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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO: SACV 11-731 JVS (ANx)

NORTHLAND FAMILY PLANNING
CLINIC, INC.,

Plaintiff(s),

ORDER RE CROSS MOTIONS FOR
SUMMARY JUDGMENT

v.

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

Defendant(s).

Plaintiff Northland Family Planning Clinic, Inc. (“Northland”) claims that Defendants Center for Bio-Ethical Reform (“CBR”), Gregg Lee Cunningham (“Cunningham”), Donald Cooper (“Cooper”), Seth Gruber (“Gruber”), Todd Bullis (“Bullis”), Reel to Real Ministries, Inc., doing business as The Apologetics Groups (“TAG”), and Eric Holmberg (“Holmberg”) (collectively, “Defendants”), infringed Northland’s copyrighted video, “Every Day, Good Women Choose Abortion” (the

1 “Northland Video”), by creating three videos that feature excerpts of the Northland
2 Video. Defendants claim fair use. The parties have brought cross motions for
3 summary judgment. (Defendants’ Mot. Br., Docket No. 40; Plaintiffs’ Mot. Br., Docket No.
4 44.) Northland seeks a partial judgment finding that Defendants infringed
5 Northland’s copyright and cannot avail themselves of the fair use defense.¹
6 Defendants move for summary judgment finding that certain individuals did not
7 infringe Northland’s copyright, and that any use of the Northland Video is
8 insulated by the fair use defense. For the following reasons, Northland’s Motion is
9 DENIED and Defendants’ Motion is GRANTED.

10 I. Background

11
12 Northland runs family planning clinics in the greater Detroit area of
13 Michigan. (Declaration of Sara G. Wilcox (“Wilcox Decl.”), Ex. A, Deposition of
14 Renee Chelian (“Chelian Dep.”) 19:6-7, 22:22-23:2, Docket No. 56.) Northland
15 created the Northland Video in late 2009 to be used for outreach, counseling, and
16 education in an effort to de-stigmatize abortion. (Id. at 57:20-58:7; Declaration of
17 Rene Chelian (“Chelian Decl.”) ¶ 2, Docket No. 57.) The message of the
18 Northland Video is that abortion is not uncommon, and that women are good
19 regardless of how they exercise their reproductive rights. (Id.; Notice of Filing of
20 Exs., Chelian Dep., Ex. 8, Docket No. 50.) The Northland Video conveys that the
21 clinic offers guidance to women who are struggling to feel good about themselves
22 after having an abortion and women who are grappling with the decision whether
23 to terminate their pregnancy. (Chelian Dep., Ex. 6.) Northland founder, Rene
24 Chelian, and her employees spent significant time and creative effort writing and
25 revising the script they used to create the Northland Video. (See id. at 83:2-25.)
26 Northland registered a copyright for the Northland Video with the United States

27 ¹ Northland requests that damages be assessed at a later date. (Pl.’s Mot. Br. 1.)

1 Copyright Office in 2009. (Wilcox Decl., Ex. D.) Northland posted the Northland
2 Video on its website and on YouTube in November 2009. (First Amended Compl.
3 (“FAC”) ¶ 22.)²

4 Beginning in early 2011, Defendants made a series of videos using unaltered
5 segments of the Northland Video without Northland’s permission. TAG, acting
6 through its director and sole employee, Eric Holmberg, created a 1 minute and 17
7 second video that uses several verbatim segments of the Northland Video (the
8 “TAG Video”). (Pl.’s Notice of Lodging, Ex. F, Deposition of Eric Holmberg
9 (“Holmberg Dep.”) 17:19-22, 20:11-16, 37:10-25, Docket No. 77.) The TAG
10 Video alternates between images from the Northland Video and images depicting
11 alleged abortions. (*Id.* at Ex. 39.) The narrative from the Northland Video
12 continues while the screen shows graphic, up-close images of the surgical
13 procedure of dismembering and removing fetuses, many of which have discernible
14 limbs or appear to be nearly viable. (*Id.*) The TAG Video uses the segments of the
15 Northland Video in the same order as they appear in the original; Northland’s logo
16 and copyright mark remain as they did in the original. (*Id.*) The TAG Video
17 closes with Northland’s name, telephone number, and the words “Your Dead baby
18 at 10 to 12 weeks,” superimposed over a bloody, dismembered fetus. (*Id.*)
19 Holmberg testified that he created the TAG Video to expose the “fallacies” of the
20 Northland Video. (*Id.* at 39:1-8, 40:18-41:5.) He stated that he made the TAG
21 Video “quickly,” and posted it on his private YouTube channel a “few hours” after

22 ² The Court notes that the month and year during which Northland allegedly posted the
23 Northland Video is inconsistent in the record. The FAC and Northland’s motion brief state that
24 it was posted in November 2009, while Ms. Chelian testified that she posted it in November
25 2010 (Chelian Dep. 40:8-11), and Northland’s Statement of Unconverted Facts (“Pl.’s SUF”)
26 states that it was posted in January 2010, (Pl.’s SUF, Docket No. 46). It is undisputed, however,
27 that it was available on the Internet sometime before 2011.

1 viewing the Northland Video. (Id.) Holmberg then emailed the link to the TAG
2 Video on YouTube to an unknown number of persons, including Cunningham.
3 (Id. at 45:3-20; Wilcox Decl., Ex. I.) The TAG Video was posted to a high-traffic
4 anti-abortion blog called JillStanek.com, (Wilcox Decl., Ex. J), and Cunningham,
5 the director of CBR, instructed Cooper, CBR's manager, to post the TAG Video on
6 the CBR website with a credit to TAG, (Id. at Ex. K).

7 Then Cunningham decided to make his own video. Acting on behalf of
8 CBR, Cunningham directed a contractor to create a video using segments from the
9 Northland Video, the TAG Video, and clips of "the strongest abortion-in-progress
10 shots" from other canned footage. (Id. at Ex. L.) Cunningham instructed the
11 contractor to alternate between the Northland segments and the alleged abortion
12 images, akin to the TAG Video. The resulting video (the "CBR I Video") opens
13 with a Biblical citation, then alternates between segments of the Northland Video,
14 using both its audio and visual, and the abortion footage, which is accompanied by
15 a foreboding song called "Natural One." (Id.; Pl.'s Notice of Lodging, Ex. A,
16 Deposition of Tod Bullis ("Bullis Dep."), Ex. 5.) Northland's logo and copyright
17 remain on the CBR I Video. (Bullis Dep., Ex. 5.) On behalf of CBR and at the
18 direction of Cunningham and Cooper, Gruber posted the CBR I Video to Bullis'
19 website called Pro-LifeTube.com³ on January 25, 2011. (Wilcox Decl., Ex. R,
20 Deposition of Seth Gruber ("Gruber Dep.") 30:23-31:17.) Subsequently,
21 Cunningham directed the contractor to add a quotation from George Orwell to the
22 beginning of the CBR I Video, thereby creating the CBR II Video. (Wilcox Decl.,
23 Ex. S; Bullis Decl., Ex. 6.) Gruber, on behalf of CBR and at Cunningham's
24 direction, then posted the CBR II Video on Pro-LifeTube.com. (Gruber Dep. 30:6-

25 ³ Just as it sounds, Pro-LifeTube.com is a website that hosts videos with pro-life and anti-
26 abortion themes. (Bullis Dep. 26:14-27:11.) Users can upload videos and watch other users'
27 videos on the site. (Id. at 27:1-11.)

