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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' REPLY 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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OVERVIEW

1
2 Plaintiff's opposition to Defendants' motion for summary judgment offers
3 a tendentious, if not utterly distorted, view of the facts and law in a feckless
4 attempt to avoid the only plausible and just outcome in this case: Defendants' use
5 of Plaintiff's video was fair use and not an infringement of copyright.

6 Indeed, to avoid this inevitable conclusion—one that is compelled by the
7 facts and controlling law—Plaintiff must make the absurd argument that
8 Defendants' videos are not actual parody. To do so, Plaintiff presents what can
9 only be described as a confused, if not patently contradictory, four-part argument.
10 The first part of this argument is that Defendants' videos don't "conjure up"
11 Plaintiff's video. This claim not only contradicts Plaintiff's assertion that
12 Defendants' videos use too much of Plaintiff's video, but it also renders
13 incoherent Plaintiff's claim that Defendants' videos might actually be confused as
14 Plaintiff's video. The second and third parts of Plaintiff's argument are,
15 respectively, that Defendants' videos do not address the message of Plaintiff's
16 video and that Defendants' videos are not transformative. Not only do the
17 competing videos evidence quite clearly the opposite—indeed, Plaintiff
18 acknowledges, for example, that the videos engage the viewer in a "debate"¹
19 (Pl.'s Statement of Uncontroverted Facts at ¶ 67)—Plaintiff's own testimony
20 flatly and dispositively contradicts this assertion. It is not surprising that
21 Plaintiff's opposition and its own motion for summary judgment entirely ignore
22

23
24 ¹ Indeed, the CBR Video is publicly described as "The Most Shocking (Graphic
25 Imagery), Four-Minute Abortion Debate You Will Ever See." (Defs.' Statement
of Uncontroverted Facts [hereinafter referred to as "SMF"] at ¶ 20) (Doc. No. 40-
2).

1 Plaintiff's sworn admission that Defendants' videos transform everything about
2 Plaintiff's video (*i.e.*, "every bit") into exactly its opposite. The fourth and final
3 prong of Plaintiff's argument is that Defendants fail to show that their videos
4 were created for non-commercial purposes. Given the undisputed facts and the
5 controlling law on this matter, it is hard to even credit this argument as anything
6 but frivolous.

7 We treat in turn each of these claims below and the remaining trivial
8 assertions raised by Plaintiff.

9 In sum, this is not even a close call: Defendants' use of Plaintiff's video is
10 fair use and not an infringement of copyright as a matter of law.

11 ARGUMENT

12 **I. DEFENDANTS' VIDEOS PARODY, CRITICIZE, AND** 13 **TRANSFORM PLAINTIFF'S VIDEO AND THUS CONSTITUTE** 14 **FAIR USE.**

15 **A. Defendants' Videos Conjure Up and Reference Directly** 16 **Plaintiff's Video and Message.**

17 Plaintiff argues in its opposition that Defendants' videos do not actually
18 conjure up Plaintiff's video. (Pl.'s Opp'n at 4-8). Yet, Plaintiff's own motion for
19 summary judgment makes exactly the opposite argument when it claims that
20 Defendants' videos are not transformative because they use too much of
21 Plaintiff's video: "Instead, the Infringing Videos employ the original content to
22 convey the same message—a pro choice (*sic*) message—and then add content that
23 Defendants claim create a 'debate.'" (Pl.'s Mot. at 15). Thus, Plaintiff
24 acknowledges that Defendants' videos are commenting upon—and, as is starkly
25 evident to any fair-minded viewer, ridiculing—the very message of Plaintiff's

1 video. Indeed, Plaintiff's claim that the "Northland Video [does not have] any
2 inherent recognizable association or cultural significance that makes it . . . 'ripe
3 for social comment'" (Pl.'s Opp'n at 7) is a claim that is so devoid of reality that
4 it demonstrates the absurdity of Plaintiff's argument.

5 Even perhaps more telling is Plaintiff's argument on "excessive use," when
6 it correctly notes that Defendants employ Plaintiff's video as the "dramatic focal
7 points" upon which to launch their commentary and ridicule:

8 Moreover, like the infringing article in *Harper & Row*, the Infringing
9 Videos are structured around the verbatim Northland Video clips,
10 which serve as the dramatic focal points of the Infringing Videos.
11 Because the Northland Video "plays a key role" in the Infringing
12 Videos, this consideration weighs against fair use.

