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

19 **NORTHLAND FAMILY**
20 **PLANNING 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
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

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

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1 **INTRODUCTION**

2 This case involves a vexatious and frivolous lawsuit brought by Plaintiff
3 Northland Family Planning Clinic (“Plaintiff” or “Northland”), an abortion
4 provider located in Michigan, to silence the anti-abortion speech of Defendants,
5 who are pro-life advocates and who made “fair use” of a video produced by
6 Plaintiff to expose, criticize, and parody the video’s deception and lies regarding
7 abortion.

8 There are no genuine issues of material fact in this case, and Defendants
9 are entitled to judgment in their favor as a matter of law because Defendants’ use
10 of Plaintiff’s video was “fair use” pursuant to 17 U.S.C. § 107 and thus not a
11 copyright infringement.

12 **STATEMENT OF FACTS**

13 Plaintiff is a Michigan-based clinic that provides abortion services.
14 (Statement of Material Facts [hereinafter “SMF”] at ¶ 1). In 2009, Plaintiff
15 produced a video entitled, “Everyday Good Women Choose Abortion”
16 (hereinafter “Northland Video” or “Plaintiff’s video”). (SMF at ¶ 2). The
17 purpose of the video is to “de-stigmatize” abortion. (SMF at ¶ 7). To that end, it
18 conveys the message that abortion is a good, normal, and moral choice. (SMF at
19 ¶¶ 2, 10, 11).

20 Plaintiff admits that its video does not have a commercial purpose. (SMF
21 at ¶ 8).

22 The Northland Video is publicly available on YouTube and on Plaintiff’s
23 official website. (SMF at ¶¶ 3, 4, 49, 50). And “certainly one of the reasons it’s
24 posted on [Northland’s] website” is so that Plaintiff can use it to “de-stigmatize”
25 abortion. (SMF at ¶ 9).

1 To this day, Plaintiff refers its patients to view its video on the Internet, and
2 Plaintiff shows its video to its patients when they come in for counseling. (SMF
3 at ¶ 4). Plaintiff does not use, post, or show any of Defendants’ videos to its
4 patients. (SMF at ¶ 5).

5 Plaintiff has never sold the Northland Video, and the video is available to
6 the public online at no cost. (SMF at ¶ 3, 6, 49, 50).

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

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

17 The same day that he first saw the Northland Video, Defendant Holmberg
18 made the decision to point out the fallacies of the video by creating his own—the
19 TAG Video. (SMF at ¶¶ 14, 15).

20 Defendant Holmberg spent about an hour, maybe two, capturing
21 Northland’s video, editing it down to the segments that were most pertinent to the
22 “goodness” narrative that he, on behalf of TAG, wanted to parody, and then
23 edited in some stock abortion footage he had received from CBR and some
24 explanatory words at the end (“Northland Family Planning Center, 1-800-447-
25 7354” over a picture of the body parts of an in-utero baby aborted at 10-12 weeks,

1 with “Your Dead baby at 10 to 12 weeks”—knowing that this age range is when
2 the majority of abortions take place). Defendant Holmberg then compressed the
3 video to a 3 MPS WMV file and uploaded it as a private video on his main
4 YouTube channel. (SMF at ¶ 15). Thus, no one could see the TAG Video unless
5 Defendant Holmberg sent them the URL, which he did send to Defendant
6 Cunningham. Consequently, the TAG Video was never seen by the public. The
7 video remained private until YouTube took it down, which was almost
8 immediately. (SMF at ¶ 16; *see also* SMF at ¶ 34).

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

13 Defendant Holmberg and TAG created and produced the TAG Video for
14 “[e]ducational” purposes so as to educate people about “[t]he factual inaccuracies
15 in the Northland video.” (SMF at ¶ 18). The video was produced for non-
16 commercial, nonprofit, educational, and parodic purposes only. (SMF at ¶¶ 19,
17 23).

