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4 **UNITED STATES DISTRICT COURT**
5 **CENTRAL DISTRICT OF CALIFORNIA**
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7 NATIONAL CENTER FOR JEWISH
8 FILM,

9 Plaintiff,

10 v.

11 RIVERSIDE FILMS LLC; JOSEPH
12 DORMAN; and DOES 1 through 10,

13 Defendants.

Case No. 5:12-cv-00044-ODW(DTBx)

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT [25]**

14 Before the Court is Defendants Riverside Films LLC and Joseph Dorman's
15 Motion for Summary Judgment. (ECF No. 25.) Defendants seek a judgment that
16 either: Plaintiff National Center for Jewish Film's copyrights are invalid; or that
17 Defendants' use of the alleged copyrighted materials constitutes fair use. For the
18 following reasons, the Court **GRANTS** Defendants' Motion.

19 **I. FACTUAL BACKGROUND**

20 Plaintiff, a non-profit corporation, archives and distributes films that promote
21 Jewish heritage. (UF ¶ 1.) In July 2011, Defendants released a feature-length
22 documentary, *Sholem Aleichem: Laughing in the Darkness*. (UF ¶ 4.) The film is
23 about a 19th century Yiddish author whose works have remained a cultural touchstone
24 for Jews across the world. (UF ¶ 5.) More than a mere biography, the film examines
25 the last 150 years of Jewish history, covering the transition from the traditional,
26 religiously dominated world of *shtetls* to modern secular life.¹ (UF ¶ 6.) Plaintiff
27 alleges that Defendants, without permission or compensation, used clips of varying

28 ¹ Small Jewish market towns in Eastern Europe.

1 lengths from four of Plaintiff's copyrighted films: (1) *Yiddle with His Fiddle*; (2) *A*
2 *Letter to Mother*; (3) *Tevye the Milkman*; and (4) *Jewish Luck*. (Opp'n 4.)

3 While Plaintiff did not register a copyright for *Yiddle* or *Letter* in the U.S.,
4 Plaintiff asserts that Joseph Green, the screenplay writer and director of these two
5 films, owned and later assigned his Polish copyrights to Plaintiff in 1990. (Opp'n 1–
6 2.) Plaintiff also contends that in 1996, the U.S. Copyright Office restored the
7 copyright in *Yiddle* and *Letter*. (Opp'n 8–9.) In 1997, Plaintiff registered the
8 assignment and its restored and assigned copyrights for *Yiddle* and *Letter* with the
9 U.S. Copyright Office. (Opp'n 1–2.)

10 Regarding *Tevye* and *Jewish Luck*, Plaintiff avers it registered the English
11 prologues and English subtitles as derivative works in 1981 and 2011, respectively.
12 (Opp'n 2–3.) Plaintiff concedes that, as with any derivative work, it did not register
13 the original films. (UF ¶¶ 27, 32.) Defendants do not dispute that Plaintiff registered
14 the English prologues and subtitles as derivative works. (Reply 4.)

15 Attempting to enforce their copyrights, Plaintiff filed a complaint alleging
16 seven claims against Defendants for: (1) copyright infringement; (2) vicarious and
17 contributory copyright infringement; (3) unfair competition under California Business
18 and Professions Code section 17200; (4) unfair competition under section 43(a) of the
19 Lanham Act; (5) common law unfair competition; (6) injunctive relief; and
20 (7) declaratory relief.

21 Defendants now seek summary judgment on all claims and assert the fair use
22 defense, arguing their limited use of short clips from the four films, along with other
23 factors such as the nature of the four films and the purpose of the use, constitutes fair
24 use under 17 U.S.C. § 107. (Mot. 10–11.)

25 Defendants also argue that Plaintiff either owns no copyright or a limited
26 copyright in the four films. Specifically: (1) Defendants dispute whether Green
27 owned or later assigned any Polish copyrights in either *Yiddle* or *Letter*, and whether
28 Green could have conveyed to Plaintiff any interest at all, since *Yiddle* and *Letter* were

1 in the public domain (Mot. 9); and (2) Defendants contend that Plaintiff’s copyrights
2 in *Tevye* and *Jewish Luck* protect only the English prologues and subtitles in those two
3 films, and not the films as a whole. (Mot. 10.)

