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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' MEMORANDUM
OF POINTS & AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Date: June 4, 2012
Time: 1:30 pm
Courtroom: 10C
Hon. James V. Selna

TABLE OF CONTENTS

Page

1

2

3 TABLE OF AUTHORITIES ii

4 INTRODUCTION 1

5 STATEMENT OF FACTS 2

6 ARGUMENT 10

7 I. Standard of Review 10

8 II. Defendants’ Use of the Northland Video Constitutes “Fair Use” 10

9 A. Purpose and Character of Use..... 11

10 B. Nature of the Copyrighted Work 17

11 C. Amount and Substantiality of the Portion Used 18

12 D. Market Harm 19

13 III. Defendants Are Not Liable for Infringement 23

14 CONCLUSION 25

15 CERTIFICATE OF SERVICE 27

16

17

18

19

20

21

22

23

24

25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Cases	Page
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	<i>passim</i>
<i>Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997).....	12, 14, 17, 18
<i>Fisher v. Dees</i> , 794 F.2d 432 (9th Cir. 1986).....	10
<i>Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971).....	24
<i>Henley v. DeVore</i> , 733 F. Supp. 2d 1144 (C.D. Cal. 2010).....	16, 17, 24, 25
<i>Mattel, Inc. v. Walking Mountain Prods.</i> , 353 F.3d 792 (9th Cir. 2003).....	<i>passim</i>
<i>Mattel, Inc. v. Walking Mt. Prods.</i> , CV 99-8543 RSWL (RZx), 2004 U.S. Dist. LEXIS 12469 (C.D. Cal. June 21, 2004)	1
<i>Nunez v. Caribbean Int’l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000)	19, 20, 21
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007).....	23, 24
<i>Righthaven, LLC v. Jama</i> , 2:10-CV-1322 JCM (LRL), 2011 U.S. Dist. LEXIS 43952 (D. Nev. Apr. 22, 2011).....	16, 18

1 *Worldwide Church of God v. Phil. Church of God,*
2 227 F.3d 1110 (9th Cir. 2000)..... 16

3 **Statutes**

4 17 U.S.C. § 107.....*passim*
5 17 U.S.C. § 505..... 25
6 17 U.S.C. § 512(i) 23

7 **Rules**

8 Fed. R. Civ. P. 56..... 10
9 Fed. R. Civ. P. 30(b)(6)..... 14

10
11
12
13
14
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16
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18
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1 **INTRODUCTION**

2 Defendants’ transformative and parodic use of Plaintiff’s video was “fair
3 use” and not a copyright infringement as a matter of law. 17 U.S.C. § 107.
4 Indeed, *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003)
5 controls, and it compels a finding in Defendants’ favor on the fair use question.¹

6 Here, there is no reasonable factual dispute that (1) Defendants’ videos
7 were critical parodies of Plaintiff’s video; (2) Defendants’ videos were
8 transformative in *every* sense of the word; (3) Defendants used their videos for a
9 non-profit, educational purpose (*i.e.*, to expose the lies and deception of the
10 Northland video and thus provide a socially-valuable criticism and commentary
11 on the subject matter); (4) Defendants’ videos used the content quantum
12 minimally required to meaningfully criticize, comment upon, disparage, parody,
13 and mock Plaintiff’s video; and (5) Defendants’ videos are not a market substitute
14 for Plaintiff’s video and thus caused no cognizable market harm.

15 In sum, this court should deny Plaintiff’s motion and enter judgment in
16 Defendants’ favor as a matter of law. Indeed, if Defendants’ use of the Northland
17 Video is not “fair use,” then the fair use doctrine is a dead letter.

18
19
20 ¹ In fact, *Mattel, Inc.* compels this court to award Defendants their attorneys’ fees
21 and costs for having to defend against this objectively unreasonable and frivolous
22 lawsuit that was brought in bad faith. *See Mattel, Inc. v. Walking Mt. Prods.*, CV
23 99-8543 RSWL (RZx), 2004 U.S. Dist. LEXIS 12469 (C.D. Cal. June 21, 2004)
24 (awarding defendant \$1,584,089 in attorney’s fees and \$241,797.09 in costs as
25 compensation and deterrence for having to defend against an objectively
unreasonable and frivolous copyright claim in light of the fair use exception).
Indeed, if the district court found the “Barbie doll” case to be unreasonable and
frivolous without the plaintiff having the benefit of the *Mattel, Inc.* precedent from
the Ninth Circuit, then *a fortiori* and as a matter of law this case, post-*Mattel, Inc.*,
is beyond frivolous to the point of vexatious.

1 **STATEMENT OF FACTS**

2 Plaintiff is a Michigan-based clinic that provides abortion services. (Defs.’
3 Statement of Material Facts [hereinafter “DSMF”] at ¶ 1).² In 2009, Plaintiff
4 produced a video entitled, “Everyday Good Women Choose Abortion”
5 (hereinafter “Northland Video” or “Plaintiff’s video”). (DSMF at ¶ 2). The
6 purpose of the video is to “de-stigmatize” abortion. (DSMF at ¶ 7). To that end,
7 it conveys the message that abortion is a good, normal, and moral choice. (DSMF
8 at ¶¶ 2, 10, 11).

9 Plaintiff’s video does not have a commercial purpose. (DSMF at ¶ 8). It is
10 publicly available on YouTube and on Plaintiff’s official website. (DSMF at ¶¶ 3,
11 4, 49, 50). And “certainly one of the reasons it’s posted on [Northland’s] website”
12 is so that Plaintiff can use it to “de-stigmatize” abortion. (DSMF at ¶ 9).

13 To this day, Plaintiff refers its patients to view its video on the Internet, and
14 Plaintiff shows its video to its patients when they come in for counseling. (DSMF
15 at ¶ 4). Plaintiff has never sold nor licensed the Northland Video,³ and the video
16 is available to the public online at no cost. (DSMF at ¶¶ 3, 6, 49, 50).