18 Defendant Holmberg summarized the process by which he created the
19 TAG Video as follows: “I stumbled across the Northland video, watched it, was
20 flabbergasted by it, by both the inaccuracies, the factual inaccuracies, concerning
21 the goodness of abortion and the way it characterized both the procedure and the
22 women who choose to abort their children, decided to produce a response for the
23 express purpose of pointing out the inaccuracies, an educational response,
24 realized that I had no way to distribute it because of the nature of YouTube and
25 prohibitive materials, did not have access to any alternative means to distribute it,

1 so sent the idea to [Defendant Cunningham] thinking that he may have some
2 alternative method of distributing it, and that was the extent of it.” (SMF at ¶ 19).

3 About a month or two later, Defendant Holmberg learned of the CBR
4 Video (“The Most Shocking (Graphic Imagery), Four-Minute Abortion Debate
5 You Will Ever See”) that was posted on abortionNo.org and the Pro-LifeTube
6 channel. (SMF at ¶ 20). AbortionNo.org and the Pro-LifeTube channel websites
7 are focused entirely on an anti-abortion, pro-life message and publish only anti-
8 abortion, pro-life content. (SMF at ¶ 21).

9 The CBR Video was produced by Defendant Cunningham and CBR based
10 on CBR’s own edits, music, and images. Neither TAG nor Defendant Holmberg
11 had anything to do with the actual creation, production, posting, or distribution of
12 any CBR Video. (SMF at ¶ 22).

13 Like the TAG Video, the CBR Video was created and produced for
14 nonprofit, non-commercial, educational, and parodic purposes only. (SMF at ¶
15 23; *see also* SMF at ¶¶ 37-40).

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

19 In his capacity as Executive Director of CBR, Defendant Cunningham was
20 the person responsible for creating, producing, and publishing the CBR Video.
21 (SMF at ¶ 25).

22 Neither Defendant Don Cooper nor Defendant Seth Gruber, an intern, had
23 any authority to create, produce, or publish the CBR Video. At all times,
24 Defendants Cooper and Gruber were working under Defendant Cunningham’s
25 direction and control as the Executive Director of CBR. (SMF at ¶ 26).

1 Defendant Todd Bullis had no role whatsoever in the creation or
2 production of the CBR Video. (SMF at ¶ 27).

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

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

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

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

17 As noted above, the idea for the CBR Video was introduced to Defendant
18 Cunningham by Defendant Holmberg sometime in early January 2011.¹ (SMF at
19 ¶ 33). However, the CBR Video was created and produced solely by CBR. All
20 of the editing and every posting of the CBR Video was done under Defendant
21 Cunningham's supervision, direction, and control as Executive Director of CBR.
22 All abortion video segments originated from the CBR video archives, and the
23

24 ¹ The TAG Video was removed from YouTube within 24 hours, and Defendant
25 Cunningham has never seen that video posted anywhere else. (SMF at ¶ 34).

1 musical score was sourced from an anonymous (name not disclosed by the
2 source) public domain score. There was no cost to CBR to produce the video.
3 (SMF at ¶ 35).

4 The CBR Video was made, posted, and used exclusively for nonprofit,
5 non-commercial, educational, and parodic purposes. There was no consideration
6 or anything of any value received for the video. CBR did not sell, license, or
7 publish the video commercially. (SMF at ¶¶ 37, 38, 45, 46). CBR's critical
8 parody is available only for viewing on the Internet. It employs a minimalist
9 approach to production and is not offered for download or sale on any distribution
10 medium. (SMF at ¶ 39).

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

18 The CBR Video criticizes, comments upon, disparages, parodies, mocks,
19 and disagrees with both the deceptive message and the deceptive manner of
20 Northland's staffer who narrates the Northland Video. Northland's consistent
21 theme is the lie that abortion is "normal." Every aspect of the staffer's attire,
22 demeanor, syntax, and intonation is calculated to reinforce this deception. The
23 same is true with the flowers on her desk, the soft background music, and the
24 framed art on her walls. CBR's Video comments upon, disparages, parodies,
25 mocks, and rebuts all this duplicity with an accusatory literary quote in its

1 introduction, jarring music in its score, and graphic imagery in its video
2 refutation. (SMF at ¶ 47).