31:1.) Gruber also posted embedded links to the CBR II Video on the CBR website in at least three places, including a link where the Video could be downloaded. (Id. at 33:7-21, 92:9-16, 93:9-94:2.) The CBR Videos contain approximately 2 minutes and 22 seconds of the original 4 minute and 41 second Northland Video, or 43 percent of the original. (Wilcox Decl., Ex. U, Response to First Request for Admission No. 1.) The CBR Videos are each slightly more than four minutes long, and thus the Northland Video footage accounts for approximately half of the CBR Videos. (Id.) It is undisputed that no Defendants sought Northland’s permission to use the Northland Video to create the TAG or CBR Videos. (Wilcox Decl., Ex. T, Response to Second Request for Admission No. 64.)

There is some evidence suggesting that CBR uses the CBR Videos for publicity and fundraising. Gruber testified that a button labeled “Donate” in bold appears on every page on which the CBR Videos were posted; however, Gruber also noted that this button appears on the top right corner of the site regardless of which page a user views. (Gruber Dep. 88:5-25.) Cunningham testified that he sent the CBR Videos to “everyone [he] could possibly think of,” and showed them at group meetings “every chance” he got, “everywhere” he went. (Pl.’s Notice of Lodging, Declaration of Gregg Lee Cunningham (“Cunningham Dep.”) 133:24-134:5.) Cunningham also testified that he shows the CBR Videos “every time” he does a fundraising pitch, but Cunningham claims he does not remember whether he used the CBR Videos in his pitches prior to this lawsuit. (Id. at 156:7-8, 157:14-18.) He also explained that he shows the CBR Videos at fundraisers because the CBR Videos are “part of what we are doing,” and CBR’s “entire existence hangs on the goodwill of donors who want to know what we’re doing and want to know what our challenges and burdens are” (Id. at 156:18-21.)

1 Northland’s counsel sent letters on March 18, 2011 to Bullis as the owner of
2 Pro-LifeTube.com, and to Cunningham and Cooper as director and manager of
3 CBR, respectively, informing them that the CBR Videos infringe Northland’s
4 copyright and demanding that the CBR Videos be removed from their websites.⁴
5 (Wilcox Decl., Exs. W, X.) Bullis did not respond. (Bullis Dep. 37:13-38:25.)
6 CBR replied through counsel refusing to remove the CBR Videos. (Wilcox Decl.,
7 Ex. Z.)

8 Northland contemplated licensing the Northland Video to other clinics, and
9 Chelian had spoken with individuals in other facilities about their potential use of
10 the material. (Chelian Dep. 38:24-40:3; Chelian Decl. ¶ 5; Declaration of E.
11 Barnes (“Barnes Decl.”) ¶ 5, Docket No. 69.) However, once prospective licensees
12 such as Ms. Barnes became aware of the CBR and TAG Videos, they were no
13 longer interested in using the Northland Video. (Barnes Decl. ¶¶ 7-9.) Ms.
14 Chelian also determined that she could no longer use the Northland Video at
15 speaking engagements and seminars in light of the TAG and CBR Videos.
16 (Chelian Decl. ¶ 6.)

17 Northland filed this action against Defendants on May 12, 2011, alleging
18 Defendants’ conduct violated Northland’s exclusive right to use of the Northland
19 Video pursuant to 17 U.S.C. § 106. (Compl., Docket No. 1.) Northland filed its
20 FAC on November 29, 2011. Both parties have moved for summary judgment
21 regarding the applicability of the fair use defense to Defendants’ conduct.
22

23 ⁴ Northland’s counsel sent these notices pursuant to the Digital Millennium Copyright
24 Act (“DMCA”), 17 U.S.C. § 512, which provides that a “service provider,” such as Pro-
25 LifeTube.com and the CBR website, is not liable for copyright infringement for material posted
26 on its website by others so long as it promptly removes the material upon receiving a notification
27 of infringement from the copyright holder. 17 U.S.C. § 512(c).

II. Legal Standard

1
2 Summary judgment is appropriate when the record, read in the light most
3 favorable to the non-moving party, indicates that “there is no genuine issue as to
4 any material fact and . . . the moving party is entitled to a judgment as a matter of
5 law.”⁵ Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-
6 24 (1986). Material facts are those necessary to the proof or defense of a claim,
7 and are determined by referring to substantive law. Anderson v. Liberty Lobby,
8 Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment,
9 “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences
10 are to be drawn in his favor.” Anderson, 477 U.S. at 255.

11
12 The moving party has the initial burden of establishing the absence of a
13 material fact for trial. Anderson, 477 U.S. at 256. If the moving party satisfies its
14 initial burden, the nonmoving party “may not rest upon the mere allegations or
15 denials” of the moving party’s pleadings, but “must set forth specific facts showing
16 that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Furthermore, “Rule
17 56(c) mandates the entry of summary judgment . . . against a party who fails to
18 make a showing sufficient to establish the existence of an element essential to that
19 party’s case, and on which that party will bear the burden of proof at trial.”
20 Celotex Corp., 477 U.S. at 323. Thus, if the nonmoving party does not make a
21 sufficient showing to establish the elements of its claims, the Court must grant the
22 moving party’s motion.

23 ⁵ After reviewing the pleadings in the cross motions, the Court invited each party to
24 submit a supplemental brief of no more than five pages addressing whether the Court could
25 decide this case as a matter of law on the present factual record. (Docket No. 83.) Both parties
26 submitted briefs answering affirmatively. (Defs.’ Supp. Br., Docket No. 84; Pl.’s Supp. Br.,
27 Docket No. 85.)

1 Where the parties have made cross-motions for summary judgment, as they
2 have in this case, the Court must consider each motion on its own merits. Fair
3 Hous. Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court
4 will consider each party’s evidentiary showing, regardless of which motion the
5 evidence was tendered under. See id. at 1137.

6 “In determining any motion for summary judgment or partial summary
7 judgment, the Court may assume that the material facts as claimed and adequately
8 supported by the moving party are admitted to exist without controversy except to
9 the extent that such material facts are (a) included in the ‘Statement of Genuine
10 Disputes’ and (b) controverted by declaration or other written evidence filed in
11 opposition to the motion.” Local Rule 56-3.

12
13 **III. Discussion**

14
15 **A. Copyright Infringement**

16 To prevail on a claim of copyright infringement, Plaintiffs must show “(1)
17 ownership of a valid copyright, and (2) copying of constituent elements of the
18 work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340,
19 361 (1991). Here, the parties do not dispute that Northland owns a valid copyright
20 to the Northland Video. Nor do they dispute that the TAG and CBR Videos copy
21 substantial portions of the Northland Video. The parties dispute only whether the
22 Defendants’ use of the Northland Video constitutes fair use.

23
24 **B. Fair Use**

25
26 Fair use is an exception to a copyright holder’s right to exclusive use of the
27

1 original work and its derivatives. 17 U.S.C. § 107. It is “a privilege in others than
2 the owner of the copyright to use the copyrighted material in a reasonable manner
3 without his consent.” Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S.
4 539, 549 (1985) (quoting H. Ball, Law of Copyright & Literary Property 260
5 (1944)). The privilege results from an understanding that some limited use of
6 copyrighted material is necessary to allow artists and authors to improve upon,
7 comment on, or criticize prior works. See id.; Campbell v. Acuff-Rose Music,
8 Inc., 510 U.S. 569, 575 (1994). Fair use reflects the goals of the Copyright Act “to
9 promote the progress of science and art by protecting artistic and scientific works
10 while encouraging the development and evolution of new works.” Mattel Inc. v.
Walking Mountain Prods., 353 F.3d 792, 799 (9th Cir. 2003).