17
18
19 ² Defendants’ statement of material facts with supporting evidence was previously
filed with this court as Document No. 40-2.

20 ³ Indeed, at no time did Plaintiff ever sell the Northland Video or any license for
21 its derivative use. In fact, Plaintiff has no draft licensing agreements, contracts, or
22 any other written documents evidencing any intent to sell or license the derivative
23 use of its video. Instead, Plaintiff submits self-serving statements that two
24 individuals had some nebulous “discussions” with Renee Chilean in which no
25 details were ever discussed, including the not-so-minor detail of the cost for any
such license. Consequently, the court should dismiss Plaintiff’s claim that it was
intending to license the derivative use of the Northland Video for what it is: a
fabricated, litigation ploy devoid of any factual support. (Defs.’ Statement of
Genuine Disputes at ¶¶ 81-82; *see also* n.5, *infra*).

1 The Northland Video conveys its message that abortion is “good” and
2 normal not only through the words of its narrator, but through the narrator’s attire,
3 demeanor, and syntax, as well as the production setting, which includes the
4 flowers on her desk, the soft background music, and the framed art on the
5 surrounding walls. (DSMF at ¶¶ 2, 11, 19).

6 In early January 2011, Defendant Eric Holmberg, the president and founder
7 of Reel to Real Ministries (d/b/a The Apologetics Group) (hereinafter referred to
8 as “TAG”), “stumble[d] across” the Northland Video on the Internet while he was
9 working on another project; he came across the phrase “good woman abortion,”
10 clicked on the link, and was taken to the Northland Video. (DSMF at ¶¶ 12, 13).

11 The same day that he first saw the Northland Video, Defendant Holmberg
12 made the decision to point out the fallacies of the video by creating his own
13 work—the TAG Video. (DSMF at ¶¶ 14, 15).

14 Defendant Holmberg spent about an hour, maybe two, capturing
15 Northland’s video, editing it down to the segments that were most pertinent to the
16 “goodness” narrative that he, on behalf of TAG, wanted to parody, and then added
17 some stock abortion footage he had received from CBR and some explanatory
18 words at the end (“Northland Family Planning Center, 1-800-447-7354” over a
19 picture of the body parts of an in-utero baby aborted at 10-12 weeks, with “Your
20 Dead baby at 10 to 12 weeks”—knowing that this age range is when the majority
21 of abortions take place). Defendant Holmberg then compressed the video to a 3
22 MPS WMV file and uploaded it as a private video on his main YouTube channel.
23 (DSMF at ¶ 15). Thus, no one could see the TAG Video unless Defendant
24 Holmberg sent them the URL, which he did send to Defendant Cunningham.
25 Consequently, the TAG Video was never seen by the public. The video remained

1 private until YouTube took it down, which was almost immediately. (DSMF at ¶
2 16; *see also* DSMF at ¶ 34).

3 Defendant Holmberg sent the URL to Defendant Cunningham and CBR
4 because to his “understanding,” CBR and Defendant Cunningham “are primarily
5 focused on educating people as to the reality of abortion” and so he thought the
6 video “was more suited for [their] particular area of focus.” (DSMF at ¶ 17).

7 Defendant Holmberg and TAG created and produced the TAG Video for
8 “[e]ducational” purposes so as to educate people about “[t]he factual inaccuracies
9 in the Northland video.” (DSMF at ¶ 18) (emphasis added). The video was
10 produced for non-commercial, nonprofit, educational, and parodic purposes only.
11 (DSMF at ¶¶ 19, 23).

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

22 About a month or two later, Defendant Holmberg learned of the CBR Video
23 (“The Most Shocking (Graphic Imagery), Four-Minute Abortion Debate You Will
24 Ever See”) that was posted on [abortionNo.org](#) and the Pro-LifeTube channel.
25 (DSMF at ¶ 20). AbortionNo.org and the Pro-LifeTube channel websites are

1 focused entirely on an anti-abortion, pro-life message and publish only anti-
2 abortion, pro-life content. (DSMF at ¶ 21) (emphasis added).

3 The CBR Video was produced by Defendant Cunningham and CBR based
4 on CBR's own edits, music, and images. Neither TAG nor Defendant Holmberg
5 had anything to do with the actual creation, production, posting, or distribution of
6 the CBR Video. (DSMF at ¶ 22).

7 Like the TAG Video, the CBR Video was created and produced for
8 nonprofit, non-commercial, educational, and parodic purposes only. (DSMF at ¶
9 23; *see also* DSMF at ¶¶ 37-40). Defendants have never solicited donations for
10 the creation, production, or posting of the CBR Video. (DSMF at ¶¶ 45-46).

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

14 In his capacity as Executive Director of CBR, Defendant Cunningham was
15 the person responsible for creating, producing, and publishing the CBR Video.
16 (DSMF at ¶ 25). Neither Defendant Cooper nor Defendant Gruber, an intern, had
17 any authority to create, produce, or publish the CBR Video. At all times,
18 Defendants Cooper and Gruber were working under Defendant Cunningham's
19 direction and control as the Executive Director of CBR. (DSMF at ¶ 26).

20 Defendant Todd Bullis had no role whatsoever in the creation or production
21 of the CBR Video. (DSMF at ¶ 27).

22 Upon Defendant Cunningham's urging and insistence that the CBR Video
23 did not infringe any copyright because it was "fair use," Defendant Bullis
24 permitted the video to be posted on Pro-LifeTube, which he owned and operated
25 at the time. (DSMF at ¶ 28).

1 CBR was considering purchasing the Pro-LifeTube website from Defendant
2 Bullis. They were finalizing their discussions when they both received letters on
3 or about March 21, 2011 from Plaintiff's counsel demanding that they take down
4 the CBR Video from the website. (DSMF at ¶ 29).

5 Defendant Cunningham urged Defendant Bullis not to remove the video
6 since CBR would soon be purchasing the website and this would then become
7 CBR's issue alone. (DSMF at ¶ 30). Defendant Bullis obliged and subsequently
8 sold the website to CBR for \$6,000. (DSMF at ¶ 31).