3 Plaintiff admits that Defendants’ videos “changed,” “ruined,” and “distort”
4 “every bit” of the intent, meaning, and message of the Northland Video. (SMF at
5 ¶ 41). Plaintiff admits that the purpose of its video was to “de-stigmatize”
6 abortion, while Defendants’ videos plainly “stigmatize” abortion and seek to
7 “shame and anger and disgust anyone who’s watching [them].” (SMF at ¶ 42).
8 Plaintiff admits that Defendants’ videos “ruined” and “changed” “every bit” of
9 the intent, meaning, and message of the Northland Video by, *inter alia*, “add[ing]
10 shame and sickening images” of abortion and by “add[ing] music, other words
11 and footage.” (SMF at ¶¶ 41-44).

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

17 CBR used approximately 2 minutes and 2 seconds of the Northland
18 Video’s 4 minute and 41 seconds of footage in CBR’s 4 minute and 13 second
19 video. Thus, less than half of the CBR Video is comprised of content taken from
20 the Northland Video. This percentage is the content quantum minimally required
21 to meaningfully criticize, comment upon, disparage, parody, and rebut the most
22 deceptive elements of Plaintiff’s most misleading advertising claims. (SMF at ¶
23 52). The same is true with the TAG Video, which similarly juxtaposed graphic
24 abortion imagery against the Northland Video’s “goodness” narrative. (SMF at
25 ¶¶ 15, 18, 19).

1 CBR's purpose for producing the CBR Video was to expose Plaintiff's
2 false claims and barbaric practices through graphic audio-visual parody. (SMF at
3 ¶ 54). As Defendant Cunningham testified, "As the Northland abortion clinic's
4 saleswoman was filming her commercial advertisement, just down the hall, safely
5 out of sight of the camera, viable babies were being aborted, without benefit of
6 anesthesia – babies so far along in pregnancy that they would have been born
7 alive had their mother's labor been induced before killing them. The outrage here
8 isn't merely the ages of the babies they are aborting. Every abortion is horrific at
9 any age. The real scandal is that this abortionist, disguised as some sort of
10 objective counselor, complete with conservatively styled hair, starched blouse,
11 and horn-rimmed glasses, looks straight into the camera and tells lie after lie, for
12 the purpose of tricking vulnerable, desperate women – and young girls – into an
13 unimaginably ruinous mistake. Her manner is shrewdly calculated to be matter-
14 of-fact and reassuring. Her purpose is to disarm her victims and lure them into a
15 carefully laid trap." (SMF at ¶ 55).

16 Defendants' videos are intended to criticize, comment upon, disparage,
17 parody, mock, and disagree with the Northland staffer's manner as well as her
18 message, particularly her message that abortion is normal and "good." In fact, the
19 Northland narrator actually uses some variant of the word "good" eighteen times
20 in four minutes to describe abortion. (SMF at ¶ 56).

21 Every production decision CBR made was intended as an "abnormal"
22 counterpoise to some corresponding production element in the Northland Video.
23 None of these criticisms would have worked without the use of Northland's most
24 offensive production content. (SMF at ¶ 57).

1 The narrator in the Northland Video was engaging in speech which was
2 both commercial and political. As Defendant Cunningham testified, “Selling
3 abortion is about reinforcing and exploiting maternal ignorance. It is about telling
4 lies to perpetrate business fraud. Keeping abortion legal is about deceptive
5 political speech intended to fabricate the fiction that abortion is a nominal evil
6 best left to personal discretion. It is about reinforcing and exploiting voter
7 ignorance. Northland not only demands the right to manipulate prospective
8 victims (mothers and voters) with unconscionable falsehoods, but they then have
9 the effrontery to threaten anyone who dares rebut their claims. All CBR has done
10 is figuratively force open the door down the hall from the Northland narrator’s
11 office. The CBR Video simply shows viewers the reality which Northland’s
12 narrator struggles to distort. Is abortion an expression of ‘love’ or a vicious act of
13 violence? The CBR Video tacitly challenges viewers to decide whether they are
14 going to believe what they hear or what they see – with their own eyes. Con
15 artists can spin the facts, but the camera records the truth.” (SMF at ¶ 58).

