

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-9179-GW(PJWx)	Date	July 27, 2017
Title	<i>Paul N. Weinberg v. Dirty World, LLC, et al.</i>		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Katie Thibodeaux

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Gary J. Gorham

David Scott Gingras

PROCEEDINGS: DEFENDANT/COUNTER-CLAIMANT’S MOTION FOR SUMMARY JUDGMENT RE: PLAINTIFF’S INFRINGEMENT CLAIM [29]

The Court’s Tentative Ruling is circulated and attached hereto. Court hears oral argument. Defendant and Counter-Claimant’s motion is GRANTED IN PART and DENIED IN PART. The Court would deny Plaintiff’s Rule 56(d) motion and grant Defendant’s motion for partial summary judgment on Plaintiff’s copyright infringement claim based on the fair use doctrine. Counsel for Defendant will provide a proposed judgment forthwith.

Initials of Preparer JG : 15

Weinberg v. Dirty World, LLC; Case No. CV-16-9179-GW-(PJWx)
Tentative Ruling on Motion for Partial Summary Judgment

I. Background

Plaintiff Paul N. Weinberg sues Defendant Dirty World, LLC (“Dirty World”)¹ for copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.* See generally Complaint, Docket No. 1.

The image at the center of this litigation is a single frame photograph, captured from a five-second clip of a Belgian reality show, and subsequently uploaded to Defendant’s website. See generally *id.*; see also Docket No. 1-1 (screen capture of the image uploaded to Defendant’s website). Plaintiff has an exclusive license to enforce and prosecute any claims for copyright infringement of the five-second clip within the United States. See generally Complaint. In turn, Defendant raised the affirmative defense of fair use. See Answer at 5, Docket No. 14. Defendant now moves for partial summary judgment on Plaintiff’s claim for copyright infringement. See generally Def.’s Motion for Summary Judgment (“Motion”), Docket No. 29; Decl. of Nik Lamas-Richie (“Lamas-Richie Decl.”), Docket No. 29-2; Decl. of David S. Gingras (“Gingras Decl.”), Docket No. 29-3; Pl.’s Opposition to the Motion (“Opposition”), Docket No. 33; Decl. of Paul N. Weinberg (“Weinberg Decl.”), Docket No. 33-1; Decl. of Gary J. Gorham (“Gorham Decl.”), Docket No. 33-2; Pl.’s Statement of Disputed Facts (“SOF”), Docket No. 34; Pl.’s Evidentiary Objections, Docket No. 35; Def.’s Reply in Supp. of the Motion (“Reply”), Docket No. 36.

II. Legal Standard

Under Rule 56 of the Federal Rules of Civil Procedure, a party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought; and the court shall grant it when the pleadings, the discovery and disclosure materials on file, and any affidavits show that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see also *Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005). As to materiality, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

To satisfy its burden at summary judgment, a moving party with the burden of persuasion must establish “beyond controversy every essential element of its [claim or defense].” *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003); O’Connell & Stevenson, *Rutter Group Prac. Guide: Fed. Civ. Proc. Before Trial* (“*Federal Practice Guide*”) § 14:126 (2016). By contrast, a moving party without the burden of persuasion “must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); see also *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001)

¹ Does 1-10 have been ignored for this analysis.

(en banc) (“When the nonmoving party has the burden of proof at trial, the moving party need only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), and citing *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (holding that the *Celotex* “showing” can be made by “pointing out through argument . . . the absence of evidence to support plaintiff’s claim”)).

If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted) (citing, among other cases, *Celotex*, 477 U.S. at 323). “A non-movant’s bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment.” *See FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). In addition, the evidence presented by the parties must be admissible. *See Fed. R. Civ. P. 56(e)*. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Relatedly, “[a]ny objections to declarations or other evidence must be made at or (preferably) before the hearing, and should be ruled upon by the court before ruling on the motion itself.” *Federal Practice Guide* § 14:333 (citing *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980); *Sigler v. American Honda Motor Co.*, 532 F.3d 469, 480 (6th Cir. 2008)). In judging evidence at the summary judgment stage, however, courts do not make credibility determinations or weigh conflicting evidence at the summary judgment stage, and must view all evidence and draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *see also Motley v. Parks*, 432 F.3d 1072, 1075, n.1 (9th Cir. 2005) (en banc); *Anderson*, 477 U.S. at 255 (“The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in [the non-movant’s] favor.”).

“If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case.” *Fed. R. Civ. P. 56(g)*; *see also Federal Practice Guide* § 14:352 (“A partial summary judgment may be granted on motion of either party for adjudication of particular claims or defenses.”) (citing *id.* § 14:33).

III. Evidentiary Rulings

Plaintiff objects to certain evidence offered into the record by Defendant. *See generally* Pl.’s Evidentiary Objections. On a motion for summary judgment, “[a]dmissibility is determined under the Federal Rules of Evidence.” *Federal Practice Guide* § 14:162.2. “An affidavit or declaration used to support or oppose” a summary judgment motion “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or

declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4); *see also Federal Practice Guide* § 14:162. In light of the foregoing standard, and viewing evidence and drawing inferences in favor of Plaintiff, the Court issues the following evidentiary rulings: Plaintiff’s evidentiary objections 3, 9-10, 16 are sustained. The corresponding assertions in the Gingras Declaration and the Lamas-Richie Declaration are, therefore, struck from the record. The remaining evidentiary objections are overruled.

