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9 Attorneys for Defendant  
10 THE ORIGINAL TALK RADIO NETWORK, INC.

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 BRAVE NEW FILMS 501(c)(4),

15 Plaintiff,

16 vs.

17 MICHAEL WEINER aka MICHAEL  
SAVAGE and ORIGINAL TALK RADIO  
18 NETWORK, INC.,

19 Defendants

) Case No.: CV 08-4703 SI

) **DEFENDANT THE ORIGINAL TALK**  
) **RADIO NETWORK, INC.'S OPPOSITION**  
) **TO PLAINTIFF BRAVE NEW FILMS**  
) **501(c)(4)'S MOTION FOR PARTIAL**  
) **SUMMARY JUDGMENT**

) Date: June 12, 2009

) Time: 9:00 a.m.

) Location: Courtroom 10

) Honorable Susan Illston

20  
21  
22 Defendant THE ORIGINAL TALK RADIO NETWORK, INC. (“OTRN”) hereby  
23 responds in the above-captioned action (this “**Action**”), in opposition to the Motion for Partial  
24 Summary Judgment filed on February 27, 2009 as Document 40 in this Action (the “**Motion**”),  
25 brought by plaintiff BRAVE NEW FILMS 501(c)(4) (“**BNF**” or “**Plaintiff**”) against OTRN and  
26 defendant MICHAEL WEINER aka MICHAEL SAVAGE (“**Savage**”). In submitting this  
27 opposition memorandum, OTRN is responding primarily on behalf of OTRN in opposition to the  
28

1 relief requested against OTRN in the Motion. However, in doing so, OTRN does not concede  
2 the merits of any assertions by Plaintiff against Savage.

3  
4 **I. INTRODUCTION**

5  
6 The “Notice of Motion and Motion” state that BNF is seeking summary judgment  
7 (without expressly delineating what summary judgment is sought) “and a declaration that Brave  
8 New Films’ use of defendant Michael Savage’s copyrighted material is protected by the Fair Use  
9 Doctrine and enjoining Michael Savage and Original Talk Radio Network from further attempts  
10 to suppress protected speech regarding Mr. Savage.” (Page 2 of 20, lines 6-9.

11 In the memorandum of points and authorities in support of the Motion (“**Plaintiff’s**  
12 **Memorandum**”), BNF describes the relief it seeks differently, stating that it moves for  
13 “summary judgment and an Order: (1) declaring that Brave New Films’ use of excerpts from the  
14 October 29, 2007 broadcast of *The Michael Savage Show* is a fair use; and (2) enjoining  
15 defendants Original Talk Radio Network and Michael Savage from threatening or bringing legal  
16 action against Brave New Films relating to fair use of the Video.” (Page 6 of 20, lines 2-6).

17 As to the inconsistency in Plaintiff’s description of what Plaintiff seeks, Plaintiff’s  
18 statement in its “Notice of Motion and Motion” should control over inconsistent references to  
19 that requested relief in Plaintiff’s Memorandum. In any event, the reference to “summary  
20 judgment and” a specified declaration and/or order is overbroad, as at most, Plaintiff’s  
21 Memorandum purports to support partial summary judgment for a specific declaratory and/or  
22 injunctive relief. However, as to the following points and authorities demonstrate, OTRN  
23 respectfully submits that the Motion, even when properly narrowed in scope, is unfounded, and  
24 should be denied, as OTRN (and, in OTRN’s opinion, as to Savage as well, although OTRN is  
25 limiting its comments in this memorandum to the merits, or rather lack of merit, of the Motion as  
26 to OTRN specifically).

1 **II. ARGUMENT**

2  
3 **A. The Motion Does Not Request Declaratory Relief Against OTRN.**

4 OTRN does not claim the right to speak on behalf of Savage with respect to Savage’s  
5 copyrighted material. OTRN previously assigned the copyright to the October 29, 2007  
6 broadcast of “The Michael Savage Show” (the “**10/29/07 Broadcast**”) to Savage. As a result,  
7 although OTRN claims the copyright to every broadcast of “The Michael Savage Show” (the  
8 “**Show**”) except for the 10/29/07 Broadcast, as the Motion and Plaintiff’s Memorandum are  
9 phrased, they do not request any declarations as to copyrighted material of OTRN. Thus, in any  
10 case, regardless of the lack of merit in the Motion as to Savage, the request for a declaration as to  
11 OTRN is wholly without merit and there is no basis to include OTRN in any declaration relating  
12 to use of Savage’s copyrighted material, whether with respect to the overbroad request for  
13 “Savage’s copyrighted material”, whatever that may include, or with respect to the narrowed (but  
14 still overbroad) request for a declaration as to use of “excerpts from the 10/29/07 Broadcast”.