16 ARGUMENT

17 I. Standard of Review.

18 “The court shall grant summary judgment if the movant shows that there is
19 no genuine dispute as to any material fact and the movant is entitled to judgment
20 as a matter of law.” Fed. R. Civ. P. 56(a). The Rule 56 “standard provides that
21 the mere existence of *some* alleged factual dispute between the parties will not
22 defeat an otherwise properly supported motion for summary judgment; the
23 requirement is that there be no *genuine* issue of *material* fact.” *Anderson v.*
24 *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Moreover, “[s]ummary
25 judgment procedure is properly regarded not as a disfavored procedural shortcut,

1 but rather as an integral part of the Federal Rules as a whole, which are designed
2 to secure the just, speedy and inexpensive determination of every action.”
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted).

4 Where the material facts are not subject to dispute, summary judgment on
5 the fair use question is appropriate. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir.
6 1986).

7 **II. Defendants’ Use of the Northland Video Constitutes “Fair Use.”**

8 “Fair use” is an exception to a copyright holder’s right to exclusive use of
9 the original work and its derivatives. It is an affirmative defense to copyright
10 infringement and is codified under 17 U.S.C. § 107.

11 In determining whether the use made of an original work in a particular
12 case is a “fair use,” the court must consider the following four factors: (1) The
13 purpose and character of the use, including whether such use is of a commercial
14 nature or is for nonprofit educational purposes; (2) The nature of the copyrighted
15 work; (3) The amount and substantiality of the portion used in relation to the
16 copyrighted work as a whole; and (4) The effect of the use upon the potential
17 market for or value of the copyrighted work. 17 U.S.C. § 107.

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

1 Here, each of the four factors weigh in favor of this court finding that
2 Defendants' critical parody of Plaintiff's video was "fair use" and thus not a
3 copyright infringement as a matter of law.

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

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

17 A parody is considered a "fair use." A parody is the use of some portion of
18 a copyrighted work to "hold[] it up to ridicule," or otherwise comment or shed
19 light on it. *Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394,
20 1400-01 (9th Cir. 1997). A parody is considered transformative because it
21 provides a socially-valuable criticism or commentary of the subject work.
22 *Campbell*, 510 U.S. at 579; *see also Mattel, Inc.*, 353 F.3d at 801 (noting that
23 "because parody is a form of social and literary criticism, it has socially
24 significant value as free speech under the First Amendment") (citation and
25 quotations omitted). Consequently, a parody needs to use some portions of the

1 original work because the effectiveness of a parody depends upon its ability to
2 “conjure up” the original. *Campbell*, 510 U.S. at 580-81, 588. Moreover,
3 because the author of the original is unlikely to permit the use of his or her work
4 to criticize or ridicule that work, as in this case, a parody is not likely to supplant
5 the market for the original or its derivatives. *Id.* at 592.

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

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

24 *Id.* The same is true here in spades. Indeed, there can be no reasonable dispute
25 that Defendants’ videos are transformative. This is self-evident by viewing the

1 videos themselves. Nonetheless, Plaintiff admits that Defendants’ videos are in
2 fact transformative. During the deposition of Plaintiff, Plaintiff admitted that
3 Defendants’ videos “changed,” “ruined,” and “distort” “every bit” of the intent,
4 meaning, and message of the Northland Video. (SMF at ¶ 41). Plaintiff admitted
5 that the purpose of its video was to “de-stigmatize” abortion, while Defendants’
6 videos plainly “stigmatize” abortion and seek to “shame and anger and disgust
7 anyone who’s watching [them].” (SMF at ¶ 42). Consequently, aside from the
8 obvious and only reasonable conclusion one could reach from actually watching
9 the videos, Plaintiff admitted that Defendants’ videos were “not what we made.”
10 (SMF at ¶ 43). “They took [Plaintiff’s] video and they’ve changed it.” (SMF at ¶
11 43). As Plaintiff noted, Defendants changed the entire intent, message, and
12 meaning of the Northland Video by, *inter alia*, “add[ing] music, other words and
13 footage.” (SMF at ¶ 44).