IV. Discussion

A. Undisputed Facts²

Defendant operates a website located at www.TheDirty.com (the “Website”). SOF ¶ 1. The Website is mainly a large interactive message board where users of the site can submit posts, upload comments about posts, and can reply to comments left by other users. *See* Lamas-Richie Decl. ¶ 5. A cursory review of the Website reveals many posts containing unsavory and disparaging comments towards women. *See generally* The Dirty, <https://thedirty.com> (last visited July 16, 2017). Sometime in July 2012, an image capturing Plaintiff and his wife standing in front of a plane (the “Video Image”) was uploaded to the Website with a post entitled “My Husband Flies His Own Plane and It’s Sexy” (the “Post”).³ SOF ¶¶ 2-3. The Video Image is a single still frame image taken from a 52-minute episode of a publically broadcasted reality TV program entitled *Astrid in Wonderland*. SOF ¶¶ 4, 6. Though Plaintiff is not the original author of the entire episode, he obtained an exclusive license to a five-second portion of the *Astrid in Wonderland* episode in which the Video Image appears. *Id.* ¶¶ 7-8; *see also* Gingras Decl., Ex. B (the “License Agreement”). Before it was uploaded to the Website, the Video Image was subsequently posted as Plaintiff’s wife’s Facebook cover photo. SOF ¶ 10.

Included in the Post is the following text immediately below the Video Image:

THE DIRTY ARMY: Nik, let me introduce you to this couple Paul Weinberg and Shay Londre. So what happened is Londre posted this pic on her facebook, “my husband flies his own plane and it is sexy.” However, every time I saw her, I thought she is super ugly and awkward looking. Nik, do you have any clue how can this women [sic] get [sic] married to that rich guy and is a model. (although [sic] I have never notice [sic] her in any magazine or runway shoe [sic] but she is a model lol).

Her ears worry me. –nik

See id. ¶¶ 9-11 (emphases in original); *see also* Gorham Decl., Ex. A at 5-6 (the “Post Printout”)

² Some of the underlying “undisputed” facts cited herein have been disputed by Plaintiff or Defendant. The Court has reviewed such disputes and has included in this summary only facts that are supported by the cited evidence, altering the proffered facts if necessary to accurately reflect the uncontroverted evidence. To the extent that the cited underlying “undisputed” facts have been disputed, the Court finds that the stated disputes fail to controvert the proffered “undisputed” facts; dispute the facts on grounds not germane to the below statements; and/or fail to cite evidence in support of the disputing party’s position. As such, the Court treats such facts as undisputed. Any proffered facts not included in this Tentative Ruling were found to be improper opinions or conclusions rather than facts; were unsupported by admissible evidence; were deemed irrelevant to the Court’s present analysis; or some combination thereof.

³ The first two images described in the Complaint (*see* Complaint ¶ 13) and Opposition (*see* Opposition at 3) are not relevant to this motion, as Plaintiff only asserts his claim of copyright infringement based on his exclusive license recorded with the Copyright Office with respect to the Video Image.

(a printout of the Post on the Website as of late 2016) (emphases and grammatical errors in original). Plaintiff's wife, Shay Londre ("Londre"), as referenced above, is a professional model who has previously appeared on television. SOF ¶ 12. Londre has a publicly accessible Instagram account where she has published many photos of herself, and has over 21,000 "followers" on said social media site. *Id.* ¶ 13.

After Plaintiff acquired the exclusive rights to the five-second clip from which the Video Image was captured, he sent a letter to Defendant's registered Digital Millennium Copyright Act ("DMCA") agent dated September 9, 2016 demanding removal of the Video Image. *See id.* ¶ 15. As of July 16, 2017, the Court cannot access the Post on the link provided by both parties, and as such, parties cannot dispute Defendant's contention that the post in question has since been removed from the Website.⁴ *See id.* ¶ 17.

B. Analysis

1. Plaintiff's Rule 56(d) Motion

Plaintiff requests a continuance to allow him to conduct further discovery before the ruling on the Motion. *See* Opposition at 18. "[A] party seeking further discovery under Rule 56(d) must show that '(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.'" *Mintz v. Mark Bartelstein & Assocs. Inc.*, 906 F. Supp. 2d 1017, 1040 (C.D. Cal. 2012) (quoting *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008)).

Here, Plaintiff asks the Court to delay or deny the Motion until after the deposition of Nik Lamas-Richie ("Lamas-Richie") set to take place on July 20, 2017. *See* Opposition at 19. Lamas-Richie is the manager, founder, and editor-in-chief of the Website. *See* Lamas-Richie Decl. ¶¶ 3-4. Plaintiff asserts that the deposition will unearth information about: (1) "Dirty World's actual knowledge of infringement"; (2) "its knowledge of facts or circumstances from which infringement was apparent"; (3) "its right and ability to control content in the DirtyWorld.com website"; (4) "the nature of Dirty World's advertising purchases"; (5) "Dirty World's own participation in scraping content and commenting on posts"; (6) "the lack of transformation of the image at issue"; (7) "the basis for Richie's testimony that 'I am certain' the post came from a third party user"; (8) "the identity of the persons commenting on the post and their affiliation with Dirty World"; (9) "the date on which Dirty world contends the challenged

⁴ In his opposition brief, Plaintiff asserts that the Post, as of July 3, 2017, was still accessible via the link provided by Defendant in its answer (<https://gossip.thedirty.com/Hollywood/my-husband-flies-his-own-plane-and-itssexy/>). *See* Opposition at 2; *see also* Answer ¶ 20. The Court is unable to view this link, as it appears to be no longer valid, thus implying that the Post has been removed as per that specific link. However, the Court did not scour the Website to see if the Video Image had been reposted to another link, nor would that have any bearing on the outcome of this motion. *See Federal Practice Guide* § 14:102.2 ("Local rules relating to separate statements have the force of law and summary judgment may be upheld based on a party's failure to comply therewith. The modest demand that the opposing party specify the facts in controversy is entirely compatible with Rule 56. Judges are not obliged to scour the record looking for a factual dispute without assistance from the parties.") (citing *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001); *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999); *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 725 (8th Cir. 2003)); Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials[.]").