13 (Pl.'s Mot. at 18). It is inconceivable how Plaintiff makes its argument that
14 Defendants' videos are too focused on the Northland Video, but yet fail to
15 conjure it up. Indeed, Defendants' videos include the very source name of the
16 referenced video, "Northland Family Planning Clinic." Thus, Plaintiff's
17 argument not only contradicts the assertions of its own motion, it flies in the face
18 of the brute facts evidenced by the videos themselves.

19 Plaintiff apparently understands the difficulty of this argument, and as a
20 result, morphs the argument into a claim that the "conjure up" requirement is
21 really one that requires a "distorted imitation" and "mimicry," which, it claims, is
22 not achieved by Defendants' videos. (Pl.'s Opp'n at 5). To make this argument,
23 Plaintiff is forced to disassemble Defendants' videos into separate videos: one
24 video that uses too much of Plaintiff's video and a separate video consisting of
25 Defendants' video clips. In other words, according to Plaintiff's faulty argument,

1 Defendants' video clips do not create the obvious "distorted imitation" of
2 Plaintiff's video because Defendants' clips should not be viewed as a whole, but
3 really multiple and quite distinct videos: the portions of the referenced work (*i.e.*,
4 Plaintiff's video), on the one hand, and Defendants' ridicule and commentary in
5 the form of their clips, on the other. This approach, however, contradicts both
6 Plaintiff's own sworn testimony and the controlling case in this circuit—*Mattel,*
7 *Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

8 Specifically, Plaintiff's own testimony was that the core message and
9 purpose of its video was to de-stigmatize abortion. (SMF at ¶ 7). Indeed, at
10 approximately 50 seconds into Plaintiff's video, the narrator sets the stage of her
11 messaging by telling her audience that "[d]eciding to have an abortion is a
12 normal experience. We trust you and we believe you are making your decision
13 from a place of goodness." (SMF at ¶ 2; Chelian Dep. Exs. 8 & 9 [Northland
14 Video]). As made clear in the record, Plaintiff admitted that the purpose of its
15 video was to "de-stigmatize" abortion, while Defendants' videos plainly
16 "stigmatize" abortion and seek to "shame and anger and disgust anyone who's
17 watching [them]." (SMF at ¶ 42). And Plaintiff explained exactly how
18 Defendants' videos accomplished this reversal: Defendants' videos "changed,"
19 "ruined," and "distort[ed]" "every bit" of the intent, meaning, and message of the
20 Northland Video. (SMF at ¶ 41).

21 At the visual and artistic level, it is beyond dispute that Defendants' videos
22 as a whole conjure up and ridicule Plaintiff's message of normalcy and goodness
23 by juxtaposing jarring video and music that is anything but normal and good at
24 "dramatic focal points." And this mockery of Plaintiff's message is prefaced by a
25 scripture citation to 2 Corinthians 11:13-14, which warns viewers that Satan

1 masquerades as “an angel of light,” and an introduction quoting George Orwell,
2 which condemns the use of lies to obscure murder. (SMF at ¶ 40).

3 Moreover, Plaintiff’s effort to chop up Defendants’ videos into Plaintiff’s
4 video clips as one distinct work and Defendants’ interwoven video clips as a
5 separate work flies in the face of *Mattel, Inc.* As Plaintiff recognizes, *Mattel, Inc.*
6 held that even though the defendant used the Barbie doll image essentially in its
7 entirety, removing Barbie’s clothes and placing her in dangerous settings was
8 patently ridicule and mimicry. Yet, the defendant’s work did not literally distort
9 or modify Barbie at all. Rather, the defendant stripped Barbie of her clothes and
10 surrounded her in the defendant’s own milieu, thus providing the viewer “with a
11 different set of associations and a different context” within which to view Barbie.
12 *Mattel, Inc.*, 353 F.3d at 802. Indeed, the court was so certain of the patent
13 application of fair use that on remand it sanctioned the plaintiff with an order to
14 pay the defendant’s legal fees in excess of \$1.5 million. *Mattel, Inc. v. Walking*
15 *Mountain Prods.*, CV 99-8543 RSWL (RZx), 2004 U.S. Dist. LEXIS 12469
16 (C.D. Cal. June 21, 2004) (awarding the defendant attorney’s fees and costs as
17 compensation and as a deterrent for having to defend against an objectively
18 unreasonable and frivolous copyright claim in light of the fair use exception).