11
12 Section 107 of the Copyright Act codified the common law framework for
13 identifying fair use:

14
15 In determining whether the use made of a work in any particular case
16 is a fair use the factors to be considered shall include –

- 17
18 (1) the purpose and character of the use, including whether such
19 use is of a commercial nature or is for nonprofit educational
20 purposes;
- 21
22 (2) the nature of the copyrighted work;
- 23
24 (3) the amount and substantiality of the portion used in relation
25 to the copyrighted work as a whole; and
- 26
27 (4) the effect of the use upon the potential market for or value
28

of the copyrighted work.

1
2 17 U.S.C. § 107. The analysis “permits and requires courts to avoid rigid
3 application of the copyright statute when, on occasion, it would stifle the very
4 creativity which that law is designed to foster.” Campbell, 510 U.S. at 577
5 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (alterations omitted). The
6 factors are not winner-take-all categories to be tallied at the end to determine the
7 prevailing party; they are intended to be carefully weighed case by case with an
8 eye towards the policies underlying copyright protection. See id. “Nor may the
9 four statutory factors be treated in isolation one from another. All are to be
10 explored, and the results weighed together, in light of the purposes of copyright.”
11 Id.; accord Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc. (“Seuss II”), 109
12 F.3d 1394, 1399 (9th Cir. 1997).

13
14 Application of the fair use doctrine is a mixed question of law and fact.
15 Harper & Row, 471 U.S. at 560. Thus, where the material facts are not subject to
16 dispute, summary judgment on the fair use question is proper. Fisher v. Dees, 794
17 F.2d 432, 436 (9th Cir. 1986). Because fair use is an affirmative defense to
18 copyright infringement, the defendant bears the burden of proving fair use.
19 Campbell, 510 U.S. at 590; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146,
20 1158 (9th Cir. 2007).

21 With this background in mind, the Court considers the four statutory factors
22 individually.

23
24 1. Purpose and Character of the Use

25
26 Under the first factor, the “purpose and character of the use,” the Court
27
28

1 considers the extent to which the new work is “transformative.” Mattel, 353 F.3d
2 at 800. The new work is “transformative” if it adds “something new, with a further
3 purpose or different character, altering the first with new expression, meaning, or
4 message.” Id. (quoting Campbell, 510 U.S. at 579); Seuss II, 109 F.3d at 1400.
5 While transformative use is not “absolutely necessary” for a finding of fair use,
6 transformative works advance the goals of copyright law, and thus they are at the
7 “heart of the fair use doctrine’s breathing space within the confines of copyright.”
8 Campbell, 510 U.S. at 579. Examples of fair use include social commentary,
9 criticism, and news reporting. Id. at 578. The Court also considers whether the
10 new work is for commercial or non-commercial use. Id. at 580. Typically, a work
11 created for commercial use is less likely to bear fair use protection; however, the
12 commercial/non-commercial distinction is less significant the more transformative
13 the work is. Id.

14 Defendants’ primary argument is that the TAG and CBR Videos are
15 parodies of the Northland Video, intended to criticize, comment on, and disparage
16 the narrator’s calm manner as well as her message that good women choose to
17 terminate their pregnancy and that abortion is “normal.”

18 Parody has transformative value protected under Section 107 because it can
19 provide social benefit by commenting on the original work, and in the process,
20 create a new one. Campbell, 510 U.S. at 579; see Seuss II, 109 F.3d at 1400
21 (“Parody is regarded as a form of social and literary criticism, having a socially
22 significant value as free speech under the First Amendment.”). A parody employs
23 elements of a prior work to create a new work that, at least in part, comments on
24 the original. Campbell, 510 U.S. at 580. The difference between parody and satire
25 is that in the former the copyrighted work is “the target” and in the latter it is
26 “merely a vehicle to poke fun at another target.” Seuss II, 109 F.3d at 1400 (citing
27
28

1 Campbell, 510 U.S. at 580). “The parody must target the original, and not just its
2 general style, the genre of art to which it belongs, or society as a whole (although if
3 it targets the original, it may target those features as well).” Campbell, 510 U.S.
4 597 (Kennedy, J., concurring); see Mattel, 353 F.3d at 801. In Campbell, for
5 example, the Supreme Court determined that music group 2 Live Crew’s rap song
6 “Pretty Woman” was a parody of the Roy Orbison rock ballad “Oh, Pretty
7 Woman” because the former was, at least in part, commenting on the latter. 510
8 U.S. at 580-81. The 2 Live Crew version “reasonably could be perceived as
9 commenting on the original or criticizing it, to some degree” because “2 Live Crew
10 juxtaposes the romantic musings of a man whose fantasy comes true, with
11 degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal
12 responsibility.” Id. at 583; cf. Seuss II, 109 F.3d 1401 (finding the accused work
13 was not a parody because it broadly mimicked Dr. Seuss’ characteristic style, but
14 did not hold his style to ridicule).

15 The Campbell parody rule has been applied across all artistic media. For
16 example, the use of a well-known Annie Leibovitz photograph of Demi Moore
17 posing naked and pregnant was found to be fair in an advertisement for a movie
18 called “Naked Gun 33 1/3: The Final Cut,” where the alleged infringer replaced
19 Ms. Moore’s head with the “smirking” face of Leslie Nielsen. Leibovitz v.
20 Paramount Pictures Corp., 137 F.3d 109, 114 (2d Cir. 1998). The second work
21 was a parody because a viewer could reasonably perceive it as a comment on the
22 “undue self-importance” conveyed by the subject of the first work. Id. In Mattel,
23 artist Thomas Forsythe turned the image of Barbie as the “ideal American woman”
24 on its head with photographs portraying a nude Barbie in danger of being attacked
25 by vintage household appliances. 353 F.3d at 801. While the true Barbie displays
26 unwavering poise and glamor, Forsythe’s creations are disheveled, sexualized,
27 occasionally dismembered, and in imminent danger of attack by the domestic items

1 her very persona conjures. Id. at 802. Forsythe’s creations are parodies because
2 his social commentary is pointed at Mattel’s Barbie and the role of Barbie in
3 influencing women’s position in society.

4 By contrast, when the original work is incidental to the alleged infringer’s
5 comment on a broader topic, the work is “better characterized” as a satire. Blanch
6 v. Koons, 467 F.3d 244, 247 (2d Cir. 2006). In Blanch, the alleged infringer,
7 “appropriation artist” Jeff Koons, cut out part of a fashion photograph (“Silk
8 Sandals”) depicting the legs of a model wearing sandals, and repositioned the
9 image in a landscape of legs surrounded by abundantly glazed confections. The
10 final product is a comment on mass imagery, consumerism, overindulgence, and
11 desire. The court found that Koons’ work was “better characterized” as a satire,
12 rather than a parody, because “its message appears to target the genre of which
13 ‘Silk Sandals’ is typical, rather than the individual photograph itself.” Blanch, 467
14 F.3d at 254.

15 Parody is afforded more leeway than satire under the fair use doctrine
16 because parody necessarily requires the parodist to mimic the original to make its
17 point, while satire “can stand on its own two feet,” and thus requires further
18 justification for its borrowing. Campbell, 510 U.S. at 580. If the alleged infringer
19 merely uses the original to “get attention or avoid the drudgery in working up
20 something fresh,” the borrower’s fairness claim diminishes or even vanishes,
21 depending on the balance of the remaining factors. Id.