content supposedly was removed from the site”; and (10) “the facts and circumstances around the false representation that the content has been removed from the Dirty World site.” *Id.* at 19-20. As an initial matter, and as Defendant correctly points out in its reply (*see* Reply at 16), all of Plaintiff’s assertions except for numbers (4) and (6) *solely* relate to facts surrounding Defendant’s defense of DMCA safe-harbor protection. Because the Court finds Defendant’s affirmative defense of fair use to be dispositive to the Motion, the Court need not address Defendant’s defense of DMCA safe-harbor protection. As such, Plaintiff’s requests for further discovery on numbers (1)-(3), (5), (7)-(10) are unnecessary at this point, as each request will only unearth facts solely related to the DMCA safe-harbor issue.

As to number (6), Plaintiff’s assertion that the deposition of Lamas-Richie will unearth facts about “the lack of transformation of the image at issue,” the Court finds that the facts surrounding the transformation of the Video Image have already occurred. Plaintiff himself contends that “there was no transformation of the Derivative Image, other than by adding Dirty World’s logo onto it” (*see* Opposition at 16), yet still asks for a continuance to discover facts about the lack of transformation (*see id.* at 19-20). Such discovery is simply unnecessary. As discussed in detail below, the undisputed facts set forth about the Post on the Website establish the transformation of the Video Image. The Video Image was originally used in a reality show, whereas the Post uses the Video Image to criticize Plaintiff’s wife physical appearance, insult her modeling career, and mock Plaintiff himself. Here, the copyrighted work was used to display Plaintiff and his wife’s wealth, and their luxurious lifestyle in Hollywood (*see generally* Gingras Decl. ¶ 12 (containing a YouTube link to the full episode of *Astrid in Wonderland* from which the five-second clip was taken)), whereas the Post uses the exact same image of Plaintiff and his wife to ridicule, mock, and critique the two figures (*see* Post Printout). The language contained in the Post speaks for itself, the evidence of the language contained in the Post has already been proffered to this Court (*see* Post Printout), and as such, Plaintiff need not discover more facts about said Post or the transformation of the Video Image.

Plaintiff’s request number (4) to gather more information about the nature of Defendant’s advertising purchases is also not necessary, as the Court finds (described in more detail below) that the commercial aspect of the Website already weighs in favor of Plaintiff. Thus, Plaintiff need not produce additional evidence with regard to Defendant’s commerciality as it relates to the fair use analysis set forth here.

Accordingly, the Court denies Plaintiff’s request to delay or deny the Motion under Rule 56(d).

2. Copyright Infringement

Defendant seeks summary judgment on Plaintiff’s cause of action for copyright infringement under the Copyright Act. To prevail on a copyright infringement claim, a plaintiff must show: (1) ownership of a valid copyright; and (2) defendant’s infringement of the copyright. *See Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1143 (9th Cir. 2003); *Metcalf v. Bochco*, 294 F.3d 1069, 1072 (9th Cir. 2002). Plaintiff asserts that Defendant’s “motion assumes that [Plaintiff] has an enforceable copyright interest and admits that [Defendant] has published a portion of an original work for which [Plaintiff] has an exclusive license.” *See* Opposition at 9. Indeed, Defendant does not challenge that Plaintiff has an exclusive license for the five-second interval of the show from which the Video Image was taken (*see* SOF ¶ 8), nor do they challenge that the Video Image was uploaded to the Website (*see id.*

¶ 9). Plaintiff has established a *prima facie* case of copyright infringement because the parties do not dispute that Plaintiff owned the exclusive license property rights in the Video Image, and that Defendant used it on its Website without Plaintiff's permission. *See Hustler Magazine, Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986) (affirming a district court's finding that plaintiff made out a *prima facie* case of infringement where plaintiff was the copyright owner and defendant copied the work without plaintiff's permission).⁵

3. Fair Use Defense

Defendant argues that Plaintiff's claim is barred as a matter of law by the doctrine of fair use (*see* Motion at 8), which "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (*see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (internal quotation marks omitted) (alteration in original)). Defendant asserts that the undisputed facts establish that the Post on the Website qualifies as fair use as a matter of law. *See* Motion at 8; *see also Hustler*, 796 F.2d at 1151 ("If there are no genuine issues of material fact . . . a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work.").

The Copyright Act provides that the fair use of a copyrighted work, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. In determining whether the use of a work is a fair use, courts should consider the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. These factors should not be treated in isolation, and instead must be explored and weighed in light of copyright's purpose. *See Campbell*, 510 U.S. at 578. The Supreme Court has found that transformative uses "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" because such works generally further "the goal of copyright, to promote science and the arts[.]" *Id.* at 579. Nevertheless, there are no bright-line rules; fair use must be evaluated on a case-by-case basis by reference to the four statutory factors. *See id.* at 577.

a) *Purpose and Character of Use*

The key inquiry for the first statutory factor is "whether and to what extent the new work is 'transformative.'" *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007) (citing *Campbell*, 510 U.S. at 579). A new work is transformative when it does not "merely supersede the objects of the original creation but rather adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Perfect 10*, 508 F.3d at 1164 (internal quotation marks omitted) (quoting *Campbell*, 510 U.S. at

⁵ Defendant does not contend or even address its infringement, but rather jumps directly to its affirmative defense of fair use as its basis for summary judgment. *See* Motion at 8.