15  
16 **B. OTRN Has Never Threatened or Brought Legal Action Against Brave New**  
17 **Films.**

18 The desire for legal action in this Action is on the part of Plaintiff, which clearly relishes  
19 litigating against both OTRN and Savage, despite the total lack of any actions taken by either  
20 OTRN or Savage against Plaintiff.

21 The only action taken by OTRN at issue in this Action, and, OTRN submits, the only  
22 action by anyone at issue in this Action (OTRN continues to be mystified at Plaintiff’s insistence  
23 on litigating in this Action the merits of Savage’s positions in the separate Savage v. CAIR  
24 matter, or the merits of Savage’s opinions), is a letter issued on September 29, 2008 to YouTube  
25 on behalf of OTRN (the “**09/29/08 Letter**”).

26  
27 **C. The Motion is Clearly Without Evidentiary Foundation as to OTRN.**

1 Plaintiff has stated that Plaintiff does not believe additional discovery is necessary in  
2 order to rule on Plaintiff's Motion for Partial Summary Judgment, despite Plaintiff's insistence  
3 that additional discovery *is* necessary in order to rule on the questions of agency and knowing  
4 misrepresentation at issue in Savage's and OTRN's separate Motions for Summary Judgment in  
5 this Action (the "**Defense Motions**"). The underlying basic issues in this Action are Plaintiff's  
6 claims of agency and knowing misrepresentation.

7 Indeed, Plaintiff has secured a stipulation that the Defense Motions would go off calendar  
8 to allow Plaintiff an opportunity to be able to conduct discovery on the question of knowing  
9 misrepresentation as to Savage. (See, Declarations of Ronald H. Severaid, Benjamin A. Shapiro,  
10 and Carter Glahn in support of OTRN's motion for summary judgment in this Action).

11 By making the argument that it needs discovery in order to oppose the Defense Motions,  
12 as to OTRN, Plaintiff essentially has acknowledged that it presently does not have any evidence  
13 to raise a single triable issue of fact as to whether the actions of OTRN which Plaintiff alleges in  
14 this Action involved any knowing misrepresentations. Moreover, Plaintiff is now well aware of  
15 the declarations under penalty of perjury by the California attorneys and officers of the court on  
16 file in this Action which establish that they are the three persons involved in OTRN's actions at  
17 issue in this Action, and that the attorneys reviewing YouTube videos for inclusion in the list of  
18 videos attached to the 09/29/08 Letter, and the attorney issuing the 09/29/08 Letter, had no  
19 knowledge of the assignment of the copyright to the 10/29/07 Broadcast to Savage or of the  
20 Savage v. CAIR litigation, and the third attorney, Ronald H. Severaid, who was familiar with  
21 these matters, had not reviewed the 259 videos subject to the 09/29/08 Letter, and did not realize  
22 that the BNF video included among these 259 videos (the "**Video**") involved the 10/29/07  
23 Broadcast, which was the broadcast at issue in the Savage v. CAIR CASE. (See, Declarations of  
24 Ronald H. Severaid, Benjamin A. Shapiro and Carter Glahn in support of OTRN's motion for  
25 summary judgment in this Action).

26 By seeking a continuance of OTRN's motion for summary judgment based upon a need  
27 to secure evidence which to raise a triable issue of fact on the question of knowing  
28 misrepresentation in order to be able to oppose complete relief (a full defense judgment) in favor

1 of OTRN, Plaintiff acknowledges it has no present evidence to support affirmative relief against  
2 OTRN at this time. Yet, Plaintiff has refused to stipulate to take the Motion off calendar until a  
3 time that Plaintiff supposedly could find that non-existent evidence of a knowing  
4 misrepresentation in the actual action of OTRN which is at issue in this Action (or to allow the  
5 court to address the issue posed by all of the summary judgment motions one time, rather than  
6 address them piecemeal).