22
23 In this case, the TAG and CBR Videos are parodies of the Northland Video
24 because they use segments of the Northland Video in alternation with macabre
25 images of abortion procedures to deride the original work’s message that abortion
26 is “normal” and that good women choose to terminate their pregnancy. Akin to
27

Barbie’s metamorphosis in Mattel as commentary on gender roles, here,
1 Defendants turn the Northland Video’s message “on its head” by alternating clips
2 of the calm, empathetic doctor explaining that choosing to have an abortion does
3 not make you a bad woman, with shockingly graphic images of fetuses being
4 dismembered and removed from the birth canal. For example, in the beginning of
5 the accused Videos, a clip from the Northland Video plays in which the narrator
6 says, “deciding to have an abortion is a normal decision”; then, the screen cuts to a
7 video clip in which it appears that a fetal hand reaches out of the birth canal and
8 gloved fingers—ostensibly those of a doctor—expose more of the hand before using
9 forceps to rip off the appendage. Of course, Defendants’ abundantly clear message
10 is that deciding to have an abortion is anything but a “normal decision” made by
11 “good women.” The accused Videos continue in that vein, contrasting the serene
12 environment of the narrator’s office, her soft, conservative attire, her calm voice,
13 and her message that women are good regardless of how they exercise their
14 reproductive rights, with the gruesome and seemingly savage “reality” of an
15 abortion procedure.

16
17 Northland contends that the accused Videos are not parodies because they
18 use verbatim segments of the Northland Video to represent a viewpoint consistent
19 with Northland’s message in a “debate” regarding the broader “good women”
20 theme. (Pl.’s Mot. Br. 14-15.) In other words, the Northland clips merely serve as
21 a placeholder for the pro-choice perspective in a reproductive rights debate
22 portrayed in the accused Videos. Northland points to the tag for the CBR Videos
23 as evidence that the Video was intended to be a “debate”: “The Most Shocking
24 (Graphic Imagery), Four-Minute Abortion Debate You Will Ever See.” Northland
25 likens this case to Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010),
26 asserting that in both cases the defendants “borrow[ed] heavily from the creative
27 aspects” of the original works to make new works on “different subjects.” (Pl.’s
28

1 Mot. Br. 15 (citing Henley, 733 F. Supp. 2d at 1158)). Here, the “new work”—the
2 accused Videos—are on a “different subject” because they speak broadly about the
3 abortion “debate” and not about the Northland Video specifically.

4 However, while the CBR Videos may be coined “debates,” it is clear from
5 watching them that Defendants were not attempting to present “both sides” of the
6 issue. The Northland segments do not convey the pro-choice perspective; rather,
7 they are presented for the sake of being sharply criticized. Moreover, unlike
8 Henley, in which the defendants “evoked the same themes” as the two original
9 songs from which it borrowed “to attack an entirely separate subject,” here,
10 Defendants copied the Northland Video for the primary, if not exclusive, purpose
11 of attacking it. While the accused Videos may comment globally on the abortion
12 debate, they are primarily focused on criticizing elements of the Northland Video.⁶
13 Indeed, before this lawsuit was filed, communication between the Defendants
14 shows that the purpose of the Videos was to dispel the “falsities” of the Northland
15 Video, and to create a “parody” contrasting the “soothing lies of the narrator . . .
16 and the terrible truths of the abortion.” (Wilcox Decl., Ex. K.) Thus, the criticism
17 is targeted at the copyrighted work specifically, not just the pro-choice position.
18 The CBR Videos even suggest that the Northland narrator is Satan, as both CBR
19 Videos are entitled “Angel of Light” and display a quotation from the Biblical
20

21 ⁶ A parody that “more loosely targets an original” than the parody presented in Campbell
22 “may still be sufficiently aimed at an original work to come within [the Court’s] analysis of
23 parody.” Campbell, 510 U.S. at 581; see also MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir.
24 1981) (holding that “a permissible parody need not be directed solely to the copyrighted song but
25 may also reflect on life in general”). Thus, even if this Court found that the accused Videos
26 broadly criticized the pro-choice position in addition to the Northland Video, the analysis would
27 be in accord with Campbell.

1 verse Corinthians 11:14, which states, “And no wonder, for Satan himself
2 masquerades as an angel of light,” before cutting to the narrator. In sum, there is
3 no question of fact that the accused Videos use the original to comment on and
4 criticize that work specifically, and in the process, create a new work.

5 Northland also argues that the accused Videos are not parodies because they
6 are not “humorous mimics” of the Northland Video. (Pl.’s Mot. Br. 13.)
7 Indeed, Defendants do not dispute that the accused Videos are humorless. (Defs.’
8 Opp’n Br. 14-15, Docket No. 73.) However, during the hearing, Northland
9 overstated the importance of comedy in parody analysis. Northland quoted
10 Campbell in arguing that parody involves imitation of a previous work for “comic
11 effect or ridicule,” but these selected quotations have little, if any, legal effect, as
12 the Court stated:

13
14 The germ of parody lies in the definition of the Greek *parodeia*,
15 quoted in Judge Nelson’s Court of Appeals dissent, as ‘a song
16 sung alongside another.’ Modern dictionaries accordingly
17 describe a parody as a literary or artistic work that imitates the
18 characteristic style of an author or a work for comic effect or
19 ridicule, or as a ‘composition in prose or verse in which the
20 characteristic turns of thought and phrase in an author or class
21 of authors are imitated in such a way as to make them appear
22 ridiculous.’ For purposes of copyright law, the nub of the
23 definitions, and the heart of any parodist’s claim to quote from
24 existing material, is the use of some elements of a prior author’s
25 composition to create a new one that, at least in part, comments
26 on that author’s works.
27
28

1 510 U.S. 580 (internal citations omitted) (emphasis supplied). Thus, the “heart” of
2 a parody defense is the use of elements of the prior composition to create a new
3 work that comments on or criticizes the original. Id. Moreover, even under the
4 dictionary definition of parody quoted in Campbell, a parody is not necessarily
5 humorous: it imitates a prior work for “comic effect or ridicule.”⁷ Id. (emphasis

6
7 ⁷ At least one circuit court construing Campbell has held that parody is commentary or
8 criticism that requires neither “comic effect” nor “ridicule.” SunTrust Bank v. Houghton Mifflin
9 Co., 268 F.3d 1257, 1268-69 (11th Cir. 2001). The Eleventh Circuit reasoned:

10
11 The Supreme Court’s definition of parody in Campbell, however, is
12 somewhat vague. On the one hand, the Court suggests that the aim of
13 parody is ‘comic effect or ridicule,’ but it then proceeds to discuss parody
14 more expansively in terms of its ‘commentary’ on the original. In light of
15 the admonition in Campbell that courts should not judge the quality of the
16 work or the success of the attempted humor in discerning its parodic
17 character, we choose to take the broader view. For purposes of our fair-
18 use analysis, we will treat a work as a parody if it aims to comment upon
19 or criticize a prior work by appropriating elements of the original in
20 creating a new artistic, as opposed to scholarly or journalistic, work.

21
22 Id. (internal citations omitted). Arguably, however, the work at issue in SunTrust Bank did, in
23 fact, ridicule or attempt to ridicule the original work. In that case, the court confronted
24 humorless parody in a book that drew upon the characters and story line from “Gone with the
25 Wind” to critique the original work and the depiction of slavery in the Civil-War-era American
26 South. Id. at 1259. The court held that the accused work was a parody because it imitated the
27 original to make a “specific criticism of and rejoinder to the depiction of slavery and the

1 supplied.) Accordingly, for purposes of copyright law, humor is not a necessary
2 element of parody. Here, the accused Videos fall squarely within the Campbell
3 definition of parody because there is no doubt that a viewer could, and most likely
4 would, reasonably perceive the accused Videos to be highly critical commentary
5 on the original, aimed at ridiculing it.