579). The “more transformative the new work, the less will be the significance of the other factors . . . that may weigh against a finding of fair use.” *Morris v. Young*, 925 F. Supp. 2d 1078, 1084-85 (C.D. Cal. 2013) (alteration in original) (quoting *Campbell*, 510 U.S. at 579). The preamble to Section 107 lists criticism and comment as illustrative bases supporting fair use under this factor. *See* 17 U.S.C. § 107; *see also Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173 (9th Cir. 2012).

Plaintiff argues that the Video Image is not transformative because Dirty World only added its logo onto the image, and the “only criticism” by the author who posted the [Video Image] is the second sentence [of the Post] stating that the author does not find [Plaintiff’s wife] attractive.” Opposition at 16. Plaintiff refers to the second sentence of the Post, which states that: “However, every time I saw her, I thought she is super ugly and awkward looking.” *See* SOF ¶ 11; *see also* Post Printout. Plaintiff surmises that the mere statements on the post add “little new expression” to the Video Image. *See* Opposition at 16. Thus, posting verbatim copies of a copyrighted work “with little or no added comment or criticism” does not constitute fair use. *See Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 923 F. Supp. 1231, 1243 (N.D. Cal. 1995). The court in *Netcom* found that the works posted by the defendant were only “minimally transformative” because “unlike the typical critic, [the defendant] add[ed] little new expression to the [plaintiff’s] works.” *Id.* The court goes on to explain that “[a]lthough criticism is a favored use, where that ‘criticism’ consists of copying large portions of plaintiffs’ works – and sometimes all of those works – with often no more than one line of criticism, the fair use defense is inappropriate.” *Id.* at 1249. Plaintiff also cites to *Los Angeles Times v. Free Republic*, No. CV 98-7840 MMM (AJWx), 2000 WL 565200 (C.D. Cal. Apr. 4, 2000), to reinforce his argument that verbatim copying is non-transformative. *See* Opposition at 15. In *Free Republic*, the defendant published full text articles on a website to purportedly enable their users to “criticize the manner in which the media covers current events.” *Free Republic*, 2000 WL 565200, at *10. However, “a review of the representative articles submitted by defendants reveal[ed] that [the] visitors’ commentary focuse[d] much more on the news of the day than it [did] on the manner in which the media report[ed] that news.” *Id.* Thus, the court concluded that the defendants “use of the copyrighted articles was minimally transformative, given that the verbatim posting of the plaintiffs’ full text articles was more than was necessary to “further defendants’ critical purpose.” *Id.*

However, *Netcom* and *Free Republic* are distinguishable from this case for a number of reasons. First, the *Netcom* court noted that the defendant “copied all or almost all of many of the works which were predominately short documents of less than three pages, and mostly with no comments or with very brief comments at the beginning or end.” *Netcom*, 923 F.3d at 1247. In a footnote, the court cited some of those comments, including: (1) “The perfect reference for any occasion”; (2) “I believe a discussion of this policy is in order”; (3) “Any questions?”; (4) and “Someone requested this, I assume, to discuss.” *Id.* at 1247 n.18. The court concluded that, “[s]tanding alone, these remarks are hardly criticism or commentary.”⁶ *Id.* The court in *Netcom*

⁶ Plaintiff argues, citing *Free Republic*, 2000 WL 565200, at *8, that *Netcom* “specifically rejected defendant’s argument that his copying was fair use because subsequent visitors added further comments.” *See* Opposition at 15. However, the court in *Free Republic* (and, naturally, Plaintiff’s subsequent reliance on the opinion) includes no pincite to support this contention. The footnote in *Netcom* states that “[w]hile an entire thread *might* be considered one composite work authored by all those adding to the thread, there is no evidence in the record that any of [defendant’s] postings were followed up with further comments or criticism on the works that are excerpted.” *Netcom*, 923 F. Supp. at 1247 n.18 (emphasis added). This Court does not read *Netcom* to suggest that

explains that the defendant’s verbatim copying “shows that [defendant’s] work is only minimally transformative and that it is unlikely that [defendant] is truly pursuing a different functional milieu from the original.” *Id.* at 1249 (internal citations omitted). Here, the comments on the Post are not benign like the comments in *Netcom*, nor are they adrift from the central purpose of the Post – to criticize Plaintiff and his wife. The Court disagrees with Plaintiff’s assertion that only the second sentence of the post passes as criticism. Rather, the entire post is meant to ridicule and mock Plaintiff’s wife, calling her “ugly” and “awkward looking,” insulting her for being an unknown model, and disdainfully commenting on her ears. *See* SOF ¶ 11; *see also* Post Printout. Further, the Post is followed by user comments that include the language “she is so UGLY ewwwwwwwwwww and she is a model? maybe model for that dude’s farm haha[.]” *See* Post Printout (syntactical errors in original). Viewed within the context as a Website as a whole, the Court finds that the central purpose of the Post was to criticize and disparage women like Plaintiff’s wife. *See* The Dirty, <https://thedirty.com> (last visited July 16, 2017) (generally including many unsavory posts demeaning women); *see also* Post Printout.