9 As a result of the sale, which was finalized in mid-April 2011, Defendant
10 Bullis no longer has any control over the Pro-LifeTube website. (DSMF at ¶ 32).

11 As noted above, the idea for the CBR Video was introduced to Defendant
12 Cunningham by Defendant Holmberg sometime in early January 2011.⁴ (DSMF
13 at ¶ 33). However, the CBR Video was created and produced solely by CBR. All
14 of the editing and every posting of the video was done under Defendant
15 Cunningham's supervision, direction, and control as Executive Director of CBR.
16 All abortion video segments originated from the CBR video archives, and the
17 musical score was sourced from an anonymous public domain score. There was
18 no cost to CBR to produce the video. (DSMF at ¶ 35).

19 The CBR Video was made, posted, and used exclusively for nonprofit, non-
20 commercial, educational, and parodic purposes. There was no consideration or
21 anything of any value received for the video. CBR did not sell, license, or publish
22 the video commercially. (DSMF at ¶¶ 37, 38, 45, 46). CBR's critical parody is
23 available only for viewing on the Internet. It employs a minimalist approach to
24

25 ⁴ The TAG Video was removed from YouTube within 24 hours, and Defendant
Cunningham has never seen that video posted anywhere else. (DSMF at ¶ 34).

1 production and is not offered for download or sale on any distribution medium.
2 (DSMF at ¶ 39).

3 The CBR Video transforms the Northland Video by adding graphic images
4 of aborted fetuses to certain parts of the video, a jarring music score, a scripture
5 citation to 2 Corinthians 11:13-14, which warns viewers that Satan masquerades
6 as “an angel of light,” and an introduction quoting George Orwell, which
7 condemns the use of lies to obscure murder, so as to criticize, comment upon,
8 disparage, parody, mock, and disagree with the message conveyed by the
9 Northland Video. (DSMF at ¶¶ 40-44).

10 The CBR Video criticizes, comments upon, disparages, parodies, mocks,
11 and disagrees with both the deceptive message and the deceptive manner of
12 Northland’s staffer who narrates the Northland Video. Northland’s consistent
13 theme is the lie that abortion is “normal.” Every aspect of the staffer’s attire,
14 demeanor, syntax, and intonation is calculated to reinforce this deception. The
15 same is true with the production set, notably the flowers on her desk, the soft
16 background music, and the framed art on the walls. CBR’s Video comments
17 upon, disparages, parodies, mocks, and rebuts all this duplicity with an accusatory
18 literary quote in its introduction, jarring music in its score, and graphic imagery in
19 its video refutation. (DSMF at ¶ 47).

20 Plaintiff admits that Defendants’ videos “changed,” “ruined,” and “distort”
21 “every bit” of the intent, meaning, and message of the Northland Video. (DSMF
22 at ¶ 41). Plaintiff admits that the purpose of its video was to “de-stigmatize”
23 abortion, while Defendants’ videos plainly “stigmatize” abortion and seek to
24 “shame and anger and disgust anyone who’s watching [them].” (DSMF at ¶ 42).
25 Plaintiff admits that Defendants’ videos “ruined” and “changed” “every bit” of the

1 intent, meaning, and message of the Northland Video by, *inter alia*, “add[ing]
2 shame and sickening images” of abortion and by “add[ing] music, other words
3 and footage.” (DSMF at ¶¶ 41-44).

4 The Northland Video is promotional, advertising material posted on a
5 business website to persuade prospective customers that abortion is normal and
6 even virtuous. It is intended to de-stigmatize abortion in the public mind and to
7 gain a commercial advantage vis-a-vis Northland’s abortion industry competitors
8 through false advertising. (DSMF at ¶¶ 2-4, 7, 9-11, 48, 49).

9 CBR used approximately 2 minutes and 2 seconds of the Northland Video’s
10 4 minutes and 41 seconds of footage in CBR’s 4 minute and 13 second video.
11 Thus, less than half of the CBR Video is comprised of content taken from the
12 Northland Video. This percentage is the content quantum minimally required to
13 meaningfully criticize, comment upon, disparage, parody, mock, and rebut the
14 most deceptive elements of Plaintiff’s most misleading advertising claims.
15 (DSMF at ¶ 52). The same is true with the TAG Video, which similarly
16 juxtaposed graphic abortion imagery against the Northland Video’s “goodness”
17 narrative. (DSMF at ¶¶ 15, 18, 19).

18 CBR’s purpose for producing the CBR Video was to expose Plaintiff’s false
19 claims and barbaric practices through graphic audio-visual parody. (DSMF at ¶
20 54). As Defendant Cunningham testified, “As the Northland abortion clinic’s
21 saleswoman was filming her commercial advertisement, just down the hall, safely
22 out of sight of the camera, viable babies were being aborted, without benefit of
23 anesthesia—babies so far along in pregnancy that they would have been born alive
24 had their mother’s labor been induced before killing them. The outrage here isn’t
25 merely the ages of the babies they are aborting. Every abortion is horrific at any

1 age. The real scandal is that this abortionist, disguised as some sort of objective
2 counselor, complete with conservatively styled hair, starched blouse, and horn-
3 rimmed glasses, looks straight into the camera and tells lie after lie, for the
4 purpose of tricking vulnerable, desperate women—and young girls—into an
5 unimaginably ruinous mistake. Her manner is shrewdly calculated to be matter-
6 of-fact and reassuring. Her purpose is to disarm her victims and lure them into a
7 carefully laid trap.” (DSMF at ¶ 55).

8 Defendants’ videos are intended to criticize, comment upon, disparage,
9 parody, mock, and disagree with the Northland staffer’s manner as well as her
10 message, particularly her message that abortion is normal and “good.” In fact, the
11 Northland narrator actually uses some variant of the word “good” eighteen times
12 in four minutes to describe abortion. (DSMF at ¶ 56).