6 Finally, Northland argued at the hearing that the accused Videos are not
7 parodies because they criticize a work that is not well known to the public.
8 Northland cited language in Campbell to argue that the object of a parody is always
9 a well-known work: “Parody’s humor, or in any event its comment, necessarily
10 springs from recognizable allusion to its object through distorted imitation. Its art
11 lies in the tension between a known original and its parodic twin.” Campbell, 510
12 U.S. at 588-89. However, as quoted supra, the Campbell Court carefully defined
13 parody “for purposes of copyright law,” and nowhere in that definition did the
14 Court limit the parodist’s target to well-known works. While the Campbell Court
15 noted in dicta that “parodies almost invariably copy publicly known, expressive
16 works,” the Court did not find that parodies always, or by definition, copy
17 publicly-known works. Id. at 586. Furthermore, the Campbell Court had no

18 _____
19 relationship between blacks and whites in [‘Gone with the Wind’].” Id. at 1269. While the court
20 did not mention ridicule in its parody analysis, the work likely could have been reasonably
21 perceived as ridiculing “Gone with the Wind,” and thus it was probably a parody even under a
22 narrower construction of Campbell. In this case, the Court need not decide whether “comic
23 effect or ridicule” is a necessary part of parody because the accused Videos are undoubtedly
24 aimed at ridiculing the Northland Video. As admonished in Campbell and SunTrust Bank, the
25 Court does not evaluate the success of the ridicule, but looks only at the aim of the work and a
26 reasonable perception of the work. Accordingly, the accused Videos fall within both the broader
27 and narrower constructions of “parody.”

1 occasion to discuss parodies of obscure works because the target of the parody in
2 Campbell was the highly popular song “Oh, Pretty Woman.”

3 At least two courts applying Campbell to parodies of lesser known or
4 obscure works have found that those parodies warranted fair use protection. In one
5 case, a comedian sued for copyright infringement alleging that popular mock news
6 program “The Daily Show” (“Daily Show”) used a clip from her public access
7 television program, “The Sandy Kane Blew Comedy Show” (“Kane Show”),
8 without her authorization. Kane v. Comedy Partners, 68 U.S.P.Q. 2d (BNA) 1748,
9 2003 U.S. Dist. LEXIS 18513, at *1 (S.D.N.Y. Oct. 15, 2003), aff’d, 98 Fed.
10 App’x. 73 (2d Cir. 2004). The Daily Show segment opens with a full-screen image
11 from the Kane Show, showing the plaintiff dancing in a bikini. Id. at *3. The
12 Kane Show logo appears in the clip as it did in the original. Id. The full-screen
13 image remains on the screen for less than a second then shrinks to the lower corner,
14 and three other clips appear to form a video collage. Throughout this introduction,
15 the title “Public Excess” flashes across the screen, accompanied by music. Id. The
16 “Public Excess” segment mocks the public access programs sampled in the video
17 collage by “presenting and commenting on clips of those shows,” in the
18 characteristic format of the Daily Show. Id. at *4, *10. The accused work was
19 unlike those in traditional parody cases in that “the use of plaintiff’s clip . . . did
20 not involve an altered imitation of a famous work but the presentation of an
21 obscure, original work in a mocking context.” Id. at *10 (emphasis supplied).
22 However, because the accused work used excerpts of the original work to ridicule
23 it, parody analysis applied. The court reasoned, “[t]he only significance of
24 deeming a work a parody is the concomitant determination that the work contains
25 elements of commentary and criticism.” Id. at *11 (citing Campbell, 510 U.S. at
26 580). Thus, “the important, if not dispositive, issue is whether [the] use of
27 plaintiff’s material amounted to comment or criticism.” Id. Because the accused

1 work ridiculed the original by using plaintiff's clip in a segment called "Public
2 Excess" and adding derisive commentary, defendants "unquestionably used her
3 material for the purpose of criticism." Id.

4 In this case, akin to Kane, the target of the parody is not a publicly-known
5 work. While the Northland Video may be fairly well known in the family planning
6 and counseling community, (see, e.g., Expert Report of Ruth Arick ("Arick Rep.")
7 ¶¶ 22, 25, Docket No. 86), it is not a universal popular culture reference like "Oh,
8 Pretty Woman," Dr. Seuss, or Barbie. Like the "obscure" television show in Kane,
9 the Northland Video has a limited viewership. However, just as in Kane, where an
10 audience unfamiliar with the Kane Show could still appreciate the parody in the
11 Daily Show segment, here, a viewer unfamiliar with the Northland Video could
12 nonetheless recognize that the accused Videos were meant to ridicule the original.
13 While the Daily Show segment criticized the Kane Show by adding commentary
14 and showing clips from the original set to music with the pun title "Public Excess,"
15 here, the accused Videos derided the original by adding images, Biblical citations,
16 and music intended to contradict and ridicule the message of the Northland Video.
17 In both cases, the defendants used portions of the original to "critically examine"
18 it. 2003 U.S. Dist. LEXIS 18513, at *12-13.

19 Similarly, in RyCraft, Incorporated v. Ribble Corporation, No. 97-1573-KI,
20 1999 U.S. Dist. LEXIS 6052, at *24-31 (D. Or. Apr. 26, 1999), a parody of a little-
21 known work was entitled to fair use protection. In that case, Ribble, a cookie
22 stamp manufacturer, copied the designs, themes, and configurations of the cookie
23 stamps produced by its main competitor, Rycraft. Id. at *5. Ribble also copied
24 Rycraft's marketing materials, creating a sell sheet that displayed 48 of its designs
25 in a grid pattern and sequence substantially similar to Rycraft's "Top 40 list." Id.
26 at *9. Of the 48 Ribble cookie stamps, 41 were substantially similar in design and
27 theme as the Rycraft products. Id. Criticizing Ribble's tactics, Rycraft created a

1 flyer imitating Ribble’s sell sheet. For each of the cookie stamps Ribble had
2 copied, Rycraft placed an image of the Ribble stamp with the name of the
3 corresponding Rycraft cookie stamp below the image. The top of the flyer read,
4 “Has another company shown you our designs lately? Well, here are the
5 originals—Robin Rycraft’s designs most of which appeared on a Top 40 List we
6 published for you.” Id. at *10. Rycraft conceded that it did not know whether the
7 customers to whom it sent flyers had seen the Ribble sell sheet, and thus the object
8 of the parody was not necessarily well-known by its anticipated audience. Id. at
9 *11. Nevertheless, the flyer was a protected parody because it used elements of the
10 original to criticize Ribble for copying Rycraft’s product line. See id. at *10, *26.
11 Thus, the court implicitly held that the object of a parody need not be a well-known
12 work.

13 This Court agrees with the Kane and Rycraft courts that fair use protection is
14 not limited to parodies of well-known works. Parody promotes the creativity
15 copyright law is designed to foster whether the parodied work is a household name
16 or completely unknown. The benefit of social commentary and criticism is not
17 confined to works indicting the former. Just as the Campbell decision cautioned
18 courts against evaluating a parody’s success, so too should courts refrain from
19 evaluating the popularity of the parodist’s target. Campbell, 510 U.S. at 582
20 (quoting Yankee Publ’g v. News Am. Publ’g, Inc., 809 F. Supp. 267, 280
21 (S.D.N.Y. 1992) (Leval, J.) (“First Amendment protections do not apply only to
22 those who speak clearly, whose jokes are funny, and whose parodies succeed.”)).
23 Indeed, courts have no business circumscribing the parodist’s victim.