Defendant argues that the Post is transformative by analogizing this case to *Katz v. Chevaldina*, No. 12-22211-CIV, 2014 WL 2815496 (S.D. Fla. June 17, 2014), *aff’d*, *Katz v. Google*, 802 F.3d 1178 (11th Cir. 2015) and *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014). *See* Motion at 9. In *Katz*, the plaintiff held a copyright on an unflattering, candid photograph of himself sticking out his tongue, which was subsequently published on the defendant’s blog dedicated to criticism of the plaintiff and his business practices. *See Katz*, 2014 WL 2815496, at *1. One of the comments that the defendant superimposed on the photograph included the text: “HE RIPPED OFF SPECIAL NEEDS LITTLE JEWISH GIRL[.]” *Id.*, 2014 WL 2815496, at *6 (emphasis in original). In concluding that the defendant’s use of the photograph was fair use as a matter of law, the court found that the use of the photograph to disparage defendant was transformative. *Id.* The original article in which the copyrighted work appeared cast the plaintiff in a favorable light, whereas the defendant used the photograph in blog posts to disparage the plaintiff. *Id.*

In *Dhillon* (cited in the *Katz* opinion), the plaintiff owned the copyright to a headshot of herself which she used in connection with her campaign for political office in the State Assembly. *See Dhillon*, 2014 WL 722592, at *1. The defendant published the headshot on its website with an article critical of the plaintiff’s political views. *See id.*, 2014 WL 722592, at *6. Finding that the defendant’s use of the headshot was transformative, the *Dhillon* court wrote:

the defendant used the headshot photo as part of its criticism of, and commentary on, the plaintiff’s politics. Such a use is precisely what the Copyright Act envisions as a paradigmatic fair use.

Id., 2014 WL 722592, at *5 (citation omitted).

This case is much more similar to *Katz* and *Dhillon*, where the language used on the posts is directly critical of the subject of the copyrighted work, in stark contrast to the original positive use of the work. *See Katz*, 2014 WL 2815496, at *6 (“Defendant did not use the Photo simply to identify Plaintiff, as did the [original] publication; rather, the record is clear that Defendant used

a work, and its progeny of critical commentary, *cannot* be considered fair use as a whole, but rather to merely point out that the defendant in *Netcom* did not produce evidence of any subsequent commentary on his postings to warrant his contention that “that the critical nature of [his] postings must be viewed in light of the extended nature of ‘threads’” on his website. *Id.*

it as a means of satirizing and criticizing Plaintiff. [The court] find[s] that Defendant’s use of the Photo was transformative because it served a very different function than did its original use.”); *see also Dhillon*, 2014 WL 722592, at *5 (finding “that the defendant’s use of the headshot photo was transformative because it served the purpose of criticism, rather than identification.”). Here, the copyrighted work was used to display Plaintiff and his wife’s wealth, and their luxurious lifestyle in Hollywood (*see generally* Gingras Decl. ¶ 12 (containing a YouTube link to the full episode of *Astrid in Wonderland* from which the five-second clip was taken)), whereas the Post uses the exact same image of Plaintiff and his wife to ridicule, mock, and critique the two figures.

As Defendant readily admits, the speech in the Post “was unkind. It was mildly rude and disrespectful towards Londre. But the moral value (or lack thereof) of this speech is irrelevant here.” Reply at 1.⁷ Though the Court notes that the commentary was plainly (rather than *mildly*) rude, the comments on the Post are indeed squarely critical of Plaintiff’s wife, her appearance, her status as a model, and her relationship with her husband. Unlike *Netcom* and *Free Republic*, where the criticism was minimal and not the central focus of the defendants’ purpose of posting the copyrighted material, here the crux of the Post (and the essence of the Website as a whole) was to provide social commentary (albeit unsavory and uncouth) and criticism about many different women, including Plaintiff’s wife. This is the exact type of critique that falls within the scope of the fair use doctrine. *See Hustler*, 796 F.2d at 1152-53; *see also Katz*, 2014 WL 2815496, at *6 (finding that the defendant used her blog “as a means of satirizing and criticizing the [p]laintiff.”); *Dhillon*, 2014 WL 722592, at *5 (finding copyrighted work as transformative when the use of plaintiff’s copyrighted picture “served the purpose of criticism, rather than identification.”). The comments on the Website are focused directly (and pointedly) on critiquing Plaintiff’s wife’s physical appearance: The Post calls her “ugly,” “awkward looking,” and mocks her ears. *See Post Printout*. It further notes that she has not been noticed in any magazine or runway shoot, insinuating that she has been an unsuccessful model. Though this language would likely offend any reasonable person, the sting of the critique rings stronger due to Plaintiff’s wife’s professional career as a model, with a social media presence centered around her self-image. *See SOF* ¶¶ 12-13.⁸ The Post also includes social commentary on Plaintiff’s relationship with his wife, implying that his wife is a gold-digger who is only married to Plaintiff for his money. *See Post Printout* (“Nik, do you have any clue how can this women [sic] get married to that rich guy and is a model.”). Further, the amount of the copyrighted work used in the Post is just enough to further the critical purpose of the Post, and perhaps no less of the work could have been used by the Post to launch their critique against Plaintiff and his wife. *See Dhillon*, 2014 WL 722592, at *5 (finding that it would “not have been feasible in [the] circumstances for the defendant to have copied less than the entire photo” in order to launch their critique on the plaintiff).

⁷ While admittedly moral value is not a proper consideration in the present analysis, a question might arise as to whether the absence of any substantive value should scuttle a fair use defense. For example, would the mere juxtaposition of a copyrighted image along with a snarky remark qualify as commentary? The response to that question (and, concomitantly, the justification for the resulting length of this tentative ruling) would be to reference the Supreme Court’s observation that there are no “bright-line rules” and the fair use doctrine calls for “case-by-case analysis.” *Campbell*, 510 U.S. at 577.