13 Every production decision CBR made was intended as an “abnormal”
14 counterpoise to some corresponding production element in the Northland Video.
15 None of these criticisms would have worked without the use of Northland’s most
16 offensive production content. (DSMF at ¶ 57).

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

1 is figuratively force open the door down the hall from the Northland narrator's
2 office. The CBR Video simply shows viewers the reality which Northland's
3 narrator struggles to distort. Is abortion an expression of 'love' or a vicious act of
4 violence? The CBR Video tacitly challenges viewers to decide whether they are
5 going to believe what they hear or what they see—with their own eyes. Con
6 artists can spin the facts, but the camera records the truth." (DSMF at ¶ 58).

7 ARGUMENT

8 I. Standard of Review.

9 Summary judgment is appropriate when "there is no genuine dispute as to
10 any material fact and the [requesting party] is entitled to judgment as a matter of
11 law." Fed. R. Civ. P. 56(a). Indeed, where the *material* facts are not subject to
12 dispute, summary judgment on the fair use question is appropriate. *Fisher v.*
13 *Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

14 As demonstrated in Defendants' motion for summary judgment (Doc. No.
15 40) and below, Defendants are entitled to summary judgment on the fair use
16 question as a matter of law.

17 II. Defendants' Use of the Northland Video Constitutes "Fair Use."

18 "Fair use" is an exception to a copyright holder's right to exclusive use of
19 the original work and its derivatives. It is an affirmative defense to copyright
20 infringement and is codified under 17 U.S.C. § 107.

21 In determining whether the use made of an original work in a particular
22 case constitutes "fair use," the court must consider the following four factors: (1)
23 The purpose and character of the use, including whether such use is of a
24 commercial nature or is for nonprofit educational purposes; (2) The nature of the
25 copyrighted work; (3) The amount and substantiality of the portion used in

1 relation to the copyrighted work as a whole; and (4) The effect of the use upon the
2 potential market for or value of the copyrighted work. 17 U.S.C. § 107.

3 The analysis of these factors “permits and requires courts to avoid rigid
4 application of the copyright statute when, on occasion, it would stifle the very
5 creativity which that law is designed to foster.” *Campbell v. Acuff-Rose Music,*
6 *Inc.*, 510 U.S. 569, 577 (1994) (citation and quotation omitted). These four
7 factors should not “be treated in isolation one from another. All are to be
8 explored, and the results weighed together, in light of the purposes of copyright.”
9 *Id.* at 578.

10 Here, each of the four factors weigh in favor of this court finding that
11 Defendants’ critical parody of Plaintiff’s video was “fair use” and thus not a
12 copyright infringement as a matter of law.

13 **A. Purpose and Character of Use.**

14 Under the “purpose and character of use” factor, this court considers the
15 extent to which the new work is “transformative.” *Mattel, Inc. v. Walking*
16 *Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003). That is, the court determines
17 whether Defendants’ videos add “something new, with a further purpose or
18 different character, altering the first with new expression, meaning, or message.”
19 *Id.* (quoting *Campbell*, 510 U.S. at 579) (emphasis added). The court also
20 considers whether the new work was for- or not-for-profit. *Mattel, Inc.*, 353 F.3d
21 at 800. Moreover, “the more transformative the new work, the less will be the
22 significance of other factors, like commercialism, that may weigh against a
23 finding of fair use.” *Campbell*, 510 U.S. at 515-16; *see also Mattel, Inc.*, 353 F.3d
24 at 803 (“Given the extremely transformative nature and parodic quality of [the
25 challenged] work, its commercial qualities become less important.”).

1 A parody is considered a “fair use.” A parody is the use of some portion of
2 a copyrighted work to “hold[] it up to ridicule,” or otherwise comment or shed
3 light on it. *Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394,
4 1400-01 (9th Cir. 1997). A parody is considered transformative because it
5 provides a socially-valuable criticism or commentary of the subject work.
6 *Campbell*, 510 U.S. at 579; *see also Mattel, Inc.*, 353 F.3d at 801 (noting that
7 “because parody is a form of social and literary criticism, it has socially
8 significant value as free speech under the First Amendment”) (citation and
9 quotations omitted). Consequently, a parody needs to use some portions of the
10 original work because the effectiveness of a parody depends upon its ability to
11 “conjure up” the original. *Campbell*, 510 U.S. at 580-81, 588. Moreover, because
12 the author of the original is unlikely to permit the use of his or her work to
13 criticize or ridicule that work, as in this case, a parody is not likely to supplant the
14 market for the original or its derivatives. *Id.* at 592.

15 In *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003),
16 the court noted that “Mattel, through impressive marketing, has established Barbie
17 as ‘*the ideal American woman*’ and a ‘*symbol of American girlhood*’ for many.”
18 *Id.* at 802 (emphasis added). The court then observed that the defendant “*turns*
19 *this image on its head* . . . by displaying carefully positioned, nude, and sometimes
20 frazzled looking Barbies in often ridiculous and apparently dangerous situations.
21 *His lighting, background, props and camera angles all serve to create a context*
22 *for Mattel’s copyrighted work that transforms Barbie’s meaning.* [The defendant]
23 *presents the viewer with a different set of associations and a different context for*
24 *this plastic figure.*” *Id.* (emphasis added). The court thus concludes as follows:
25

1 However one may feel about his message—whether he is wrong or
2 right, whether his methods are powerful or banal—his photographs
3 parody Barbie and everything Mattel’s doll has come to signify.
4 Undoubtedly, one could make similar statements through other means
5 about society, gender roles, sexuality, and perhaps even social class.
6 But Barbie, and all the associations she has acquired through Mattel’s
7 impressive marketing success, conveys these messages in a particular
8 way that is ripe for social comment.