24 In sum, the Court finds that the accused Videos are parodies of the
25 Northland Video.

1 Northland further asserts that even if the accused Videos are parodies, they
2 are not sufficiently transformative to warrant fair use protection. (Pl.’s Mot. Br.
3 13-15.) Finding parody, alone, does not automatically trigger fair use protection.
4 See Campbell, 510 U.S. at 579-81 (finding that “parody may or may not be fair
5 use”); Fisher, 794 F.2d at 434 n. 2. To be transformative, “[t]here must be real,
6 substantial condensation of the materials, and intellectual labor and judgment
7 bestowed thereon; and not merely the facile use of the scissors; or extracts of the
8 essential parts, constituting the chief value of the original work.” Worldwide
9 Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000)
10 (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C. Mass. 1841)).

11 Northland contends that Defendants’ use of the Northland Video was not
12 sufficiently transformative because they used substantial verbatim sections of the
13 original and did little to alter the work as a whole. Further, Northland argues that
14 this case is distinguishable from other parody cases in that the defendants in
15 Mattel⁸ and Campbell⁹ mimicked or manipulated the original work to create their

16
17 ⁸ In Mattel, Forsythe used entire Barbie dolls and dismembered parts, but incorporated
18 them in the vignettes he created such that a new work emerged “imbued with a different
19 character.” 353 F.3d at 804. Forsythe’s “lighting, background, props, and camera angles all
20 serve to create a context for Mattel’s copyrighted work that transform Barbie’s meaning.” Id. at
21 802.

22 ⁹ In Campbell, 2 Live Crew took the most recognizable part of “Pretty Woman,” but it
23 added “scraper” noises and overlays to the music and changed the lyrics, thereby transforming it.
24 510 U.S. at 589. Thus, that case was not a situation where “a substantial portion” of the parody
25 itself was composed of a “verbatim” copying of the original. Id.; see also Abilene Music, Inc. v.
26 Sony Music Entm’t, Inc., 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003) (finding fair use of the song
27 “What a Wonderful World” in rapper Ghostface Killah’s sarcastic song “The Forest,” which
28

1 parodies, whereas here, Defendants used segments of the original work verbatim
2 and merely spliced it with other footage to form the new work. Therefore,
3 Northland asserts, Defendants' use was not sufficiently transformative to justify
4 the substantial use of verbatim clips from the Northland Video. While courts have
5 not addressed verbatim use of copyrighted video content in the parody branch of
6 the fair use doctrine, it is well established that "wholesale copying does not
7 preclude fair use per se." A&M Records Inc. v. Napster, Inc., 239 F.3d 1004, 1016
8 (9th Cir. 2001) (quoting Worldwide Church, 227 F.3d at 1118). Under "certain
9 circumstances," a use is fair even when the protected work is copied in its entirety.
10 Id.; see, e.g., Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-
11 50 (1984) (acknowledging that fair use of time-shifting necessarily involved
12 making a full copy of a protected work), superceded on others grounds by statute
13 as stated in Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913
14 (N.D. Cal. 2009); Mattel, 353 F.3d at 803 n. 8 (noting that the Ninth Circuit has
15 held that "entire verbatim reproductions are justifiable where the purpose of the
16 work differs from the original"); Bill Graham Archives v. Dorling Kindersley Ltd.,
17 448 F.3d 605, 609 (2d Cir. 2006) (finding that use of reproductions of Grateful
18 Dead concert posters in a biography of the band was fair use because they were
19 "historical artifacts" within context of the biography and thus had a transformative
20 use).

21 The "certain circumstances" of this case justified Defendants' verbatim
22 copying of Northland's work, given the difficulties of parodying a generally
23 unfamiliar video. First, Defendants had to make a full copy of the Northland
24 Video in order to distill it into the segments they would need to create their own
25 videos. Second, Defendants' verbatim use of segments of the original work was

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27 used the same melody and imitated the lyrics of the original to portray a corrupt and venal world,
28 thereby ridiculing the "unrealistically uplifting" message of the original).

necessary to create the parody because the Northland Video is not a highly
1 recognizable work ingrained in the collective psyche of Defendants' audience.
2 Unlike "Pretty Woman" or Barbie, where a parodist can comment on the original
3 with a broadly suggestive allusion, here, Defendants could not effectively comment
4 on the Northland Video without showing verbatim excerpts that captured the
5 essence of the message and the mannerisms of the narrator.¹⁰ While the
6 transformation of the Northland Video may have been more rudimentary¹¹ than the
7 transformation of the song lyrics in Campbell or the photographs of Barbie in
8 Mattel, Defendants fundamentally changed and commented on the copyrighted
9 work.¹² Compare Mattel, 353 F.3d at 800, with Religious Tech. Ctr. v. Netcom
10 On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1243 (N.D. Cal. 1995) (finding
11 that the defendant's use of copyrighted Scientology materials was not
12 transformative because, despite his purported purpose of criticizing the Church, he
13 republished the original work with little or no added commentary or criticism).

¹⁰ This argument is closely related to the "amount and substantiality of use" analysis,
15 discussed infra section B.3.

¹¹ In the TAG Video, Defendants alternate between clips from the Northland Video and
17 footage of alleged abortions. The narrative from the Northland Video continues throughout the
18 TAG Video. The CBR I Video is slightly more transformed in that Defendants added their own
19 music to accompany the images of the alleged abortions, and the Video begins with a Biblical
20 quotation. The CBR II Video is the most transformed, adding a George Orwell quotation to the
21 beginning of the CBR I Video. The Court finds that each of the accused Videos is sufficiently
22 transformative because they edit the original and add content in such a way that dramatically
23 changes the meaning of the work, thereby creating a new work that comments on the original.
24

¹² Further, "[w]hether the parody is in good taste or bad, fails or succeeds," is
26 inconsequential in the fair use analysis. Campbell, 510 U.S. 582-83.
27

1 The new background soundtrack, the visuals, and the juxtaposition of the new
2 video clips with the original creates an entirely different impact on the viewer.
3 Thus, the accused Videos are transformative.

4 The “purpose” factor also requires the Court to consider whether the
5 defendant’s use is commercial or noncommercial. See 17 U.S.C. § 107; Harper &
6 Row, 471 U.S. at 562. “The crux of the profit/nonprofit distinction is not whether
7 the sole motive of the use is monetary gain but whether the user stands to profit
8 from exploitation of the copyrighted material without paying the customary price.”
9 Id. In determining whether the purpose for the infringing work was “profit,”
10 “monetary gain is not the sole criterion . . . particularly in [a] . . . setting [where]
11 profit is ill-measured in dollars.” Worldwide Church, 227 F.3d at 1117 (alteration
12 in original) (quoting Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989)
13 (holding that a professor’s verbatim copying of an academic work was not fair use,
14 in part because a professor can “profit” by gaining recognition among his peers and
15 authorship credit)). In Worldwide Church, the Ninth Circuit concluded that the
16 Philadelphia Church of God “unquestionably” profited from the use of Worldwide
17 Church of God’s publication because it provided them with their core text essential
18 to its members’ religious observance, thereby enabling the ministry to grow. 227
19 F.3d at 1118.