19 This is precisely what Defendants have done here, if not with even more
20 artistic flair. Defendants’ videos strip the “normalcy” and “goodness” of
21 Plaintiff’s version of a Barbie doll-like abortion by removing the fig leaves of the
22 milieu created by Plaintiff. The placement of images showing the stark reality of
23 abortion at its most gruesome moment before and after each of the “dramatic
24 focal points” along with a jarring music score is the quintessential “distorted
25 imitation” and “mimicry” fair use recognizes.

1 In sum, Plaintiff's argument that Defendants' videos do not conjure up the
2 Northland Video for ridicule with distorted imitation just does not wash.
3 Plaintiff's argument is contracted by its own admissions, and it was soundly
4 rejected by *Mattel, Inc.*

5 **B. Defendants' Videos Specifically Address the Message of**
6 **Plaintiff's Video.**

7 To put it politely, yet bluntly, the second prong of Plaintiff's argument that
8 Defendants' videos do not address the "normalcy" and "goodness" messages of
9 Plaintiff's video is sophomoric. (*See* Pl.'s Opp'n at 8-9). It is sophomoric
10 because it seems to suggest that to "address" Plaintiff's video, Defendants must
11 use an explicit medium such as the spoken word and more particularly that
12 Defendants' use of carefully placed visual images with a jarring music score that
13 almost literally attack the original work does not count as expressive critique and
14 ridicule.² Plaintiff's argument, if taken seriously, would nullify most of what
15 counts for expressive art throughout history.

16 And to make this argument, Plaintiff is left to argue the absurd point that
17 Defendants do not succeed in their goal of parodying the lies about the
18 "goodness" narrative presented by the Northland Video because that narrative is
19 not that abortion is normal or good *per se*, but that a woman who has to make that
20 choice is a good person. In Plaintiff's own words: "The Infringing Videos do not
21 address the crux of the Northland Video: that a woman who is faced with
22

23 _____
24 ² And, as noted, Plaintiff conveniently ignores the fact that the CBR Video is
25 prefaced by a scripture citation to 2 Corinthians 11:13-14, which warns viewers
that Satan masquerades as "an angel of light," and an introduction quoting George
Orwell, which condemns the use of lies to obscure murder. (SMF at ¶ 40).

1 deciding whether to have an abortion is a good person, and that the process that
2 she engages in when making that decision can be difficult.”³ (Pl.’s Opp’n at 9).
3 And, even more precisely stated in Plaintiff’s own words, the following appears
4 at two minutes and twenty-one seconds into Plaintiff’s video: “When a woman
5 decides to have an abortion, she is making a choice that is thoughtful, considered,
6 and essentially coming from a place of goodness.” (SMF at ¶ 2; Chelian Dep.
7 Exs. 8 & 9 [Northland Video]).

8 But these absolute statements about the choice to have an abortion are
9 manifestly false, and these are precisely the messages Defendants’ videos attack.
10 It is simply not the case, even assuming abortion is not the murder of an innocent
11 human life as Defendants maintain, that women decide to have abortions only
12 after a “thoughtful” and “considered” process that is “essentially coming from a
13 place of goodness.” All over the world, and it is certainly notoriously true in
14 China where the state forces its citizens to have an abortion after they’ve reached
15 the statutory one-child quota, women decide to have abortions for all sorts of
16 reasons that are not sourced in “goodness,” but in coercion and exploitation, and
17 in many cases, such as abortions in parts of the world where young females are
18 targeted because the society values sons over daughters, for sorted and morally
19 dubious reasons. And even more to the point, precisely because Defendants
20 contest Plaintiff’s premise that abortion is not morally reprehensible, their videos
21 expose the “normalcy” and “goodness” narrative which permeates the Northland
22 Video with the ugly and shocking reality that is abortion at the naked visual level.
23

24 ³ Plaintiff also ignores the fact that the Northland Video refers to its work (*i.e.*,
25 performing abortions) as not only “good,” but as “sacred.” (SMF at ¶ 2; Chelian
Dep. Exs. 8 & 9 [Northland Video]).