9 *Id.* (emphasis added). The same is true here. Plaintiff, through its Northland
10 Video, is attempting to establish that its abortion business is “good,” normal, and
11 moral, and that those who pay for its abortion services are similarly participating
12 in this “goodness.” Defendants’ videos turn this narrative “on its head” by
13 presenting an entirely different set of associations and a different context for
14 Plaintiff’s abortion messaging that transform the meaning of the Northland
15 Video—the target of Defendants’ critical parody.

16 Indeed, as *Mattel, Inc.* makes clear, Plaintiff’s claim that only “humorous
17 mimicries” qualify as parodies for fair use purposes is patently incorrect, if not
18 utterly absurd, particularly in light of the factual context of this case. (*See* Pl.’s
19 Mem. at 13) (claiming that Defendants’ videos are not “parody” because they “are
20 not humorous mimicries of the Northland Video”). As an initial matter, there is
21 nothing humorous about abortion—it is a subject of serious social concern and is
22 thus “ripe for social comment”—the highest purpose of “fair use.” *See id.*

23 Moreover, Plaintiff cites to no case which holds that parody in the context
24 of fair use is limited to “humorous mimicries.” Indeed, the very case cited by
25 Plaintiff makes the point that ridicule as commentary is “the nub” of parody:

1 The germ of parody lies in the definition of the Greek *parodeia*,
2 quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung
3 alongside another.” . . . Modern dictionaries accordingly describe a
4 parody as a “literary or artistic work that imitates the characteristic
5 style of an author or a work for comic effect or ridicule,” or as a
6 “composition in prose or verse in which the characteristic turns of
7 thought and phrase in an author or class of authors are imitated in
8 such a way as to make them appear ridiculous.” For the purposes of
9 copyright law, the nub of the definitions, and the heart of any
10 parodist’s claim to quote from existing material, is the use of some
11 elements of a prior author’s composition to create a new one that, at
12 least in part, comments on that author’s works.

13 *Campbell*, 510 U.S. at 580 (footnotes omitted) (emphasis added).

14 Here, there can be no reasonable dispute that Defendants’ videos are
15 transformative—that is, Defendants “create[d] a transformative work with new
16 expression, meaning, [and] message.” *See Dr. Seuss Enters., L.P.*, 109 F.3d at
17 1401. And there can be no reasonable dispute that Defendants’ videos “hold[] up
18 to ridicule” the “goodness” narrative of the Northland Video—the very target of
19 Defendants’ critical parody. *See id.* This is self-evident by viewing the videos.

20 And, in the event one is incapable of viewing the obvious, Plaintiff admits
21 that Defendants’ videos are in fact transformative. During the deposition of
22 Northland taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil
23 Procedure, Plaintiff admitted that Defendants’ videos “changed,” “ruined,” and
24 “distort” “every bit” of the intent, meaning, and message of the Northland Video.
25 (DSMF at ¶ 41). Plaintiff admitted that the purpose of its video was to “de-

1 stigmatize” abortion, while Defendants’ videos plainly “stigmatize” abortion and
2 seek to “shame and anger and disgust anyone who’s watching [them].” (DSMF at
3 ¶ 42). Consequently, aside from the obvious and only reasonable conclusion one
4 could reach from actually watching the videos, Plaintiff admitted that Defendants’
5 videos were “not what we made.” (DSMF at ¶ 43). “They took [Plaintiff’s] video
6 and they’ve changed it.” (DSMF at ¶ 43). As Plaintiff noted, Defendants changed
7 the entire intent, message, and meaning of the Northland Video by, *inter alia*,
8 “add[ing] music, other words and footage.” (DSMF at ¶ 44).

9 Thus, “however one may feel about [Defendants’] message—whether [they
10 are] wrong or right, whether [their] methods are powerful or banal—[their videos]
11 parody [Northland’s video] and everything [it] has come to signify.” Therefore,
12 Defendants’ videos are “transformative” as a matter of fact and law. Indeed, “[b]y
13 developing and transforming associations with [Northland’s “goodness” narrative,
14 Defendants have] created the sort of social criticism and parodic speech protected
15 by the First Amendment and promoted by the Copyright Act.” *See Mattel, Inc.*,
16 353 F.3d at 803 (emphasis added).

17 Consequently, “[g]iven the extremely transformative nature and parodic
18 quality” of Defendants’ videos, any “commercial qualities become less important”
19 in the fair use analysis. *Mattel, Inc.*, 353 F.3d at 803. Nonetheless, there is no
20 dispute that Defendants did not sell, license, or publish their videos commercially.
21 Defendants created, produced, and published their videos solely for nonprofit,
22 educational purposes. And Plaintiff’s claim that Defendants used the Northland
23 video “commercially” is factually and legally incorrect. (*See* Pl.’s Mem. at 11-
24 12).

1 As Defendant Cunningham testified, “CBR has not directly solicited
2 donations for the CBR Video. Any requests for donations remotely related to the
3 video were made after Northland filed this lawsuit and for the sole purpose of
4 helping us defray the costs associated with this litigation.” (Cunningham Decl. at
5 ¶ 11) (Doc. No. 40-4). *See also Righthaven, LLC v. Jama*, 2:10-CV-1322 JCM
6 (LRL), 2011 U.S. Dist. LEXIS 43952, at *7-*8 (D. Nev. Apr. 22, 2011) (finding
7 “fair use” of copyrighted article and noting that the nonprofit “defendants’
8 solicitation of donations on their website is immaterial, and no reasonable jury
9 could conclude that the defendants used the disputed article for a commercial
10 purpose”). Accepting Plaintiff’s argument would essentially disqualify every
11 nonprofit from asserting a fair use defense to a copyright infringement claim since
12 virtually every nonprofit solicits donations on its website and from others to
13 support the work it is doing. Indeed, Plaintiff cannot point to one dollar that CBR
14 raised that was directly related in any commercial or for-profit sense to
15 Defendants’ use of the Northland Video. As noted by the indisputable evidence,
16 any direct request for donations related to the CBR Video was made for the
17 purpose of deferring the costs of defending against this meritless litigation.