20 In this case, Defendants at least in part profited from the creation and
21 dissemination of the accused Videos. First, it is undisputed that Cunningham used
22 the CBR Videos for fundraising and spreading CBR’s message. Cunningham
23 testified that he shows the CBR Videos “every time” he does a fundraising pitch
24 because the CBR Videos are “part of what we are doing,” and CBR’s “entire
25 existence hangs on the goodwill of donors who want to know what we’re doing
26 and want to know what our challenges and burdens are” (Cunningham Dep.
27

133:24-134:5, 156:18-21.) Defendants argue that this fact is immaterial because
1 Cunningham declared that any request for donations “remotely related” to the
2 accused Videos were made after Northland filed this suit for the sole purpose of
3 defraying litigation costs. (Defs.’ Opp’n to Pl.’s MSJ 16 (citing Cunningham Decl.
4 ¶ 11).) However, Cunningham’s Declaration is inconsistent with his deposition
5 testimony, in which he stated that he could not remember whether he used the CBR
6 Videos in his pitches prior to this lawsuit. (Cunningham Dep. 156:7-8, 157:14-18.)
7 Moreover, Defendants have cited no authority for their position that using an
8 accused work to solicit donations for a litigation defense of that work is exempted
9 commercial activity.¹³

10
11 Second, even if Defendants did not use these videos directly for fundraising,
12 the Videos generated traffic to the anti-abortion websites on which they were
13 posted and incited discussion on the sites’ message boards. Defendants
14 appropriated the copyrighted material to advance their own message, and therefore
15 derived a benefit from their use. Generating traffic to one’s website or conveying
16 one’s message effectively using copyrighted material is within the type of “profit”
17 contemplated by Worldwide Church. Moreover, that users on the CBR website
18 could make donations through a link on the same page where the Videos were
19 posted is further evidence that the Defendants profited from the Videos. Henley,
20 733 F. Supp. 2d at 1159. But see Righthaven, LLC v. Jama, No. 2:10-CV-1322
21 JCM (LRL), 2011 U.S. Dist. LEXIS 43952, at *7-8 (finding it immaterial in the

22 ¹³ Defendants cite Righthaven, LLC v. Jama, No. 2:10-CV-1322 JCM (LRL), 2011 U.S.
23 Dist. LEXIS 43952, at *7-8 (D. Nev. Apr. 22, 2011), for the proposition that the solicitation of
24 donations on a non-profit organization’s website is immaterial to the commercial use analysis.
25 (Defs.’ Opp’n to Pl.’s MSJ 16.) However, that case does not hold that fundraising for a litigation
26 defense of the accused work is protected under copyright law. The Court finds no reason to
27 draw a distinction between pre- and post-litigation commercial use of infringing works.

1 commercial use analysis that a defendant non-profit organization solicited
2 donations on its website where the accused material was posted).

3 However, as noted earlier, the commercial aspects of the accused work are
4 less important when the work is significantly transformative. Campbell, 510 U.S.
5 at 579. Indeed, “even works involving comment and criticism ‘are generally
6 conducted for profit in this country.’” Mattel, 353 F.3d at 803 (quoting Campbell,
7 510 U.S. at 584). Here, Defendants used Northland’s work to criticize it—not to
8 “exploit its creative virtues.” Blanch, 467 F.3d at 257. On balance, the profit
9 Defendants gained from the use of Northland’s copyrighted material is a minor part
10 of the analysis in light of the transformative use of the material.

11 12 2. Nature of Copyrighted Work

13
14 The second statutory factor, “the nature of the copyrighted work,”
15 acknowledges that creative works are “closer to the core of intended copyright
16 protection” than informational and functional works, “with the consequence that
17 fair use is more difficult to establish when the former works are copied.”
18 Campbell, 510 U.S. at 586. However, this factor is not “terribly significant in the
19 overall fair use balancing,” Seuss II, 109 F.3d at 1401, particularly in the parody
20 context where a creative work is frequently the nub of the parodist’s comment or
21 criticism, see Campbell, 510 U.S. at 586 (finding the second factor unlikely to
22 “help in separating the fair use sheep from the infringing goats in a parody case”).

23 The copyrighted work in this case is informational, functional, and creative.
24 Northland made creative choices in writing the script and staging the narrator in its
25 Video. The Video is also informational and functional because it promotes the
26 guidance program at Northland and spreads Northland’s “good women” message.
27 The artistic decisions Northland made in articulating its message, staging the

1 scene, and adding inspirational quotes and calming music makes this work “closer
2 to the core of intended copyright protection” than purely informational or
3 functional works. Accordingly, this factor weighs slightly in favor of Northland.

4 3. Amount and Substantiality of Portion Used

5
6 In the parody context, the third factor turns on “the persuasiveness of a
7 parodist’s justification for the particular copying done, . . . [;] the extent of
8 permissible copying varies with the purpose and character of the use.” Campbell,
9 510 U.S. at 586. The analysis of this factor will “also tend to address the fourth, by
10 revealing the degree to which the parody may serve as a market substitute for the
11 original or potentially licensed derivatives.” Id. at 587.

12
13 Parodies have more leeway under the third factor because a parody must
14 take recognizable material from the original in order to convey its message.
15 Campbell, 510 U.S. at 588-89. Moreover, to be recognizable, the parodist
16 generally must extract the “heart” of the original. Id. (noting that “[i]t would be
17 difficult to see how the transformed work’s parodic character would have come
18 through if it did not copy the core of the original”). There is, of course, a
19 limitation on the amount and substantiality of the original the parodist may use:

20
21 Once enough has been taken to assure identification, how much
22 more is reasonable will depend, say, on the extent to which the
23 song’s overriding purpose and character is to parody the
24 original or, in contrast, the likelihood that the parody may serve
25 as a market substitute for the original.

26 Id. at 587. The Ninth Circuit has adopted the “conjure up” test: “The parodist is
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28

1 permitted a fair use of a copyrighted work if it takes no more than is necessary to
2 ‘recall’ or ‘conjure up’ the object of his parody.” Seuss II, 109 F.3d at 1400
3 (collecting cases in accord). But see Mattel, 353 F.3d at 804 (“We do not require
4 parodic works to take the absolute minimum amount of the copyrighted work
5 possible.”)

6 Northland argues that even if the accused Videos are parodies, Defendants
7 have taken too much of the Northland Video to invoke fair use protection. The
8 CBR Videos use 2 minutes and 2 seconds of the Northland Video’s 4 minute and
9 41 seconds of footage, or 43 percent of the Northland Video. The CBR I Video is
10 slightly under 4 minutes long, and the CBR II Video is approximately 4 minutes
11 and 13 seconds long. Thus, the CBR Videos are between 48 and 53 percent
12 Northland’s original work. The TAG Video is 1 minute and 17 second long, and
13 the entire audio track is taken from the Northland Video—27 percent of the
14 Northland Video’s audio track. Northland asserts that Defendants’ use is not fair
15 because it is excessive in relation to the total length of the accused Videos, and it
16 plucks from the core of the copyrighted material.

17 However, there is no “fixed limit” on the amount a parodist may copy.
18 Fisher, 794 F.2d at 439. Indeed, “‘substantial copying by a defendant, combined
19 with the fact that the portion copied constituted a substantial part of the defendant’s
20 work’ does not automatically preclude the fair use defense.” Id. at 438 (quoting
21 Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978)). There are
22 three considerations important to determining whether a taking is excessive under
23 the circumstances. Fisher, 794 F.2d at 439. First, courts consider the degree of
24 public recognition of the original work. Id. Close copying is impermissible when
25 the work is well-known or familiar to the audience. Compare Walt Disney Prods.,
26 581 F.2d at 756 (close copying of Disney characters impermissible), with Rycraft,

1 Inc., 1999 U.S. Dist. LEXIS 6052, at *28 (close copying of cookie stamp sell sheet
2 permitted because it was “essential to plaintiff’s comment or criticism). Second,
3 courts evaluate the “ease of conjuring up the original work in the chosen medium.”
4 Id. For example, in Air Pirates, defendants created a subversive comic book
5 copying Disney characters near-verbatim. 581 F.2d at 757-58. The court found
6 that defendants “took more than was necessary to place firmly in the reader’s mind
7 the parodized work and those specific attributes that [were] to be satirized,” noting
8 that graphic design was a relatively easy medium for parody. Id. The court opined
9 that other media, such as song or speech, could have more fair use leeway, given
10 the greater difficulty in mimicking that media. Id. Third, the court analyzes the
11 focus of the parody, *i.e.* whether the overriding purpose was to parody the original
12 or whether it had another purpose. Fisher, 794 F.2d at 439; *see* Campbell, 510
13 U.S. at 588.