14 Thus, “however one may feel about [Defendants’] message—whether [they
15 are] wrong or right, whether [their] methods are powerful or banal—[their videos]
16 parody [Northland’s video] and everything [it] has come to signify.” Therefore,
17 Defendants’ videos are “transformative” as a matter of fact and law. Indeed, “[b]y
18 developing and transforming associations with [Northland’s “goodness” narrative,
19 Defendants have] created the sort of social criticism and parodic speech protected
20 by the First Amendment and promoted by the Copyright Act.” *See Mattel, Inc.*,
21 353 F.3d at 803 (emphasis added).

22 Finally, there is no dispute that Defendants did not sell, license, or publish
23 their videos commercially. Defendants created, produced, and published their
24 videos solely for nonprofit, educational purposes. *See also Righthaven, LLC v.*
25 *Jama*, 2:10-CV-1322 JCM (LRL), 2011 U.S. Dist. LEXIS 43952, at *7-*8 (D.

1 Nev. Apr. 22, 2011) (finding “fair use” of copyrighted article and noting that the
2 nonprofit “defendants’ solicitation of donations on their website is immaterial,
3 and no reasonable jury could conclude that the defendants used the disputed
4 article for a commercial purpose”).

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

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

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

15 Here, there is nothing “creative” about Plaintiff’s infomercial. The
16 Northland Video is simply a deceptively false advertisement used by Plaintiff to
17 lure people into its abortion clinic. It is not artistic in any conceivable sense of
18 the word. There is nothing “creative” about expressing lies about abortion and
19 hiding its true essence behind an Orwellian “newspeak” descriptive such as
20 “goodness.” Indeed, the fact that the Northland Video was so deceptive is the
21 very reason why Defendants’ videos, which used irrefutable visual evidence to
22 rebut Plaintiff’s false narrative, were so effective in their criticism, commentary,
23 and parody. And this is particularly true in the case of the Northland narrator
24 who, while describing the “goodness” of an abortion, is having her deceptive
25 words juxtaposed against a brutally graphic reality.

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

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

7 The third factor “asks whether the amount and substantiality of the portion
8 used in relation to the copyrighted work as a whole, are reasonable in relation to
9 the purpose of copying.” *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr. Seuss Enters.,*
10 *L.P.*, 109 F.3d at 1402). The court “assesses the persuasiveness of a parodist’s
11 justification for the particular copying done, recognizing that the extent of
12 permissible copying varies with the purpose and character of the use.” *Mattel,*
13 *Inc.*, 353 F.3d at 803 (quotations and citation omitted). As the Ninth Circuit
14 noted, “We do not require parodic works to take the absolute minimum amount of
15 the copyrighted work possible. As the Supreme Court stated in *Campbell*, ‘once
16 enough has been taken to assure identification, how much more is reasonable will
17 depend, say, on the extent to which the [work’s] overriding purpose and character
18 is to parody the original, or, in contrast, the likelihood that the parody may serve
19 as a market substitute for the original.” *Mattel, Inc.*, 353 F.3d at 803 (quoting
20 *Campbell*, 510 U.S. at 587).

21 Here, Defendants added words and music and juxtaposed graphic images
22 of abortion against the “goodness” narrative of Plaintiff’s video. Less than half of
23 the CBR Video is comprised of content taken from the Northland Video. This
24 percentage, however, is the content quantum minimally required to meaningfully
25 criticize, comment upon, disparage, parody, and rebut the most deceptive

1 elements of Northland’s most misleading advertising claims. The same is true
2 with the TAG Video, which similarly juxtaposed graphic abortion imagery
3 against Northland’s “goodness” narrative. Moreover, there is no question that the
4 “overriding purpose and character [of Defendants videos] is to parody the”
5 Northland Video, and there is no chance that Defendants’ videos will “serve as a
6 market substitute for” the Northland Video. Therefore, this factor favors
7 Defendants as well.