7 As such, Plaintiff's insistence on pursuing the Motion against OTRN at this time truly is  
8 frivolous and in bad faith. In any event, the Motion should be denied for the lack of any actual  
9 fact or evidence establishing that OTRN made any knowing misrepresentation as to the Video in  
10 the 09/29/08 Letter.

11 Furthermore, Plaintiff has failed to establish a single fact that suggests that there is any  
12 ongoing controversy with regard to OTRN that demands either declaratory or injunctive relief.

13 First, Plaintiff seeks declaratory relief with regard to the 10/29/07 Broadcast, OTRN has  
14 made and makes no further claim of content in the Video subject to an OTRN copyright once  
15 notified of its error in including the Video in the list of 259 videos attached to the 09/29/08  
16 Letter, and Plaintiff can show no fact to the contrary. To grant summary judgment against  
17 OTRN regarding Plaintiff's fair use claims with regard to the Video would be the equivalent of  
18 granting summary judgment to a random passerby who has never heard of Michael Savage,  
19 Brave New Films, or CAIR – OTRN is similarly situated, in that OTRN does not own the  
20 underlying copyrighted material in the Video, nor has it in any way acted as Michael Savage's  
21 agent in the drafting or issuance of the 9/29/08 Letter (and there is no contrary evidence – either  
22 in support of the Motion, or at all). Furthermore, Plaintiff can cite no evidence supporting its  
23 case that it is in danger of lawsuit from OTRN, since OTRN does not and will not claim that its  
24 copyright was violated by the Video, since OTRN neither owns nor claims the copyright to the  
25 content from the Show included in the Video.

26 Second, Plaintiff seeks injunctive relief enjoining OTRN from threatening or bringing  
27 legal action with regard to the Video. Yet again, OTRN has made no such threat of legal action  
28 against BNF, nor any claim against any party since being notified that it mistakenly included the

1 Video in it list of 259 videos posted on YouTube in the 9/29/08 Letter. OTRN has no intention  
2 of making any such threat or claim, and indeed would have no grounds for any such threat or  
3 claim, and Plaintiff can provide no evidence to suggest that OTRN will make any such threat or  
4 claim in the future.

5 The 9/29/08 Letter did not single out the Video – it was an obvious attempt to prevent  
6 massive copyright infringement taking place on YouTube by requesting that YouTube remove  
7 259 videos from its website containing material from the Show. The inclusion of the Video, the  
8 material for which OTRN did not hold copyright over, was erroneous, and OTRN has repeatedly  
9 stated as much in its motions, briefs and declarations in this Action.

10  
11 **D. Declaratory Judgment Is Improper Because No Live Dispute Exists As To The**  
12 **Video.**

13 Under *MedImmune Inc., v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), declaratory relief  
14 is proper only where “the facts alleged, under all the circumstances, show that there is a  
15 substantial controversy, between the parties having adverse legal interests, of sufficient  
16 immediacy and reality to warrant the issuance of a declaratory judgment.” While courts have  
17 found that a defendant’s cessation of activity against a plaintiff does not render a case or  
18 controversy moot, see *Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003), there must be  
19 some facts supporting allegations that the defendant has acted or will act with adverse legal  
20 interest against the plaintiff. Declaratory relief should be denied when it “will neither serve a  
21 useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings  
22 and afford relief from the uncertainty and controversy faced by the parties.” *United States v.*  
23 *Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985). “Stated another way, the central question ...  
24 is whether changes in the circumstances that prevailed at the beginning of litigation have  
25 forestalled any occasion for meaningful relief.” *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d  
26 1125, 1129 (9th Cir. 2005). Declaratory relief must also serve a purpose beyond the remedies  
27 sought by a plaintiff on its claims at law. *Brunette v. Humane Society*, 40 Fed. Appx. 594, 598  
28 (9th Cir. 2002). As the Court has stated, “it is not the function of the federal courts to crystallize

1 the litigation strategies of parties whenever asked to do so. Practical usefulness to litigants or  
2 not, the Constitution confines the power of the federal courts to issue declaratory judgments to  
3 disputes that are sufficiently immediate or real.” *Aydin Corp. v. Union of India*, 940 F.2d 527,  
4 529 (9th Cir. 1991).