⁸ Indeed, negative comments about a model’s appearance can hardly be considered anything less than a damning and hurtful critique of the model’s main public asset – her image.

The Post, especially viewed within the context of the Website was transformative. Rather than using the photo to merely identify Plaintiff or his wife, as Plaintiff did on her Facebook profile page, or glorify Plaintiff and his wife’s lifestyle, as the creator of *Astrid in Wonderland* did, the entire Post uses the Video Image as part of a direct critique on Plaintiff’s wife’s appearance, her status as a model, her husband, and her relationship with her husband. See *Dhillon*, 2014 WL 722592, at *5 (“[T]he plaintiff used the headshot photo as a tool to positively market herself By contrast, the defendant used the headshot photo in connection with an article criticizing the plaintiff’s political views.”). Such a use is precisely what the Copyright Act envisions as a paradigmatic fair use. See *Hustler*, 796 F.2d at 1152-53; see also *Dhillon*, 2014 WL 722592, at *5 (finding that the defendant’s use of the headshot photo was transformative because it served the purpose of criticism, rather than identification.”); *Perfect 10*, 508 F.3d at 1165 (finding that making an exact copy of a protected work may be transformative, provided “the copy serves a different function than the original work”); *Kelly, v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003) (finding transformative use where the original purpose of the copied images was aesthetic, while the new purpose was to improve access to information). Overall, the Court finds that the use of the Video Image in the Post was transformative, and this sub-factor in evaluating the purpose and character of the use weighs in strong favor of Defendant.

Another consideration in evaluating the purpose and character of the use is whether the Website was a commercial rather than non-profit endeavor. See 17 U.S.C. § 107(1) (“In determining whether the use made of a work in particular case is a fair use the factors to be considered shall include . . . whether such use is of a commercial nature or is for nonprofit educational purposes[.]”); see also *Campbell*, 510 U.S. at 584. Defendant contends that its use is “incidentally commercial,” but the Court disagrees with this assertion. See Motion at 15. The Website contains over 200,000 posts and derives a majority of its revenue from online advertising. See Lamas-Richie Decl. ¶¶ 7-9. Defendant contends that there is no evidence that Defendant “ever attempted to profit directly from the sale of copies of the Video Image as opposed to profiting indirectly merely because the Video Image was among millions of other images appearing on Defendant’s website.” Motion at 13; see also Lamas-Richie Decl. ¶ 10. Moreover, Defendant submits a declaration that it does “not sell, nor have we ever sold, ads on a per-click basis. Accordingly, an increase in traffic to the site does not result in any increase in advertising revenue.” Lamas-Richie Decl. ¶ 11. In turn, Plaintiff argues that Defendant “presents no evidence to refute a reasonable inference that traffic to its site is a substantial factor in determining the price for advertising on its site.” See Opposition at 12. Plaintiff cites to *Fitzgerald v. CBS Broadcasting, Inc.*, 491 F. Supp. 2d 177 (D. Mass. 2007), for the notion that, while a single clip or image may not directly affect revenues, the Website as a whole was designed for commercial purposes. Opposition at 11-13. The Court in *Fitzgerald* noted that:

though there were no advertisements on [defendant’s] website at the time that it hosted the photo, the website’s purpose was to attract viewers to the station and raise the station’s profile, ratings, and commercial revenues. More broadly, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row*, 471 U.S. at 562. [Defendant] certainly stood to profit from its use of the photo on television and

on the internet. Newscasts without imagery draw fewer viewers, ratings fall, and revenue falls in turn. [Defendant's] use was commercial.

Fitzgerald, 491 F. Supp. 2d at 188 (alterations added). Defendant mentions multiple times that its Website may be “incidentally commercial” because of its advertising nature. *See* Reply at 11-12. The Court agrees with the common-sense logic explained in *Fitzgerald* that the mere absence of an advertisement on an individual clip does not negate the commerciality of an enterprise as a whole which derives value from advertisements. *See Fitzgerald*, 491 F. Supp. 2d at 188. Indeed, the more eyes on a page, the more likely future advertiser are to invest in a given website. Thus, the Court finds the commerciality of the Website weighs in favor of Plaintiff.

While the fact that the Website was commercial in isolation tends to weigh against a finding of fair use, the Post's highly transformative incorporation of the Video Image minimizes its significance. *See Campbell*, 510 U.S. at 579, 584-85; *see also Sofa Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1279 (9th Cir. 2013) (finding the fact that the defendant's work was a commercial production to be “of little significance” in the first fair use factor because the defendant's use of the plaintiff's copyrighted work was transformative); *Kelly*, 336 F.3d at 818 (“The more transformative the new work, the less important the other factors, including commercialism, become.”). As such, the Court finds that the first fair use factor favors Defendant.

b) Nature of the Copyrighted Work

The second fair use factor considers whether the copyrighted work “is imaginative and original[.]” *See Hustler*, 796 F.2d at 1154. Creative works are considered “closer to the core of intended copyright protection” than works that are merely “informational.” *Campbell*, 510 U.S. at 586. This factor also considers whether the work was published or unpublished, as “[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.” *See Kelly*, 336 F.3d at 820.