8 **D. Market Harm.**

9 Under the fourth factor, the relevant inquiry is whether the new work tends
10 to supplant or substitute for the potential market for the original or its derivatives.
11 *Campbell*, 510 U.S. at 592; *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24
12 (1st Cir. 2000) (finding fair use and noting that “this factor is concerned with
13 secondary uses that, by offering a substitute for the original, usurp a market that
14 properly belongs to the copyright holder”) (citation omitted). *Harm caused by*
15 *effective criticism or disparagement is not cognizable injury under the Copyright*
16 *Act.* *Campbell*, 510 U.S. at 590-92. As the Supreme Court clearly stated, “[A]s
17 to parody pure and simple, it is more likely that the new work will not affect the
18 market for the original in a way that is cognizable under this factor.” *Id.* at 591.

19 “Because parody may quite legitimately aim at garroting the original,
20 destroying it commercially as well as artistically, the role of the courts is to
21 distinguish between biting criticism that merely suppresses demand and copyright
22 infringement, which usurps it.” *Id.* at 592 (internal citations, quotations, and
23 brackets omitted). “This distinction between potentially remedial displacement
24 and unremediable disparagement is reflected in the rule that there is no protectible
25 derivative market for criticism.” *Id.*; *see also Mattel, Inc.*, 353 F.3d at 805

1 (“Because of the parodic nature of [the defendant’s work], however, it is highly
2 unlikely that it will substitute for products in Mattel’s markets or the markets of
3 Mattel’s licensees.”). Thus, “the only harm to derivatives that need concern” this
4 court, “is the harm of market substitution. The fact that a parody may impair the
5 market for derivative uses by the very effectiveness of its critical commentary is
6 no more relevant under copyright than the like threat to the original market.”
7 *Campbell*, 510 U.S. at 593; *Mattel, Inc.*, 353 F.3d at 805 (“As to Mattel’s claim
8 that [the defendant] has impaired Barbie’s value, this fourth factor does not
9 recognize a decrease in value of a copyrighted work that may result from a
10 particularly powerful critical work.”); *Nunez*, 235 F.3d at 24 (“In fact, to the
11 extent that the copying damages a work’s marketability by parodying it or
12 criticizing it, the fair use finding is unaffected.”).

13 Once again, no reasonable trier of fact could conclude that Defendants’
14 videos would be a market *substitute* for the Northland Video. It is unreasonable
15 and utterly inconceivable that Defendants’ videos would compete with the
16 Northland Video in the abortion clinic or abortion counseling market. And this is
17 obviously the case “because the parody and the original . . . serve different market
18 functions.” *Campbell*, 510 U.S. at 591. Here, one video seeks to promote its
19 clinical services by portraying abortion as a moral and virtuous “good” and the
20 other video seeks to expose the reality of abortion by juxtaposing images showing
21 that abortion is a violent and vicious act that results in the killing of an innocent
22 human life. It is nonsense to even suggest that the latter (Defendants’ videos) is a
23 market substitute for the former (Plaintiff’s video).

24 Moreover, there is no question that Northland would not develop nor
25 license others to develop a video similar to Defendants’ videos. As the U.S.

1 Supreme Court noted, “The market for potential derivative uses includes only
2 those that creators of original works would in general develop or license others to
3 develop. Yet the unlikelihood that creators of imaginative works will license
4 critical reviews or lampoons of their own productions removes such uses from the
5 very notion of a potential licensing market.” *Campbell*, 510 U.S. at 592. Thus, as
6 noted above, the fact that Defendants’ parody may impair the market for
7 derivative uses by the very effectiveness of its critical commentary is no more
8 relevant under copyright than the like threat to the original market.

9 In sum, like the first three factors, this factor falls squarely in favor of
10 Defendants.

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

19 CONCLUSION

20 Based on the foregoing, Defendants respectfully request that this court
21 grant their motion and enter judgment in their favor as to all claims. Additionally,
22 because Plaintiff’s copyright infringement claim was so frivolous, Defendants
23 request that this court consider imposing sanctions against Plaintiff and its
24 counsel for continuing to pursue this meritless case. At a minimum, Defendants
25

1 request that this court award them their costs and reasonable attorneys' fees
2 pursuant to 17 U.S.C. § 505 and other applicable law.

3 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 Respectfully submitted,

7 /s/ Robert J. Muise

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9 *Co-counsel for Defendants*