18 And while a nonprofit may stand to gain in a commercial sense from
19 copying a work in its entirety and distributing large numbers of copies to its
20 members and the public without “paying the customary price” for the work, *see*
21 *Worldwide Church of God v. Phil. Church of God*, 227 F.3d 1110, 1117-19 (9th
22 Cir. 2000), there is nothing remotely similar to that here. Thus, Plaintiff’s reliance
23 on such cases is entirely misplaced. (Pl.’s Mem. at 12). Additionally, *Henley v.*
24 *DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010), is distinguishable because, unlike
25 the videos at issue here, there was nothing transformative about the *Henley*

1 defendants' use of the plaintiff's music. *Mattel, Inc.*, 353 F.3d at 803 (holding
2 that "commercial qualities become less important" in the fair use analysis for
3 transformative works). Moreover, unlike the facts in this case, it is evident that
4 the defendants in *Henley* were using the copyrighted works specifically as a
5 fundraising tool. *See Henley*, 733 F. Supp. 2d at 1159.

6 In sum, the full weight of the first factor falls in favor of Defendants.

7 **B. Nature of the Copyrighted Work.**

8 This factor, the "nature of the copyrighted work," reflects a recognition
9 "that creative works are 'closer to the core of intended copyright protection' than
10 informational or functional works." *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr.*
11 *Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir.
12 1997)). Moreover, as the Ninth Circuit has "recognized in the past, 'this nature of
13 the copyrighted work factor typically has not been terribly significant in the
14 overall fair use balancing.'" *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr. Seuss*
15 *Enters., L.P.*, 109 F.3d at 1402).

16 Here, there is nothing "creative" about Plaintiff's infomercial. The
17 Northland Video is simply a deceptively false advertisement used by Plaintiff to
18 lure people into its abortion clinic. It is not artistic in any conceivable sense of the
19 word. There is nothing "creative" about hiding the truly violent and inhumane
20 nature of abortion behind an Orwellian "newspeak" descriptive such as
21 "goodness." Indeed, the fact that the Northland Video was so deceptive is the
22 very reason why Defendants' videos, which used irrefutable visual evidence to
23 rebut Plaintiff's false narrative, were so effective in their criticism, commentary,
24 and parody. And this is particularly true in the case of the Northland narrator
25

1 who, while describing the “goodness” of an abortion, is having her deceptive
2 words juxtaposed against a brutally graphic reality.

3 Moreover, the fact that the Northland Video is informational and not
4 “creative” entertainment is demonstrated by the fact that Plaintiff, today, uses the
5 video when counseling its clients.

6 Indeed, Plaintiff’s designated “expert” testified under oath that there was
7 nothing creative, new, or unique about the “Good Woman concept,” and it did not
8 originate with Northland. (R.A. Dep. at 100 at Ex. 2).

9 In sum, “a reasonable trier of fact could only reach one conclusion as to the
10 nature of the [Northland Video]—it is an informational work . . . and thus
11 deserves less protection than a creative work of entertainment.” *Righthaven, LLC*,
12 2011 U.S. Dist. LEXIS 43952, at *8. Therefore, this factor weighs in Defendants’
13 favor.

14 **C. Amount and Substantiality of the Portion Used.**

15 The third factor “asks whether the amount and substantiality of the portion
16 used in relation to the copyrighted work as a whole, are reasonable in relation to
17 the purpose of copying.” *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr. Seuss Enters.,*
18 *L.P.*, 109 F.3d at 1402). The court “assesses the persuasiveness of a parodist’s
19 justification for the particular copying done, recognizing that the extent of
20 permissible copying varies with the purpose and character of the use.” *Mattel,*
21 *Inc.*, 353 F.3d at 803 (quotations and citation omitted). As the Ninth Circuit
22 noted, “*We do not require parodic works to take the absolute minimum amount of*
23 *the copyrighted work possible.* As the Supreme Court stated in *Campbell*, ‘once
24 enough has been taken to assure identification, how much more is reasonable will
25 depend, say, on the extent to which the [work’s] overriding purpose and character

1 is to parody the original, or, in contrast, the likelihood that the parody may serve
2 as a market substitute for the original.” *Mattel, Inc.*, 353 F.3d at 803 (quoting
3 *Campbell*, 510 U.S. at 587) (emphasis added). The *Mattel, Inc.* ruling is critical
4 here precisely because the plaintiff’s argument that less of the Barbie image could
5 have been used—similar to the argument advanced by Plaintiff in this case—was
6 soundly rejected by the court. *Mattel, Inc.*, 353 F.3d at 804.

7 Here, Defendants added words and music and juxtaposed graphic images of
8 abortion against the “goodness” narrative of Plaintiff’s video. Less than half of
9 the CBR Video is comprised of content taken from the Northland Video. This
10 percentage, however, is the content quantum minimally required to meaningfully
11 criticize, comment upon, disparage, parody, and rebut the most deceptive elements
12 of Northland’s most misleading advertising claims. Specifically, the quite
13 obvious use of each segment of the Northland Video was to directly counter the
14 “goodness” messaging in that segment with the harsh and revolting reality that is
15 abortion. The same is true with the TAG Video, which similarly juxtaposed
16 graphic abortion imagery against Northland’s “goodness” narrative. Moreover,
17 there is no question that the “overriding purpose and character [of Defendants
18 videos] is to parody the” Northland Video, and there is no chance that Defendants’
19 videos will “serve as a market substitute for” the Northland Video. Therefore, this
20 factor favors Defendants as well.

21 **D. Market Harm.**

22 Under the fourth factor, the relevant inquiry is whether the new work tends
23 to supplant or substitute for the potential market for the original or its derivatives.
24 *Campbell*, 510 U.S. at 592; *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24
25 (1st Cir. 2000) (finding fair use and noting that “this factor is concerned with

1 secondary uses that, by offering a substitute for the original, usurp a market that
2 properly belongs to the copyright holder”) (citation omitted). Harm caused by
3 effective criticism or disparagement is not cognizable injury under the Copyright
4 Act. *Campbell*, 510 U.S. at 590-92. As the Supreme Court clearly stated, “[A]s to
5 parody pure and simple, it is more likely that the new work will not affect the
6 market for the original in a way that is cognizable under this factor.” *Id.* at 591.