4 II. LEGAL STANDARD

5 Summary judgment should be granted if there are no genuine issues of material
6 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
7 P. 56. The moving party bears the initial burden of establishing the absence of a
8 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).
9 Once the moving party has met its burden, the nonmoving party must go beyond the
10 pleadings and identify specific facts that show a genuine issue for trial. *Id.*

11 A genuine issue of material fact must be more than a scintilla of evidence, or
12 evidence that is merely colorable or not significantly probative. *Addisu v. Fred*
13 *Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is “material” where
14 the resolution of that fact might affect the outcome of the suit under the governing
15 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). An issue is
16 “genuine” if the evidence is sufficient for a reasonable jury to return a verdict for the
17 nonmoving party. *Id.* Where the moving and nonmoving parties’ versions of events
18 differ, courts are required to view the facts and draw reasonable inferences in the light
19 most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

20 Further, the Court need not “scour the record in search of a genuine issue of
21 triable fact”—it is the nonmoving party’s responsibility to “identify with reasonable
22 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91
23 F.3d 1275, 1279 (9th Cir. 1996). Finally, conclusory or speculative testimony in
24 affidavits and moving papers is insufficient to raise genuine issues of fact and defeat
25 summary judgment. *Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730,
26 738 (9th Cir. 1979).

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1 **III. DISCUSSION**

2 As a practical matter, the Court notes that there could be a genuine issue as to
3 copyright ownership and restoration; but a finding against Plaintiff on fair use would
4 render moot, as far as this case is concerned, any discussion of copyright ownership.
5 Thus, the Court first considers the question of fair use.

6 **A. The Defense of Fair Use**

7 To establish a claim of copyright infringement, Plaintiff must show ownership
8 of the copyright and copying by Defendants. *Kelly v. Arriba Soft Corp.*, 336 F.3d
9 811, 817 (9th Cir. 2003). Fair use of a copyrighted work, however, is not an
10 infringement. 17 U.S.C. § 107. The fair use doctrine exists to preserve the future use
11 of artistic works for purposes of criticism, comment, reporting, teaching, scholarship,
12 and research. *Id.*

13 Fair use is a mixed question of law and fact. *Harper & Row, Publ'rs, Inc. v.*
14 *Nation Enters.*, 471 U.S. 539, 560 (1985). Courts weigh four factors to determine
15 whether a use is fair: (1) the purpose and character of the use; (2) the nature of the
16 copyrighted work; (3) the amount and substantiality of the portion used in relation to
17 the copyrighted work as a whole; and (4) the effect of the use on the potential market
18 or value of the copyrighted work. 17 U.S.C. § 107; *Harper*, 471 U.S. at 560–61. The
19 Court discusses each factor in turn.

20 ***1. The purpose and character of the use***

21 The question here is whether the new work supplants the original; or instead
22 adds something new, with a further purpose or different character, altering the first
23 with new expression, meaning, or message—that is, whether the new work is
24 “transformative.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
25 Although a finding of a new work’s transformative nature is not absolutely necessary
26 for fair use, such works lie at the heart of the fair use doctrine’s guarantee of
27 “breathing space within the confines of copyright.” *Id.*

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1 Here, Plaintiff argues Defendants merely added a voiceover to the original
2 scenes depicting *shtetls*, and therefore their use is not transformative. (Opp’n 16.)
3 Plaintiff cites *Los Angeles News Service*, where a news-clip-licensing company shot
4 video of the Reginald Denny beating from its helicopter with its own equipment. *Los*
5 *Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997).
6 And KCAL, a competitor, used the video without permission and compensation. *Id.*
7 at 1120. The district court granted summary judgment for KCAL, finding that its
8 telecasts of the video were fair use for purposes of news reporting. *Id.* But the Ninth
9 Circuit reversed after rebalancing the fair-use factors. *Id.* at 1123.

10 But this case is different. Here, Defendants’ voiceovers, editing, and overall
11 production adds something new to the underlying works. In *Los Angeles News*
12 *Service*, KCAL’s voiceovers narrating the Denny beating did not alter the meaning or
13 arrangement of the heart of the claimed work—the unique camera angles and clarity
14 of the images. *Id.* at 1122. But here, Defendants use short video clips obtained from
15 the copyrighted works—e.g., snippets of *shtetl* scenery—in a montage with other non-
16 copyrighted scenes. Even the longer video clips—e.g., the scene in *Tevye* depicting
17 the protagonist’s struggles with his daughter’s rejection of the Jewish faith—are
18 buttressed with other scenes and commentary that explain the relevance and
19 background of the video clip. Scholarly commentary runs throughout *Sholem*
20 *Aleichem* and does more than mere narration. This documentary aims to teach and
21 enlighten its audience about Aleichem’s work and Jewish history. Based on the
22 Court’s review of the alleged infringing scenes in *Sholem Aleichem*, the Court finds
23 that Defendants’ use is transformative.

