Ex. A).

21 43. Plaintiff admitted that Defendants' videos were "not what we made."
22 (R.C. Dep. at 26 at Ex. A). "They took [Northland's] video and they've changed
23 it." (R.C. Dep. at 139 at Ex. A).

1 44. Plaintiff admitted that Defendants changed the entire intent,
2 message, and meaning of the Northland Video by, *inter alia*, “add[ing] music,
3 other words and footage.” (R.C. Dep. at 26, 66, 116, 129 at Ex. A).

4 45. The creation, production, and posting of the CBR Video were all
5 done for nonprofit, non-commercial, educational, and parodic purposes. In fact,
6 using graphic video imagery makes it exceedingly difficult to solicit donations for
7 pro-life work. Consequently, creating, producing, and posting the CBR Video is
8 inimical to CBR’s interests as a donor-funded, non-profit organization in that it
9 actually makes it more difficult to solicit donations to fund its work. But,
10 Defendant Cunningham considered the Northland Video so deceptive that he, as
11 the Executive Director of CBR, thought it was necessary to rebut this deception
12 with a video that exposed the Northland Video in ways that words could not.
13 (Cunningham Decl. at ¶ 12 at Ex. B).

14 46. Nonetheless, CBR has not directly solicited donations for the CBR
15 Video. Any requests for donations related to the video were made after Plaintiff
16 filed this lawsuit and for the sole purpose of helping CBR defray the costs
17 associated with this litigation. (Cunningham Decl. at ¶ 12 at Ex. B).

18 47. The CBR Video criticizes, comments upon, disparages, parodies,
19 mocks, and disagrees with both the deceptive message and the deceptive manner
20 of Plaintiff’s staffer who narrates the Northland Video. Pursuant to CBR’s view,
21 Plaintiff’s consistent theme is the lie that abortion is “normal.” Further, CBR
22 takes the position that every aspect of the staffer’s attire, demeanor, syntax, and
23 intonation is calculated to reinforce this deception. The same is true with the
24 flowers on her desk, the soft background music, and the framed art on her walls.
25 CBR’s Video comments upon, disparages, parodies, mocks, and rebuts all this

1 duplicity, as perceived by CBR, with an accusatory literary quote in its
2 introduction, jarring music in its score, and graphic imagery in its video
3 refutation. (Cunningham Decl. at ¶ 13 at Ex. B; *see also* Bullis Dep. Exs. 5 & 6).

4 48. CBR's position is that the Northland Video is promotional,
5 advertising material posted on a business website to persuade prospective
6 customers through deceit and deception that abortion is normal and even virtuous.
7 CBR also takes the position that the Northland Video is intended to de-stigmatize
8 abortion in the public mind and to gain a commercial advantage vis-a-vis
9 Plaintiff's abortion industry competitors through false advertising. (Cunningham
10 Decl. at ¶ 14 at Ex. B).

11 49. The Northland Video is not sold as a product to consumers. In fact,
12 the Northland Video is publicly available on YouTube at the following URL:
13 http://www.youtube.com/watch?v=8LNCau39L_s, and it is currently posted on
14 Plaintiff's official website at the following URL:
15 <http://www.northlandfamilyplanning.com/videos/everyday-good-women/>.
16 (Cunningham Decl. at ¶ 14 at Ex. B; R.C. Dep. at 60 at Ex. A; R.C. Dep. at 38
17 [under seal]).

18 50. Consequently, the Northland Video can be viewed by the general
19 public at any time and at no cost. (Cunningham Decl. at ¶ 14 at Ex. B).

20 51. Neither the CBR Video nor the TAG Video is posted on YouTube or
21 Northland's website. (Cunningham Decl. at ¶ 15 at Ex. B).

22 52. CBR used approximately 2 minutes and 2 seconds of the Northland
23 Video's 4 minute and 41 seconds of footage in CBR's 4 minute and 13 second
24 video. Thus, less than half of the CBR Video is comprised of content taken from
25 the Northland Video. This percentage is the content quantum minimally required

1 to meaningfully criticize, comment upon, disparage, parody, and rebut the most
2 deceptive elements of Plaintiff's most misleading advertising claims.
3 (Cunningham Decl. at ¶ 16 at Ex. B; R.C. Dep. Exs. 8 & 9; Bullis Dep. Exs. 5 &
4 6).