7 “Because parody may quite legitimately aim at garroting the original,
8 destroying it commercially as well as artistically, the role of the courts is to
9 distinguish between biting criticism that merely suppresses demand and copyright
10 infringement, which usurps it.” *Id.* at 592 (internal citations, quotations, and
11 brackets omitted) (emphasis added). “This distinction between potentially
12 remedial displacement and unremediable disparagement is reflected in the rule
13 that there is no protectible derivative market for criticism.” *Id.*; *see also Mattel,*
14 *Inc.*, 353 F.3d at 805 (“Because of the parodic nature of [the defendant’s work],
15 however, it is highly unlikely that it will substitute for products in Mattel’s
16 markets or the markets of Mattel’s licensees.”). Thus, “the only harm to
17 derivatives that need concern” this court, “is the harm of market substitution. The
18 fact that a parody may impair the market for derivative uses by the very
19 effectiveness of its critical commentary is no more relevant under copyright than
20 the like threat to the original market.” *Campbell*, 510 U.S. at 593; *Mattel, Inc.*,
21 353 F.3d at 805 (“As to Mattel’s claim that [the defendant] has impaired Barbie’s
22 value, this fourth factor does not recognize a decrease in value of a copyrighted
23 work that may result from a particularly powerful critical work.”); *Nunez*, 235
24 F.3d at 24 (“In fact, to the extent that the copying damages a work’s marketability
25 by parodying it or criticizing it, the fair use finding is unaffected.”).

1 Once again, no reasonable trier of fact could conclude that Defendants’
2 videos would be a market *substitute* for the Northland Video. To begin, there is
3 simply no evidence in the record that there was a market for a substitution to have
4 occurred or that Plaintiff seriously contemplated entering any such market, except
5 as an *ad hoc* fabrication for this lawsuit. But, even if we were to assume,
6 *arguendo*, that a market existed, it is unreasonable and utterly inconceivable that
7 Defendants’ videos would compete with the Northland Video in the abortion
8 clinic or abortion counseling market. And this is obviously the case “because the
9 parody and the original . . . serve different market functions.” *Campbell*, 510 U.S.
10 at 591. Here, one video seeks to promote its clinical services by portraying
11 abortion as a moral and virtuous “good” and the other video seeks to expose the
12 reality of abortion by juxtaposing images showing that abortion is a violent and
13 vicious act that results in the killing of an innocent human life. It is nonsense to
14 even suggest that the latter (Defendants’ videos) is a market substitute for the
15 former (Plaintiff’s video). And this is further evidenced by the fact that
16 Defendants’ videos only ever appear on pro-life websites, while Plaintiff
17 maintains the Northland Video on its abortion clinic website (and YouTube) to
18 this very day. There is no reasonable dispute that Defendants’ videos would never
19 appear on an abortion clinic’s website (and they are not permitted on YouTube).
20 Thus, there is simply no basis for claiming any market harm in this case.

21 Moreover, there is no question that Northland would neither develop nor
22 license others to develop a video similar to Defendants’ videos. As the U.S.
23 Supreme Court noted, “The market for potential derivative uses includes only
24 those that creators of original works would in general develop or license others to
25 develop. Yet the unlikelihood that creators of imaginative works will license

1 critical reviews or lampoons of their own productions removes such uses from the
2 very notion of a potential licensing market.” *Campbell*, 510 U.S. at 592. Thus, as
3 noted above, the fact that Defendants’ parody may impair some imagined market
4 for derivative uses precisely because of the effectiveness of its critical
5 commentary is far more dispositive of the issue of fair use than a fact-deprived
6 claim of market harm.

7 In sum, like the first three factors, this factor falls squarely in favor of
8 Defendants.⁵

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11 ⁵ Plaintiff’s counsel stipulated on the record that there was no market harm other
12 than an alleged harm to the derivative licensing use of the Northland Video
13 (Chelian Dep. at 95 at Ex. 1), which itself is based solely upon some vague
14 “discussions” Renee Chilean allegedly had with two people in which no details
15 were ever discussed. Plaintiff has no draft licensing agreements, contracts, or any
16 other writings whatsoever evidencing any intent to sell or license the derivative
17 use of the Northland Video. Plaintiff never had any substantive discussions about
18 selling or licensing the derivative use of the Northland Video, and Plaintiff
19 continues to use the video as a counseling and educational tool. (*See, e.g.*,
20 Chelian Dep. at 38:16-17; 39:14-25; 42:3-16; 102:23-25; 103:1-2, 5-12; 104:20-
21 23; 105:4-11; 106:12-18 at Ex. 1 [admitting that Northland never sold or licensed
22 the Northland Video; never had any discussions about any of the essential or even
23 non-essential terms of a sales or licensing agreement, such as the price at which
24 Plaintiff might be willing to sell or license the Northland Video or the price the
25 supposed purchasers or licensees might be willing to pay to acquire the rights to
the Northland Video; and moreover, Plaintiff never had any discussions regarding
any of the other terms of a sale or license of the Northland Video]; *see also* DSMF
at ¶ 4). Indeed, it is no accident that 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).
Plaintiff’s entire offer of proof of a market and of market harm is the self-serving
and baseless assertions of E.B.—assertions that lack any credibility in that they
are transparently fabricated for purposes of this lawsuit. Most tellingly, there was
not a single email, letter, note, or draft of any discussion whatsoever of the use,
much less the sale or license, of the Northland Video by C.K. or E.B., or any

1 In the final analysis, “the public benefit in allowing . . . social criticism to
 2 flourish is great. The fair use exception recognizes this important limitation on
 3 the rights of the owners of copyrights.” *Mattel, Inc.*, 353 F.3d at 806 (“Finally,
 4 the benefits to the public in allowing such use—allowing artistic freedom and
 5 expression and criticism of a cultural icon—are great. Allowing [the defendant’s]
 6 use serves the aims of the Copyright Act by encouraging the very creativity and
 7 criticism that the Act protects.”). Thus, Defendants’ use of the Northland Video is
 8 “fair use” and not a copyright infringement.