24 Plaintiff also argues that Defendants’ commercial exploitation of the short
25 video clips is dispositive. (Opp’n 17.) But relevant case law dictates that a work’s
26 commercial or nonprofit character is not conclusive. *Campbell*, 510 U.S. at 584. The
27 fact that a use of a copyrighted work was for a nonprofit, educational purpose does not
28 insulate it from infringement. *Id.* Likewise, commercial use does not bar a finding of

1 fair use. *Id.* at 584–85. And the more transformative the new work, the less
2 significance the other factors matter. *Id.* at 578. Accordingly, the Court finds that this
3 factor favors Defendants.

4 **2. *The nature of the copyrighted work***

5 This factor recognizes that some works are closer to the core of intended
6 copyright protection than others. *Kelly*, 336 F.3d at 820. For instance, fair use is
7 more difficult to establish when fictional works or films are at issue. *Id.* But use of
8 published works (as opposed to unpublished works) is more likely to qualify as fair
9 use because the first appearance of the artist’s expression has already occurred. *Id.*

10 Plaintiff contends the very essence of its copyrighted works fits squarely within
11 the scope of this factor; since they are fictional films. (Opp’n 18–19.) Defendants
12 respond that this factor should favor them because the films had already been
13 published a long time. (Mot. 17.) Further, for *Tevye* and *Jewish Luck*, the
14 copyrighted material is not the scene itself, but only the (technical) English subtitles.
15 (*Id.*) For at least those two films, the Court finds that the creative element is severely
16 lacking, as it is very easy with today’s technology to translate the dialogue and
17 reproduce the English subtitles. And for all four films, they are very old, and possibly
18 in the public domain. Upon considering the parties’ arguments for this factor, the
19 Court finds that this factor weighs slightly in Defendants’ favor.

20 **3. *The amount and substantiality of the portion used in relation to the***
21 ***copyrighted work as a whole***

22 The third factor asks whether the amount and substantiality of the portion used
23 in relation to the copyrighted work as a whole are reasonable in relation to the purpose
24 of the copying. *Campbell*, 510 U.S. at 586.

25 The parties do not dispute Defendants’ use of the four films as follows:

- 26 • 7 clips used from *Yiddle* and *Letter*: of that, 22 seconds are from *Yiddle*,
27 representing 0.4% of the run time of *Yiddle*; and 41 seconds are from
28 *Letter*, representing 0.6% of the run time of *Letter*.

- 13 clips from *Jewish Luck* totaling 37 seconds, representing 0.6% of the run time of *Jewish Luck*.
- 9 clips from *Tevye* totaling 1 minute and 24 seconds, representing 1.5% of the run time of *Tevye*.²

(UF ¶¶ 42–44, 47–50, 54–57.)

But Plaintiff contends Defendants’ choice of clips from the four films were substantial in quality—conceding that while the quantity used was small, the portions taken were the heart of the copyrighted films. (Opp’n 20–21.)

Plaintiff rely on several cases where courts have weighed the amount-and-substantiality factor in the copyright holders’ favor, despite the small quantity of the portions used. In *Los Angeles News Service*, the defendant used 30 seconds of footage from the four-minute original video; this, the court noted to be “only a small part,” but found that it was the heart of the work—“the best of the . . . footage.” *Los Angeles News Service*, 108 F.3d at 1122. And in *Harper*, the Supreme Court found that the defendant’s verbatim copying of small portions of President Ford’s unpublished memoirs, tipped this factor in the copyright holder’s favor because those portions “qualitatively embodied Ford’s distinctive expression.” *Harper*, 471 U.S. at 560–61. Finally, Plaintiff offers *Roy*, where after a jury verdict for the copyright holder, the district court concluded that the jury could reasonably have found that the defendant’s use of short portions of Charlie Chaplin’s films was “qualitatively great.”³ *Roy Exp. Co. Establishment of Vaduz v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980).

² These figures for *Jewish Luck* and *Tevye* assume that Plaintiff’s copyrights cover the entire film itself. Assuming that the copyrights only cover the English subtitles, the quantity of the clips containing the English subtitles is significantly less.

³ The defendant used clips from 5 films: 1 minute and 45 seconds from *City Lights*, which ran for 1 hour and 23 minutes; 3 minutes and 45 seconds from *The Kid*, which ran for 1 hour; 1 minute and 25 seconds from *The Circus*, which ran for 1 hour and 12 minutes; 55 seconds from *Modern Times*, which ran for 1 hour and 29 minutes; and 1 minute and 15 seconds from *The Gold Rush*, which ran for 1 hour and 12 minutes. *Roy*, 503 F. Supp. at 1145.