5 53. Additionally, Plaintiff has posted 16 minutes and 41 seconds of
6 promotional video on the video advertising page of its website. CBR's use of
7 portions of the Northland Video content comprises approximately 11% of all
8 Northland promotional video posted for viewing on Plaintiff's website.
9 (Cunningham Decl. at ¶ 16 at Ex. B).

10 54. As noted previously, Plaintiff's video is not marketed for sale.
11 CBR's use, therefore, has no effect on the potential market value of any of its
12 content. CBR's express purpose for producing the CBR Video was to expose
13 Plaintiff's false claims and barbaric practices through graphic audio-visual
14 parody. (Cunningham Decl. at ¶ 17 at Ex. B).

15 55. As testified to by Defendant Cunningham, "As the Northland
16 abortion clinic's saleswoman was filming her commercial advertisement, just
17 down the hall, safely out of sight of the camera, viable babies were being aborted,
18 without benefit of anesthesia – babies so far along in pregnancy that they would
19 have been born alive had their mother's labor been induced before killing them.
20 The outrage here isn't merely the ages of the babies they are aborting. Every
21 abortion is horrific at any age. The real scandal is that this abortionist, disguised
22 as some sort of objective counselor, complete with conservatively styled hair,
23 starched blouse, and horn-rimmed glasses, looks straight into the camera and tells
24 lie after lie, for the purpose of tricking vulnerable, desperate women – and young
25 girls – into an unimaginably ruinous mistake. Her manner is shrewdly calculated

1 to be matter-of-fact and reassuring. Her purpose is to disarm her victims and lure
2 them into a carefully laid trap.” (Cunningham Decl. at ¶ 18 at Ex. B).

3 56. The CBR Video and the TAG Video are intended to criticize,
4 comment upon, disparage, parody, mock, and disagree with the Northland
5 staffer’s manner as well as her message, particularly her message that abortion is
6 normal and “good.” In fact, the narrator actually uses some variant of the word
7 “good” eighteen times in four minutes to describe abortion. (Cunningham Decl.
8 at ¶ 19 at Ex. B; *see also* Holmberg Dep. at 56-57, 76-77, 78 at Ex. C; TAG
9 Amended Answers to Interrogs at 6-7 at Ex. D).

10 57. Every production decision CBR made was intended as an
11 “abnormal” counterpoise to some corresponding production element in the
12 Northland Video. None of these criticisms would have worked without the use of
13 Plaintiff’s most offensive production content. (Cunningham Decl. at ¶ 19 at Ex.
14 B).

15 58. The narrator in the Northland Video was engaging in speech which
16 was both commercial and political. As Defendant Cunningham testified, “Selling
17 abortion is about reinforcing and exploiting maternal ignorance. It is about telling
18 lies to perpetrate business fraud. Keeping abortion legal is about deceptive
19 political speech intended to fabricate the fiction that abortion is a nominal evil
20 best left to personal discretion. It is about reinforcing and exploiting voter
21 ignorance. Northland not only demands the right to manipulate prospective
22 victims (mothers and voters) with unconscionable falsehoods, but they then have
23 the effrontery to threaten anyone who dares rebut their claims. All CBR has done
24 is figuratively force open the door down the hall from the Northland narrator’s
25 office. The CBR Video simply shows viewers the reality which Northland’s

1 narrator struggles to distort. Is abortion an expression of ‘love’ or a vicious act of
2 violence? The CBR Video tacitly, if not jarringly, challenges viewers to decide
3 whether they are going to believe what they hear or what they see – with their
4 own eyes. Con artists can spin the facts, but the camera records the truth.”
5 (Cunningham Decl. at ¶ 20 at Ex. B).

6 CONCLUSIONS OF LAW

7 1. “Fair use,” as codified under 17 U.S.C. § 107, is an affirmative
8 defense to copyright infringement.