Plaintiff argues that the use is creative in that the framing of the shot was staged, and that Plaintiff altered the Video Image prior to the Facebook posting, by “changing the aspect ratio, saturating the photo, removing stray hairs, and changing the color and exposure.” *See* Opposition at 17; Weinberg Decl. ¶ 3. Defendant argues that the Video Image is factual, given that it is merely a depiction of Plaintiff and his wife in a public setting. *See* Motion at 16; *see also Katz*, 802 F.3d at 1183 (“The Photo was previously published and primarily factual. The second factor therefore weighs in favor of fair use.”); *Fitzgerald*, 491 F. Supp. 2d at 188 (candid photograph of mobster leaving police station was a primarily factual work). As a threshold matter, Plaintiff's assertion that his alterations to the Video Image prior to the Facebook posting are irrelevant to this analysis. Plaintiff has no license or registered copyright to the *altered* Video Image. *Cf.* SOF ¶ 8. Rather, his exclusive license is to the five-second clip from *Astrid in Wonderland*. *See id.* Therefore, any alterations made to the Video Image by the Plaintiff are not relevant to this analysis, as he does not have a registered copyright to the Video Image with the alterations he made to said image. Thus, viewing the evidence in the light most favorable to Plaintiff, the Video Image does include certain amounts of creativity, given that it was part of a larger body of work which was filmed and staged by the production team and director of *Astrid in Wonderland* (*see* SOF ¶5; *see also* Gingras Decl. ¶ 12 (citing the YouTube clip of the full *Astrid in Wonderland* episode), rather than a candid photo taken for news purposes as was the

case in *Katz* and *Fitzgerald* cited by Defendant. Thus, this sub-factor of the analysis weighs in slight favor of Plaintiff.

In any event, neither party contests that the original work (the five-second clip from *Astrid in Wonderland*) was previously published in 2012 on public television. See SOF ¶ 6. Moreover, Plaintiff's wife published the Video Image on her Facebook page (see *id.* ¶ 10), thereby publishing the identical Video Image prior to the Post on the Website. Seemingly, the publication of the photograph on Facebook was public, because it was taken from said site and then uploaded to the Website. See *id.* ¶ 9. Thus, this sub-factor of the analysis weighs in favor of Defendant. See *Kelly*, 336 F.3d at 820 ("Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.").

Overall, the Court finds this factor neutral, as it contains certain creative elements, but was previously published on public television and elsewhere.

c) Amount of the Work Used

The third fair use factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are "reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586. The focus of the inquiry must be whether verbatim copying is necessary to Defendant's critical purpose. See *Campbell*, 510 U.S. at 586-87; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) ("[w]hile other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, . . . excessive copying precludes fair use[.]"). "If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Dhillon*, 2014 WL 722592, at *5.

Here, Defendant contends that the amount of the work used is merely a single frame out of the 74,880 frames contained in the entire 52-minute episode of *Astrid in Wonderland* from which the Video Image was captured. See Motion at 16. Plaintiff contends that Defendant copied the entire copyrighted work from Plaintiff's wife's Facebook profile page, thus using 100% of the copyrighted work. See Opposition at 17-18. Both parties are incorrect. Plaintiff's copyright infringement claim is based on his exclusive license to a five-second clip from *Astrid in Wonderland* (and the Video Image taken from the *Astrid in Wonderland* clip), not the use of the image as it was modified by Plaintiff and subsequently uploaded to Facebook. See SOF ¶¶ 4, 7-8, 10. It is undisputed that Defendant used a single still frame from the five-second clip. See SOF ¶¶ 2-4. The Court finds that Defendant used only one frame out of roughly 120 frames⁹ available in the five-second clip, thus copying less than one percent of the clip for which Plaintiff may assert his rights under the License Agreement. See SOF ¶ 8. This amount of the copyrighted work used by Defendant is *de minimus*, and this factor weighs in favor of the Defendant. See *Sofa Entm't, Inc. v. Dodger Prods., Inc.*, 782 F. Supp. 2d 898, 907-908 (C.D. Cal. 2010) (finding that the defendant's use a seven-second clip of a television show was not significant or substantial, and therefore, the third factor of the fair use analysis weighed in favor of the defendant), *aff'd*, 709 F.3d 1273 (9th Cir. 2013).

Even if Plaintiff was correct that Defendant used 100% of the copyrighted work, the Court would find that the amount used by Defendant was "as much as is necessary for [its]

⁹ Defendant derives its calculation of 74,880 frames based on an average of 24 frames per second. See Motion at 16. The Court uses this number as well in its calculation.

intended use,” *i.e.* to criticize. *Dhillon*, 2014 WL 722592, at *5. As discussed above, the purpose of the post was to directly criticize Plaintiff and Plaintiff’s wife, and the picture posted on the Website only includes a picture of himself and his wife. Thus, the Post contained the amount of the work necessary to effectuate a critique on Plaintiff’s wife, her stature as a model, her relationship with her husband, her husband himself, and their lifestyle. *See id.* (finding that the defendant’s use of the entire headshot of the plaintiff did not weigh in favor of the plaintiff, as it would “not have been feasible in [the] circumstances for the defendant to have copied less than the entire photo” in order to launch their critique on the plaintiff).

d) Effect of the Use Upon the Potential Market

The fourth factor looks to the “effect of the use upon the potential market for or value of the copyrighted work.” *Monge*, 688 F.3d at 1180. This inquiry requires courts to consider both the extent of the harm caused by the alleged infringer and “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (internal quotation marks and citation omitted). This inquiry must include harm to the market for the original and harm to the market for derivative works. *Id.* However, the law does not recognize a derivative market for critical works. *Id.* at 592. Market harm caused by effective criticism that suppresses demand is not cognizable. *Id.* at 591. Instead, the only kind of harm cognizable is market substitution – *i.e.* where the new work diminishes demand for the original work by acting as a substitute for it. *Id.* at 591-92. Thus, where a work is transformative, market harm may not so readily be inferred and there is no presumption of market harm. *See Monge*, 688 F.3d at 1180-81.