1 The Court does not find that the clips Defendants used from the four films were
2 highly substantive; and instead finds that the use was minimal—both quantitatively
3 and qualitatively. For instance, the clips used from *Yiddle* and *Letter* depict Jewish
4 life within *shtetls*. At best, these are background scenes, mere transitions between
5 other, more important scenes. The Court finds no merit Plaintiff’s argument that these
6 *shtetls* scenes are the heart of *Yiddle* and *Letter*. Further, Plaintiff’s copyrights in
7 *Jewish Luck* and *Tevye* are only for the English subtitles. And Plaintiff’s contention
8 that those subtitles are the heart of the films—even if the copied scenes themselves are
9 the heart of the film—is meritless; the Court cannot conceive how English subtitles
10 can be considered anything but ancillary. Accordingly, this factor also favors
11 Defendants.

12 **4. Effect of the use on the potential market or value of the copyrighted**
13 **work**

14 When commercial use amounts to mere duplication of a work’s entirety, it
15 supersedes the original and serves as a market replacement for it, making it likely that
16 cognizable market harm to the original will occur. *Campbell*, 510 U.S. at 591. But
17 when the second use is transformative, this market harm is less certain. *Id.*

18 Plaintiff avers Defendants’ documentary serves as a market replacement for the
19 copyrighted films. (Opp’n 14–15.) But this argument fails because Defendants’
20 *Sholem Aleichem* does not duplicate the copyrighted films. Further, the Court is
21 unconvinced that the use of the copyrighted clips—as background for scholarly
22 commentary—in *Sholem Aleichem* would dissuade consumers from patronizing the
23 original full-length films. It is difficult to imagine that *Sholem Aleichem* competes
24 with Plaintiff’s four films in the same market space. The Court agrees with
25 Defendants that the opposite is likely true, that *Sholem Aleichem* caused a newfound
26 interest in Plaintiff’s copyrighted films. (Reply 9.) Thus, this factor also favors
27 Defendants.

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1 **5. *Bad faith***

2 Finally, Plaintiff argues Defendants’ fair use defense should fail because they
3 acted in bad faith. (Opp’n 12–13.) Plaintiff contends Dorman contacted Plaintiff
4 before using the copyrighted clips; obtained copies of the copyrighted films from
5 Plaintiff; and then used the clips without paying Plaintiff a nominal licensing fee of
6 \$12,000. (Opp’n 13–14.) Further, Plaintiff insists that its licensing fee of \$12,000 is
7 modest compared to the \$1M in revenues received for *Sholem Aleichem*. (Opp’n 14.)
8 But Defendants argue that they obtained the clips from *Yiddle* and *Letter* through an
9 archival clip licensing company. (Mot. 4.)

10 While this is not a factor in the determination of fair use, bad faith can bar the
11 defense of fair use entirely. *See Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).
12 Plaintiff repeatedly asserts that Defendants’ failure to obtain Plaintiff’s permission to
13 use the clips, and failure to compensate Plaintiff for the licensed use, disrobes
14 Defendants of their fair use defense. (Opp’n 14.) But the Court finds that
15 Defendants’ acts are reasonable—especially in the light of Plaintiffs’ tenuous
16 copyrights and Defendants’ belief in its fair-use rights—and finds that these acts do
17 not amount to bad faith.

18 In summary, all of the fair use factors weigh in Defendants’ favor; and the
19 Court concludes that *Sholem Aleichem* use of Plaintiffs’ four films deserves fair-use
20 protection as a matter of law. And because the Court has found fair use, the Court
21 declines to opine on the issues surrounding copyright ownership.⁴

22 **B. Other Causes of Action**

23 Because the Court has found fair use, the Court agrees with Defendants’
24 arguments that Plaintiff’s other claims for unfair competition, injunctive relief, and
25

26 ⁴ The Court also declines to delay ruling on this motion so that Plaintiff may depose Defendant
27 Dorman. The Court finds that the evidence provided by the parties on this motion is sufficient to
28 support a finding of fair use, and Dorman’s deposition will unlikely conjure up an issue of material
fact concerning fair use.

1 declaratory relief are moot since they all rely on (or are preempted by) the underlying
2 copyright claim. (Reply 10–12.)

3 **IV. CONCLUSION**

4 Having found that Defendants’ alleged acts of copyright infringement are
5 protected by the fair-use doctrine, Defendants’ Motion for Summary Judgment is
6 **GRANTED**. Defendants must file a motion for attorney’s fees and costs, if they so
7 desire, within 21 days. All remaining dates for this case are hereby **VACATED**.

8 **IT IS SO ORDERED.**

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10 September 14, 2012

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13 **OTIS D. WRIGHT, II**
14 **UNITED STATES DISTRICT JUDGE**