9 2. In determining whether the use made of a work in a particular case is
10 a “fair use,” the court should consider the following factors:

11 a. The purpose and character of the use, including whether such
12 use is of a commercial nature or is for nonprofit educational purposes;

13 b. The nature of the copyrighted work;

14 c. The amount and substantiality of the portion used in relation
15 to the copyrighted work as a whole; and

16 d. The effect of the use upon the potential market for or value of
17 the copyrighted work. 17 U.S.C. § 107.

18 3. These four factors should not “be treated in isolation one from
19 another. All are to be explored, and the results weighed together, in light of the
20 purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578
21 (1994).

22 4. “[T]he public benefit in allowing . . . social criticism to flourish is
23 great. The fair use exception recognizes this important limitation on the rights of
24 the owners of copyrights.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d
25 792, 806 (9th Cir. 2003).

1 5. Under the “purpose and character of use” factor, the reviewing court
2 considers the extent to which the new work is “transformative.” *Mattel, Inc.*, 353
3 F.3d at 800. That is, the court determines whether the new work adds “something
4 new, with a further purpose or different character, altering the first with new
5 expression, meaning, or message.” *Id.* (quoting *Campbell*, 510 U.S. at 579). The
6 court also considers whether the new work was for- or not-for-profit. *Id.*
7 Moreover, “the more transformative the new work, the less will be the
8 significance of other factors, like commercialism, that may weigh against a
9 finding of fair use.” *Campbell*, 510 U.S. at 515-16.

10 6. A parody is the use of some portion of a copyrighted work to “hold[]
11 it up to ridicule,” or otherwise comment or shed light on it. *Dr. Seuss Enters.,*
12 *L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1400-01 (9th Cir. 1997).

13 7. A parody is considered transformative because it provides a socially-
14 valuable criticism or commentary of the subject work. *Campbell*, 510 U.S. at
15 579. Consequently, a parody needs to use some portions of the original work
16 because the effectiveness of a parody depends upon its ability to “conjure up” the
17 original. *Id.* at 580-81, 588.

18 8. Because the author of the original is unlikely to permit the use of his
19 or her work to criticize or ridicule that work, a parody is not likely to supplant the
20 market for the original or its derivatives. *Id.* at 592.

21 9. The second factor, the “nature of the copyrighted work,” reflects a
22 recognition “that creative works are ‘closer to the core of intended copyright
23 protection’ than informational or functional works.” *Mattel, Inc.*, 353 F.3d at 803
24 (quoting *Dr. Seuss Enters., L.P.*, 109 F.3d at 1402).

1 10. The third factor “asks whether the amount and substantiality of the
2 portion used in relation to the copyrighted work as a whole, are reasonable in
3 relation to the purpose of copying.” *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr.*
4 *Seuss Enters., L.P.*, 109 F.3d at 1402).

5 11. Under the fourth factor, the relevant inquiry is whether the new work
6 tends to supplant or substitute for the potential market for the original or its
7 derivatives. *Campbell*, 510 U.S. at 592. Harm caused by effective criticism or
8 disparagement is *not* cognizable injury under the Copyright Act. *Id.* at 591-92.
9 “Because parody may quite legitimately aim at garroting the original, destroying
10 it commercially as well as artistically, the role of the courts is to distinguish
11 between biting criticism that merely suppresses demand and copyright
12 infringement, which usurps it.” *Id.* at 592 (internal citations, quotations, and
13 brackets omitted).

14 12. “[T]he only harm to derivatives that need concern” this court, “is the
15 harm of market substitution. The fact that a parody may impair the market for
16 derivative uses by the very effectiveness of its critical commentary is no more
17 relevant under copyright than the like threat to the original market.” *Id.* at 593.

18 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 16, 2012, I electronically filed the foregoing
3 with the Clerk of the Court using the ECF system which will send notification of
4 such filing to all counsel of record. Parties not on ECF system and requiring
5 postal service: none.

6 Additionally, I caused to be served the exhibits filed in the traditional
7 manner and/or under seal in this case via U.S. Mail, postage pre-paid, upon the
8 following:

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14 Respectfully submitted,

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