1 Moreover, as noted previously, Plaintiff's deposition testimony renders this
2 argument not only sophomoric, but flatly contradicted by Plaintiff's own
3 admissions. How is it possible that Defendants' videos so successfully
4 transformed Plaintiff's video from one of "de-stigmatization" of the abortion
5 decision to its opposite, as testified to by Plaintiff's designated representative,
6 Renee Chelian, yet accomplished this artistic feat without actually addressing this
7 fundamental narrative of de-stigmatization? Plaintiff has no answer for this
8 anomaly, and that is precisely why Plaintiff has chosen to ignore its own sworn
9 testimony on this critical point. (*See* SMF at ¶¶ 41-44).

10 **C. Defendants' Videos Manifestly Transform Plaintiff's Video.**

11 Plaintiff's third prong of the argument that Defendants' videos are not fair
12 use rests on the purported distinction between "transform" and "change." (Pl.'s
13 Opp'n at 10-11). In essence, Plaintiff's argument is that change must transform
14 the very meaning and purpose of the referenced work. Defendants agree. And,
15 indeed, Plaintiff's deposition testimony supports Defendants' position and
16 contradicts its lawyers' opposition brief on this very critical point. As
17 Defendants' motion makes clear, it is not just that Defendants' videos "change"
18 or "ruin" Plaintiff's video that make the videos transformative. (*See* Defs.' Mem.
19 at 11-14) (Doc. No. 40-1). Rather, as Renee Chelian testified, Defendants' videos
20 take portions of Plaintiff's video and transform de-stigmatization into
21 stigmatization, which is the transformation of the very core meaning and purpose
22 of Plaintiff's video. (SMF at ¶¶ 41-44).

23 Indeed, Plaintiff's effort to distinguish *Mattel, Inc.*, merely underscores just
24 how dispositive that decision is for this case. In *Mattel, Inc.*, the defendant did
25 not alter Barbie at all. All he did was remove some or all of her clothes and place

1 her into different environmental contexts (*i.e.*, a blender). Barbie as a physical
2 thing remained unchanged. Barbie *qua* America's image of what the Barbie doll
3 stood for was transformed. Similarly here, Plaintiff has testified without
4 hesitation or equivocation that its video's message and purpose was to de-
5 stigmatize the abortion decision and that Defendants' videos successfully turned
6 that on its head. If ever there was a case of transformation in the context of fair
7 use, Defendants' videos would be a profound and jolting example of how to
8 achieve this using mediums that bring to bear both the grotesque and the sublime.

9 **D. Defendants' Videos Were Neither Created Nor Used for**
10 **Commercial Purposes.**

11 To begin, Defendants have addressed the points presented in Plaintiff's
12 fourth prong of its argument in their opposition to Plaintiff's motion for summary
13 judgment. (Defs.' Opp'n at 15-17) (Doc. No. 73). However, what deserves
14 attention here is Plaintiff's abuse of the factual record. In an effort to create facts
15 similar to *Worldwide Church of God v. Phil. Church of God, Inc.*, 227 F.3d 1110
16 (9th Cir. 2000), Plaintiff literally distorts the facts of *Worldwide Church* and
17 those in evidence before this court to create a new record *ex nihilo*.

18 Contrary to Plaintiff's rendition, *Worldwide Church* stands for the
19 proposition that a work copied in its entirety and not transformed at all may not
20 be used by a religious, non-profit organization to attract members and gain
21 donations. *Worldwide Church*, 227 F.3d at 1110-17. A non-profit is not exempt
22 from the full analysis of the fair use doctrine simply because it is a non-profit.
23 Indeed, *Worldwide Church* was about the taking and use of a 380-page work and
24 simply converting it for the church's own purposes. The case had *nothing* to do
25 with parody or critique. Even Plaintiff's parenthetical description of this case

1 (see Pl.’s Opp’n at 7 [“finding reproduction and distribution by nonprofit
2 organization of an entire religious written work not fair use”]) recognizes that this
3 was a case where a 380-page work was used in its entirety for specific gain by the
4 non-profit. (Pls.’ Opp’n at 7-8).