9 **III. Defendants Are Not Liable for Infringement.**

10 While fair use is a complete defense for all Defendants in this action, there
 11 is, nonetheless, no basis for finding Defendants Cooper, Gruber, Bullis,⁶ TAG, or
 12

13 third-party prior to the appearance of Defendants’ videos, much less any kind of
 14 an agreement from Plaintiff to any third party. (*See* Chelian Dep. at 38:16-17;
 15 39:14-25; 42:3-16; 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at
 16 Ex. 1). Indeed, according to Plaintiff’s own documents, the only interest
 17 expressed in a writing to actually use the Northland Video occurs *after* the CBR
 18 Video is produced and published and only after Plaintiff and its colleagues
 19 became aware of the CBR Video. (Muisse Decl., Ex. A [NFP_000038] at Ex. 2).
 20 The final blow to this fabrication’s legal relevance is the fact that one of Renee
 21 Chelian’s own colleagues reassures her after the CBR Video is posted that there is
 22 no likelihood that any reasonable person would confuse Plaintiff’s “Good
 23 Woman” messaging with the CBR Video. (Muisse Decl., Ex. A [NFP_000048-B]
 24 at Ex. 2). And the reason is patently obvious: Defendants’ videos turn the “Good
 25 Woman” narrative on its head and are so clearly a transformative critique of the
 reference work that they stand as the quintessential exemplar of the power of
 parody and the propriety of fair use. (*See* DSMF at ¶¶ 15, 18-19, 25, 40). In sum,
 there is absolutely no evidence of market harm legally or factually. (Defs.’
 Statement of Genuine Disputes at ¶¶ 81-82).

⁶ Defendant Bullis is also not liable as a result of the safe harbor provision of 17
 U.S.C. § 512(i). *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir.
 2007) (“We hold that a service provider ‘implements’ a policy if it has a working
 notification system, a procedure for dealing with DMCA-compliant notifications,

1 Holmberg liable on the basis of “vicarious infringement” or “contributory
2 infringement.”

3 “Vicarious infringement requires proof that the defendant exercises the
4 requisite control over the direct infringer and that the defendant derives a direct
5 financial benefit from the direct infringement.” *Henley*, 733 F. Supp. 2d at 1164
6 (citations and quotations omitted); *see also Gershwin Publ’g Corp. v. Columbia*
7 *Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that “one may be
8 vicariously liable [for copyright infringement] if he has the right and ability to
9 supervise the infringing activity and also has a direct financial interest in such
10 activities”).

11 “Contributory infringement requires proof that a defendant (1) has
12 knowledge of a third party’s infringing activity, and (2) induces, causes, or
13

14 and if it does not actively prevent copyright owners from collecting information
15 needed to issue such notifications.”). First, it is evident from the record that
16 Plaintiff successfully provided Defendant Bullis with a “take down notice,” and
17 without any difficulty, thereby evidencing a “working notification system.” Two,
18 the record evidences “a procedure for dealing with DMCA-compliant
19 notifications” (*i.e.*, the statute does not require the publication of the procedures
20 prior to receipt of the take-down notification). And three, there is nothing in the
21 record even suggesting that Defendant Bullis “prevent[ed] copyright owners from
22 collecting information needed to issue such notifications.” In fact, Defendant
23 Bullis posted the CBR Video, which included, when viewed by the public, the
24 name of the publishing party, CBR, and CBR’s website address, abortionNo.org.
25 (*See* DSMF at ¶ 25 [CBR Video]). Indeed, there is nothing in the record to
suggest that Plaintiff had any difficulty determining who needed to be provided
the take-down notification and how to contact them. And finally, because the
CBR Video made fair use of the Northland Video, there was no copyright
infringement as a matter of law, and thus Defendant Bullis acted appropriately
under all the relevant statutory provisions. (*See also* DSMF at ¶¶ 28-30; *see also*
¶ 32 [demonstrating that Bullis sold his website shortly after receiving Plaintiff’s
letter]).

1 materially contributes to the infringing conduct.” *Henley*, 733 F. Supp. 2d at 1164
2 (citations and quotations omitted).

3 As the evidence shows, Defendant Cunningham, in his capacity as
4 Executive Director of CBR, was the only person who had the right and ability to
5 supervise any allegedly infringing activity with regard to the CBR Video (and
6 none had a direct financial interest in any such activity). Additionally, Defendants
7 Cunningham and CBR were the only Defendants that induced, caused, or
8 materially contributed to any alleged copyright infringement. Defendants Cooper,
9 Gruber, and Bullis had no authority to supervise or control any infringing activity,
10 nor did they induce, cause, or materially contribute to any such activity.
11 Moreover, the extent of Eric Holmberg’s and TAG’s involvement in any alleged
12 copyright violation was to create a concept video that neither Holmberg nor TAG
13 ever made available to the public nor used for any personal gain, financial or
14 otherwise. Indeed, while Defendant Holmberg did provide Defendant
15 Cunningham with a concept, he did not learn of any of CBR’s activities until he
16 actually saw the allegedly infringing video posted on the Internet.

17 In sum, Defendants are not liable for copyright infringement.

18 CONCLUSION

19 Based on the foregoing, Defendants respectfully request that this court deny
20 Plaintiff’s motion and enter judgment in Defendants’ favor as to all claims.
21 Defendants also request that this court award them their costs and reasonable
22 attorneys’ fees pursuant to 17 U.S.C. § 505 and other applicable law.
23
24
25

1 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 11, 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*

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