Here, Defendant contends that “there is no evidence in the record showing that there is any market value in the [Image] taken from *Astrid in Wonderland* (indeed, the star of that show – Astrid – does not even appear in the image).” Motion at 17. Plaintiff counters that the Court can presume market harm because Defendant’s commercial use of the Image “amounts to a mere duplication of the entirety of an original.” Opposition at 18 (citing *Campbell*, 510 U.S. at 590 n.21 (quotation omitted)).

Defendant contends that the Video Image has no market value because: (1) Plaintiff produced no documents reflecting payments he made to purchase rights in the Video Image from the original copyright holder (*see* Docket No. 29-3 at 22 (Plaintiff’s response to request No. 3, asking Plaintiff to produce documents reflecting payments by Plaintiff to purchase rights in the Video Image)); (2) Plaintiff produced no documents reflecting any damages he is seeking to recover in this case (*see* Docket No. 29-3 at 24 (Plaintiff’s response to Defendant’s request No. 8, asking for the production of any documents Plaintiff has reflecting monetary damages)); and (3) Plaintiff admitted that he had not earned any money from the sale of the Video Image (*see* Docket No. 29-3 at 28 (Plaintiff’s response to Defendant’s request for admission No.13, asking Plaintiff to admit he has never earned any money from the commercial sale of the Video Image)).

Plaintiff does not respond to Defendant’s assertion that the Video Image has no market value, but instead asks the Court to presume market harm per his cite to *Campbell*. Opposition at 18. However, *Campbell* explains that “[n]o ‘presumption’ or inference of market harm . . . is applicable [in] a case involving something beyond mere duplication for *commercial* purposes.” *Campbell*, 510 U.S. at 591 (emphasis added). Here, though there is duplication of the

copyrighted work, Defendant’s unsavory, yet legally significant, transformation of the Video Image for use of criticism is beyond “mere duplication for commercial purposes.” *See id.* Thus, the Court will not presume market harm here.

Upon examination of the record, the Court has found no evidence that there is any market value in the Video Image itself. In order for the Court to find market harm, it would first have to assume a market for the Video Image. The Court would be hard-pressed to do so based on the lack of evidence. Defendant argues that, “given the highly questionable argument that any commercial market exists at all for generally low-quality screenshots taken from a reality TV show, [Plaintiff] must show there is at least *some* commercial market for such works,” and that Plaintiff has not done so here. Reply at 14 (emphasis in original). This assertion is correct. *See Dhillon*, 2014 WL 722592, *6 (finding “effect on market” prong favored defendant, because, “[t]he plaintiff fails to allege that she ever attempted to sell the headshot photo at any time in the past, or that she had any plans to attempt to do so in the future. In short, the plaintiff has failed to allege that any market ever existed for the sale or licensing of the headshot photo, or that such a market might have developed at any future time.”). Here, the Post on the Website had no impact upon any actual or potential market for Plaintiff’s copyrighted work. *See Katz*, 802 F.3d at 1184 (noting that the defendant “took the highly unusual step of obtaining the copyright to the Photo and initiating this lawsuit specifically to *prevent* its publication. [Defendant] profoundly distastes the Photo and seeks to extinguish, for all time, the dissemination of his ‘embarrassing’ countenance. Due to [Defendant’s] attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work.”) (emphasis in original).

Plaintiff also argues that the Video Image has value in the marketplace because Defendant added its own watermark “in order to prevent [the Video Image] from being lifted from TheDirty.com[.]” Opposition at 18. This is an assertion without any factual or legal support. Even if, *arguendo*, adding its own watermark did accrue some value to Defendant, it is unfounded that said value in the copied and transformed work imputes value to the original work. Thus, this most important factor weighs strongly in favor of Defendant. *See Harper*, 471 U.S. at 566 (“This last factor is undoubtedly the single most important element of fair use.”)

e) Balancing the Fair Use Factors

On balance, the Post containing the Video Image on the Website falls within the fair use doctrine as a matter of law. The Post was transformative, the Video Image was previously published, and, importantly, the Post had no effect on the potential market for the copyrighted work. Although the work can be considered creative and Defendant used the Post in a commercial setting, the strength of the first and fourth factors of the analysis far outweigh the factors that slightly tip in favor of Plaintiff. Thus, the Court holds that the affirmative defense of fair use applies as a matter of law, and partial summary judgment as to fair use is warranted. *See Dhillon*, 2014 WL 722592, at *4-6 (granting summary judgment for the defendant on its affirmative defense of fair use where defendant’s use of plaintiff’s photograph “served the purpose of criticism, rather than identification,” and the defendant’s use had no impact on the potential market for the copyrighted work); *Katz*, 2014 WL 2815496, at *10 (same); *Calkins v. Playboy Enter. Intern., Inc.*, 561 F. Supp. 2d 1136, 1141-44 (E.D. Cal. 2008) (granting summary judgment for the defendant on its affirmative defense of fair use because the defendant used the copyrighted work “in a new context to serve a different function (inform and entertain Playboy readers) than the original function (gifts for family and friends)” of plaintiff’s photograph, and the defendant’s use had no effect on the market for the original work); *see also Burnett v.*

Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 969-972 (C.D. Cal. 2007) (dismissing a claim for copyright infringement without leave to amend where defendant's cartoon depiction of Carol Burnett in an "awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure" weighed strongly in favor of defendant's fair use defense).

V. Conclusion

Based on the foregoing, the Court would deny Plaintiff's Rule 56(d) motion and grant Defendant's motion for partial summary judgment on Plaintiff's copyright infringement claim based on the fair use doctrine.