5 *Worldwide Church* is simply inapposite to the facts here for two
6 fundamental reasons. One, Defendants’ videos are transformative, and
7 transformative in precisely the way the fair use exception demands. The decision
8 in *Worldwide Church* hinged in great measure on the fact that there was no
9 transformative use. *Id.* at 1117 (“Although ‘transformative use is not absolutely
10 necessary for a finding of fair use,’ where the ‘use is for the same intrinsic
11 purpose as [the copyright holder’s] . . . such use seriously weakens a claimed fair
12 use.’”) (citation omitted). And, as the Ninth Circuit has made clear, “[g]iven the
13 extremely transformative nature and parodic quality” of Defendants’ videos, any
14 “commercial qualities become less important” in the fair use analysis. *Mattel,*
15 *Inc.*, 353 F.3d at 803.

16 Two, the testimony and record in this case are clear: Defendants did not use
17 their videos for commercial gain in any way, shape, or form. (See SMF at ¶¶ 37-
18 39). The testimony cited by Plaintiff to suggest otherwise was testimony by
19 Defendant CBR that CBR used its video in two contexts. The first was to
20 accomplish the very goal of parody for which the video was produced: to make it
21 available to the general public to criticize and ridicule Plaintiff’s video. It did so
22 by posting its video on its website and posting links elsewhere. It neither
23 solicited funds nor members nor sought any other commercial gain through the
24 presentation of its video. (See also Defs.’ Statement of Genuine Disputes at ¶¶
25 37-39, 62-63) (Doc. No. 73-1). Moreover, as the undisputed record also makes

1 clear, unlike the defendant in *Worldwide Church*, which used the 380-page work
2 to build its membership and donation base, Defendant CBR's use of its video
3 made it more difficult to raise funds and fit into the mainstream anti-abortion
4 movement precisely because of its graphic use of abortion clips as critique and
5 parody. (Cunningham Decl. at ¶¶ 10, 12) (Doc. No. 40-4).

6 Plaintiff's argument that the use is commercial because Defendant CBR
7 also solicited donations through other pages on its website is incorrect in that this
8 use does not create the necessary commercial nexus found in *Worldwide Church*;
9 that nexus being a direct link between the use of the 380-page work to build its
10 membership and the specific use of that book for the same purposes as it was
11 intended by its creator-copyright holder without "paying the customary price" for
12 the work. *Worldwide Church of God*, 227 F.3d at 1117-19.

13 The second use of the video, as CBR testified to, was in letters to solicit
14 defense funds for *this* litigation. Asking members of the public to support its fair
15 use defense and mentioning the video at issue so that the public might judge the
16 matter for itself is hardly an infringing use of the copyright work as found in
17 *Worldwide Church*. Indeed, a finding that post-litigation fundraising efforts by a
18 non-profit amounts to "commercial gain" would surrender the non-profit's ability
19 to defend the very First Amendment rights embodied in the fair use doctrine.

20 For these reasons, and based especially on the transformative nature of
21 Defendants' videos, this court should reject Plaintiff's argument of commerciality
22 and find that Defendants have prevailed on all elements of the fair use analysis.

23 **II. NATURE OF THE COPYRIGHTED WORK.**

24 This factor need not trouble the court for very long. Indeed, as the Ninth
25 Circuit has "recognized in the past, 'this nature of the copyrighted work factor

1 typically has not been terribly significant in the overall fair use balancing.”
2 *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books,*
3 *USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997)). Similarly here, this factor is not
4 “terribly significant” in the analysis due in large part to the transformative nature
5 of Defendants’ videos. Nonetheless, it is certainly worth highlighting the fact that
6 Plaintiff’s own designated “expert” testified under oath that there was nothing
7 creative, new, or unique about the “Good Woman concept,” and it did not
8 originate with Northland. (R.A. Dep. at 100:1-18 at Ex. 2) (Doc. No. 73-3).

9 In sum, it is reasonable for a trier of fact to conclude that the Northland
10 Video “is an informational work . . . and thus deserves less protection than a
11 creative work of entertainment.” *Righthaven, LLC v. Jama*, 2:10-CV-1322 JCM
12 (LRL), 2011 U.S. Dist. LEXIS 43952, at *8 (D. Nev. Apr. 22, 2011).