5 Based on Plaintiff’s own refusal to have this motion heard after discovery, it is clear that  
6 Plaintiff believes that discovery is unnecessary to decide whether declaratory judgment is  
7 appropriate. Upon summary judgment, if the moving party bears the burden of proof at trial, the  
8 moving party “must come forward with evidence which would entitle it to a directed verdict if  
9 the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co., Inc. v. Darden*  
10 *Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). The Court must draw all  
11 reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477  
12 U.S. 242, 252 (1986).

13 In order to establish a case for declaratory relief, then, Plaintiff must establish: (1) the  
14 declaratory relief presents a useful purpose in clarifying and settling the legal relations in issue;  
15 (2) the declaratory relief would terminate the proceedings and afford relief from uncertainty and  
16 controversy faced by the parties. Plaintiff has failed to demonstrate a scintilla of evidence to  
17 either of these effects. The legal relations at issue are not in dispute – the Video was included in  
18 a list of 259 challenged videos du to an oversight, and has not been (and will not be) challenged  
19 by OTRN since OTRN was notified that it did not in fact own the underlying copyright to the  
20 broadcast material at issue in the Video. OTRN simply has no grounds whatsoever to file suit  
21 based on the Video, and has never claimed otherwise once informed of its error.

22 Plaintiff has presented no evidence to the effect that OTRN drafted or sent the 9/29/08  
23 Letter on behalf of Savage. In order to claim a need for declaratory relief, Plaintiff would have  
24 to claim agency by OTRN on behalf of Savage in the 9/29/08 Letter, a claim Plaintiff does not  
25 make since, as Plaintiff’s counsel have stated, such an agency claim would require further  
26 discovery.

27 Furthermore, without solving the agency question, declaratory relief would be utterly  
28 superfluous. Beyond that, declaratory relief regarding Plaintiff’s fair use claims in the Video

1 does not touch upon the root issue in this case – whether there was a “knowing  
2 misrepresentation” under 17 U.S.C. §512(f). Even if the Court found the Video to be fair use,  
3 that would not terminate the proceedings or simplify the controversy, since the question at stake  
4 is whether OTRN as alleged agent or Savage as alleged principal drafted or issued the 9/29/08  
5 Letter in subjective bad faith. Plaintiff does not even pretend to contemplate discussing that  
6 issue in its motion for partial summary judgment, since Plaintiff claims that that issue too  
7 requires further discovery.

8 OTRN has not challenged the re-posting of the Video at YouTube, nor has OTRN  
9 challenged the posting of the Video at Plaintiff’s website, nor has OTRN made any claim  
10 whatsoever with regard to the Video once it was notified of its error in including the Video in a  
11 list of 259 videos attached to the 9/29/08 Letter. Barring a showing that OTRN acted as  
12 Savage’s agent in the issuance of the 9/29/08 Letter – a showing that has not even been  
13 attempted by Plaintiff, which attempts to elude the basic issue of agency in favor of challenging  
14 ancillary and unrelated issues in an attempt to prolong this litigation – there should be no  
15 declaratory relief in this case, in any event.

16 **E. Injunctive Relief Is Improper Because No Live Dispute Exists.**

17 Under *EBay Inc. v. Mercexchange, L.L.C.*, 126 S.Ct. 1837, 1839 (2006), permanent  
18 injunctive relief must satisfy a four-factor test before a court may grant such relief. The plaintiff  
19 must demonstrate “(1) that it has suffered an irreparable injury; (2) that remedies available at  
20 law, such as monetary damages, are inadequate to compensate for that injury; (3) that,  
21 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is  
22 warranted; and (4) that the public interest would not be disserved by a permanent injunction.”  
23 Similarly, under *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001) (citations  
24 omitted), a cause of action becomes moot “when the issues presented are no longer ‘live’ or the  
25 parties lack a legally cognizable interest in the outcome.”