14 In this case, the Fisher factors militate in favor of Defendants. First, because
15 the Northland Video is not well-known or familiar to the public, Defendants had to
16 use a significant portion of it for the audience to appreciate its parodic nature.
17 Unlike the universally recognizable Disney characters in Air Pirates, Defendants
18 needed more than a mere allusion to the Northland Video to effectively parody it.
19 Second, the Northland Video is not easy to conjure up in a sound byte or a single
20 image. While the Ninth Circuit has not specifically opined that video or film is a
21 difficult media to parody, the challenges of parodying video are closer to song or
22 speech than graphic design. Akin to a song or speech, with parody of video there
23 is a “special need for accuracy” that provides some license for a “closer” parody.
24 Fisher, 794 F.2d at 439. Just as a would-be parodist loses the likeness of a song if
25 she substantially varies the music or meter of the original, a would-be parodist
26 loses the likeness of a film if he substantially varies the script or setting of the
27 original. It follows that video, like song and speech, should be afforded greater
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leeway in determining whether a defendant borrowed in excess. Moreover, the
1 Court also considers the difficulty of “conjuring up” the message of a little known
2 video without resorting to use of that video. See Campbell, 510 U.S. at 589.
3 While five seconds might be sufficient to capture the iconic image of Marilyn
4 Monroe in a billowing skirt standing over a vent, the challenge presented in
5 parodying the Northland Video is at the other end of the spectrum.
6

7 Third, as discussed supra section B.1, the overriding purpose of the accused
8 Videos was to parody the original. While the accused Videos may have
9 commented on the broader abortion debate or may have helped solicit patronage
10 for CBR, these effects were incidental to the primary purpose of parodying
11 Northland’s Video. Additionally, the fact that the accused Videos were not a
12 market substitute for the Northland Video weighs in Defendants’ favor. Northland
13 likens this case to Harper & Row, noting that in both cases the copied material
14 played a “key role in the infringing work.” (Pl.’s Mot. Br. 18 (citing 471 U.S. at
15 566).) In Harper & Row, President Ford contracted with Time Magazine for
16 prepublication excerpts from his memoirs. Harper & Row, 471 U.S. at 541.
17 Before Time published the story, Nation Magazine acquired a copy of the memoir
18 manuscript and “scooped” the story, paraphrasing and copying significant portions
19 at the heart of the memoir. Id. The fair use defense was not available because the
20 purpose of the news story was to exploit copyrighted work without licensing it, and
21 the effect on the market was great, given that Nation usurped Time’s exclusive and
22 valuable right of first publication. Id. at 562-63; see also Elvis Presley Enters. v.
23 Passport Video, 349 F.3d 622, 629 (9th Cir. 2003), overruled on other grounds as
24 stated in AFL Telecomms. KKC v. SurplusEZ.com, No. CV11-1086-PHX-DGC,
25 2011 U.S. Dist. LEXIS 132055, *5-6 (9th Cir. Nov. 15, 2011). In contrast, here,
26 Defendants did not usurp the market for the Northland Video, and the accused
27 Videos certainly are not a market substitute. Moreover, unlike Nation Magazine,
28

1 Defendants did not evade a licensing agreement. In sum, the purpose of the parody
2 militates in favor of finding fair use.

3 4. Market Harm

5 Under the “market effect” factor, the Court focuses on the extent to which
6 the Defendants’ work usurps the potential market for the original or its derivatives.
7 Campbell, 510 U.S. at 592. It is not relevant that a use may damage the original’s
8 value through criticism. Id. at 591-92; Bourne Co. v. Twentieth Century Fox Film
9 Corp., 602 F. Supp. 2d 499, 510 (S.D.N.Y. 2009) (“If a parody of the original work
10 would usurp the market for licensing other comedic uses of the original work, then
11 all parodies would fail under this prong of the analysis.”). Courts must distinguish
12 between “biting criticism that merely suppresses demand and copyright
13 infringement, which usurps it.” Campbell, 510 U.S. at 592 (quoting Fisher, 794
14 F.2d at 438) (alterations omitted).

15
16 This analysis requires consideration of more than just the market effect of
17 the particular infringement at issue. Courts are to consider ““whether unrestricted
18 and widespread conduct of the sort engaged in by the defendant . . . would result in
19 a substantially adverse impact on the potential market’ for the original.” Id. at 590
20 (citation omitted). The burden is on the defendant to “bring forward favorable
21 evidence” that potential markets will not be harmed. Dr. Seuss II, 109 F.3d at
22 1403.

23 In this case, the harm Northland claims to suffer is not cognizable because it
24 stems from an “aim at garroting the original,” not a usurpation of the original’s
25 market. Campbell, 510 U.S. at 592. Northland asserts that the accused Videos
26 have diminished the value of the Northland Video and have terminated all
27

1 conversations with potential licensees. While this is no phantom injury, it is not
2 recognized by the Copyright Act. Campbell, 510 U.S. at 591-92 (“We do not, of
3 course, suggest that a parody may not harm the market at all, but when a lethal
4 parody, like a scathing theater review, kills the demand for the original, it does not
5 produce a harm cognizable under the Copyright Act.”) Furthermore, it is
6 unfathomable to think that the accused Videos are a market substitute for the
7 Northland Video. The purposes and messages of the two are diametrically
8 opposite.

9 In sum, the accused Videos cause no cognizable market harm to the
10 Northland Video. Accordingly, this factor weighs in favor of Defendants.

11 5. Aggregate Assessment

12 The fair use analysis involves a delicate balancing of the four factors with an
13 eye towards the purposes of copyright. “The doctrine has been said to be ‘so
14 flexible as virtually to defy definition.’” Princeton Univ. Press v. Mich. Document
15 Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting Time Inc. v. Bernard Geis
16 Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)). The case-by-case analysis
17 resists bright-line determinations and the resulting decisions inevitably represent a
18 sort of rough justice.
19
20

21 In this case, the balance of the factors weighs in favor of finding fair use.
22 While the accused works have some commercial use, their transformative character
23 substantially eclipses that consideration. Thus, the first factor tips in favor of
24 Defendants. Because the Northland Video is, at least in part, a creative work, the
25 second factor militates in favor of Northland. The third factor weighs in favor of
26 Defendants because they did not use an excessive amount of the Northland Video
27

1 to create their parody, in light of the Fisher factors. Finally, the fourth factor also
2 weighs in favor of Defendants because the accused Videos did not create a
3 cognizable market injury to the Northland Video. Though Northland many have
4 suffered pecuniary or reputational losses as a result of the accused Videos, those
5 injuries are not recognized under the Copyright Act. On balance, Defendants' use
6 of the Northland Video was fair.

7 **C. Vicarious and Contributory Infringement**


8
9 If a use of copyright is deemed to be fair, the use "is not an infringement of
10 copyright." 17 U.S.C. § 107. Because the Court finds that Defendants' use of the
11 Northland Video was fair, Defendant did not infringe Northland's copyright as a
12 matter of law. Accordingly, the Court need not consider Northland's claim of
13 vicarious or contributory infringement.

14
15 **IV. Conclusion**

16
17 For the foregoing reasons, Defendants' Motion for Summary Judgment is
18 GRANTED, and Northland's Motion for Summary Judgment is DENIED.

19
20 IT IS SO ORDERED.

21
22
23
24 DATED: June 15, 2012

25
26 
27 JAMES V. SELNA
28 UNITED STATES DISTRICT JUDGE