13 **III. THE AMOUNT AND SUBSTANTIALITY OF USE WERE** 14 **APPROPRIATE.**

15 Contrary to Plaintiff’s contention, Defendants’ assertion that the amount of
16 video used was “the content quantum minimally required to criticize” the
17 Northland Video is not “wholly conclusory” and without factual support. (*See*
18 *Pl.’s Opp’n* at 16). Indeed, as with the analysis regarding the transformative
19 nature of Defendants’ videos, Defendants invite the court to view the videos
20 themselves. Similar to how Defendants’ graphic imagery ridicules Plaintiff’s
21 message more effectively than words ever could, viewing the videos demonstrates
22 the minimalist way in which Defendants’ ridiculed and mocked the essential
23 “focal points” of Plaintiff’s message, including its method of delivery.
24 Consequently, Defendants used only those essential parts of the Northland Video
25 that were necessary to effectively create their critical parodies. And the fact that

1 this amount equated to approximately one half of the Northland Video should not
2 be surprising—indeed, it should be expected. Moreover, contrary to Plaintiff’s
3 assertion, the Ninth Circuit and the U.S. Supreme Court are clear on this point:
4 “[*The courts*] do not require parodic works to take the absolute minimum amount
5 of the copyrighted work possible. . . . ‘once enough has been taken to assure
6 identification, how much more is reasonable will depend, say, on the extent to
7 which the [work’s] overriding purpose and character is to parody the original, or,
8 in contrast, the likelihood that the parody may serve as a market substitute for the
9 original.” *Mattel, Inc.*, 353 F.3d at 803 (quoting *Campbell*, 510 U.S. at 587)
10 (emphasis added). Here, there can be no reasonable dispute that the “overriding
11 purpose and character [of Defendants’ videos] is to parody the original” and that
12 Defendants’ videos are no market substitute for the Northland Video. In sum, the
13 amount and substantiality of use were appropriate.

14 **IV. THE EVIDENCE PRESENTED SHOWS, WITHOUT**
15 **REASONABLE DISPUTE, NO MARKET HARM.**

16 As demonstrated more fully in Defendants’ motion for summary judgment
17 (*see* Defs.’ Mem. at 16-18) (Doc. No. 40-1) and in their opposition to Plaintiff’s
18 motion for summary judgment (Defs.’ Opp’n at 19-23) (Doc. No. 73), harm
19 caused by effective criticism or disparagement is not cognizable injury under the
20 Copyright Act—whether the harm is to the original or its derivative uses.
21 *Campbell*, 510 U.S. at 590-92. Consequently, “[b]ecause parody may quite
22 legitimately aim at *garroting the original, destroying it commercially as well as*
23 *artistically*, the role of the courts is to distinguish between *biting criticism that*
24 *merely suppresses demand* and copyright infringement, which *usurps it.*” *Id.* at
25 592 (internal citations, quotations, and brackets omitted) (emphasis added). Thus,

1 under this factor, the relevant inquiry is whether Defendants’ videos tend to
2 supplant or substitute for the potential market for the Northland Video or its
3 derivatives. *Id.* at 592. Here, it is utterly implausible—indeed, it is quite
4 frivolous—to argue that Defendants’ videos would usurp demand for the
5 Northland Video or its derivatives in any conceivable way.

6 In its opposition, Plaintiff, relying on *Dr. Seuss Enters., L.P. v. Penguin*
7 *Books, USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997), claims that Defendants
8 failed to “bring forward favorable evidence” that there has been no market harm.
9 Plaintiff is mistaken on a number of fronts.

10 First, as *Dr. Seuss* makes clear, the assumption of market harm was made
11 because the use at issue was not transformative and thus operated as a market
12 substitute. It was upon that finding that the court noted the defendants’ burden.
13 *See id.* (“Because, on the facts presented, Penguin and Dove’s use of *The Cat in*
14 *the Hat* original was non-transformative, and admittedly commercial, we conclude
15 that market substitution is at least more certain, and market harm may be more
16 readily inferred.”).

17 Second, the market harm caused by the market substitution at issue in *Dr.*
18 *Seuss* was directly related to the “substantial” “good will and reputation associated
19 with Dr. Seuss’ work.” *Id.* Here, Plaintiff has disavowed any such harm to good
20 will or reputation⁴ and, in fact, has argued just the opposite, noting that there is no
21 “evidence that the Northland Video is well-known among the general public or
22 even among activists in the abortion debate.” (Pl.’s Opp’n at 6).

23
24 ⁴ Plaintiff has disavowed any damages related to Defendants’ use of the
25 Northland Video other than “the loss of licensing opportunity.” (Chelian Dep. at
95:1-6 at Ex. 1) (Doc. No. 73-2).

1 And finally, Defendants have presented irrefutable evidence that there was
2 no market harm. As the record shows, Plaintiff has never sold the Northland
3 Video, nor has it ever licensed the video. Plaintiff has no draft licensing
4 agreements, contracts, or any other writings whatsoever evidencing any intent to
5 sell or license the Northland Video. Plaintiff never had any substantive
6 discussions about selling or licensing the Northland Video, and Plaintiff continues
7 to use the video as a counseling and educational tool. (*See* Chelian Dep. at 38:16-
8 17; 39:14-25; 42:3-16; 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18
9 at Ex. 1 [admitting that Plaintiff never sold or licensed the Northland Video; never
10 had any discussions about any of the essential or even non-essential terms of a
11 sales or licensing agreement, such as the price at which Plaintiff might be willing
12 to sell or license the Northland Video or the price the supposed purchasers or
13 licensees might be willing to pay to acquire the rights to the Northland Video; and
14 moreover, Plaintiff never had any discussions regarding any of the other terms of
15 a sale or license of the Northland Video]) (Doc. No. 73-2). Consequently, it is not
16 surprising that Plaintiff's "expert" testified that she knew of not a single instance
17 where a similar video was licensed to another abortion provider or anyone else
18 for that matter. (R.A. Dep. at 110:1-11 at Ex. 2) (Doc. No. 73-3). Most tellingly,
19 there was not a single email, letter, note, or draft of any discussion whatsoever of
20 the use, much less the sale or license, of the Northland Video by anyone prior to
21 the appearance of Defendants' videos, much less any kind of an agreement from
22 Plaintiff to any third party. (*See* Chelian Dep. at 38:16-17; 39:14-25; 42:3-16;
23 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (Doc. No. 73-
24 2). Indeed, according to Plaintiff's own documents, the only interest expressed in
25 a writing to actually use the Northland Video occurs after the CBR Video is

1 produced and published and only after Plaintiff and its colleagues became aware
2 of the CBR Video. (Muisse Decl., Ex. A [NFP_000038] at Ex. 3) (Doc. No. 73-4).
3 The final blow to any claim of market harm comes from one of Renee Chelian’s
4 own colleagues, who correctly reassures her after the CBR Video is posted that
5 there is no likelihood that any reasonable person would confuse Plaintiff’s “Good
6 Woman” messaging with the CBR Video. (Muisse Decl., Ex. A [NFP_000048-B]
7 at Ex. 3) (Doc. No. 73-4). And the reason is patently obvious: Defendants’ videos
8 turn the “Good Woman” narrative on its head and are so clearly a transformative
9 critique of the reference work that they stand as the quintessential exemplar of the
10 power of parody and the propriety of fair use. In sum, the evidence is
11 overwhelming and undisputed that there is absolutely no market harm legally or
12 factually.

13 CONCLUSION

14 Based on the foregoing, Defendants respectfully request that this court
15 grant their motion and enter judgment in their favor as to all claims. Additionally,
16 because Plaintiff’s copyright infringement claim is so frivolous, Defendants
17 request that this court award them their costs and reasonable attorneys’ fees
18 pursuant to 17 U.S.C. § 505 and other applicable law.

19 Respectfully submitted,

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21 /s/ David Yerushalmi
22 David Yerushalmi, Esq.

23 AMERICAN FREEDOM LAW CENTER
24 /s/ Robert J. Muise
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Counsel for Defendants

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 21, 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 Respectfully submitted,

7 /s/ Robert J. Muise
8 Robert J. Muise, Esq.

9 *Co-counsel for Defendants*