26 Plaintiff does not even bother to make a case as to why an injunction is necessary under  
27 the *EBay* standard, because an injunction is *plainly unnecessary*. OTRN has never challenged  
28 Plaintiff’s use of the Video on its website, or on any other website, and OTRN made no further

1 claims with regard to the Video’s posting on YouTube once it was notified that it had  
2 erroneously included the Video in a list of 259 videos attached to the 9/29/08 Letter. The  
3 9/29/08 Letter itself contained an erroneous reference to the Video in a list of 259 videos, due to  
4 drafting counsel Benjamin Shapiro’s complete ignorance of the *Savage v. CAIR* case and  
5 ignorance that the copyright to the underlying broadcast of “The Michael Savage Show” was  
6 owned by Savage rather than OTRN; issuing counsel Carter Glahn’s similar ignorance; and  
7 reviewing counsel Ronald Severaid’s good faith oversight in failing to review the list of 259  
8 videos contained in the 9/29/08 Letter. Any content posted by Plaintiff on YouTube and  
9 removed as a result thereof was restored to YouTube within a short period of time without  
10 further objection by OTRN.

11 No irreparable injury exists under the *EBay* standard, since Plaintiff has in fact suffered  
12 no injury. First, Plaintiff has suffered no injury generally, since Plaintiff’s YouTube channel was  
13 removed for less than 24 hours, and the Video was at all times available on its website;  
14 furthermore, removal of Plaintiff’s YouTube channel was never requested nor desired by OTRN,  
15 and was in fact the sole intervening decision of YouTube. Second, any conceivable injury as a  
16 result of the removal of the Video has been repaired by YouTube’s replacement of the Video  
17 without any protest from OTRN. Further, there is no threat of continuing injury since OTRN  
18 does not claim any copyright in the Video. Barring the agency argument that Plaintiff fails to  
19 make or establish, there is not an iota of evidence suggesting that OTRN does, can or will  
20 threaten Plaintiff with any injury regarding the Video.

21 Remedies available at law, such as monetary damages, are wholly adequate to  
22 compensate for any injury, if any actually occurred, for the brief period the Video was off  
23 YouTube due to a bona fide mistake and error on the part of OTRN with respect to inclusion of  
24 the Video in the list of 259 videos attached to the 09/29/08 Letter.

25 A remedy in equity is unwarranted considering the balance of hardships between the  
26 plaintiff and defendant, in that no such balance exists –Plaintiff currently suffers from no  
27 hardship in the absence of injunctive relief, since Plaintiff is not now nor has Plaintiff been under  
28 threat from OTRN since Plaintiff’s notification of OTRN regarding its erroneous inclusion of the

1 Video in the 9/29/08 Letter, and in fact Plaintiff makes no agency argument with regard to the  
2 Motion.

3 Declaratory and injunctive relief are not designed to prevent imaginary harms and even  
4 more so, to prevent harms that cannot possibly occur – they are designed to remedy real harms  
5 occurring and attributable to defendants.

6 The issue presented is “no longer ‘live’” – nor, frankly, has it ever been live -- under  
7 *Clark*. Regardless of any prior circumstances, therefore, there is no legal basis for issuance of  
8 any injunction against OTRN in this Action, as there is, and can be, no actual showing of  
9 ongoing or future actions by OTRN justifying any injunctive relief.

10  
11 **F. OTRN Should Not Have to Argue The Merits Of Plaintiff’s Fair Use Claims**

12 OTRN has cited numerous grounds on which issue of the relief sought by Plaintiff in the  
13 Motion is unwarranted. Frankly, Plaintiff’s insistence on pursuing the Motion at this stage seems  
14 to be a calculated and callous attempt to force OTRN into litigating the fair use argument  
15 advanced by Plaintiff only to argue that the argument itself justifies declaratory or injunctive  
16 relief – but the Motion is not dependent on Plaintiff’s fair use argument – OTRN does not claim  
17 any further interest in the content of the Video (and Savage made no claim with respect thereto).  
18 Plaintiff seeks to force litigation on the issue and then asks for an injunction against nonexistent  
19 threats of litigation by OTRN or Savage.

20 Moreover, the fair use argument involves triable issues of fact in order to evaluate the  
21 actual factual issues of the specific use in question.

22  
23 **G. The CAIR Action is a Red Herring**

24 Plaintiff makes claims that the 09/29/08 Letter is “Round Two” to the CAIR Action’s  
25 “Round One”. However, that false argument is dependent on Plaintiff agency theory which, as  
26 noted above, is wholly unsupported.

27  
28 **III. CONCLUSION**

1 For all of the reasons stated above, the Motion should be denied.  
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4 DATED: March 22, 2009  
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7 SEVERAID & GLAHN, PC  
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9

10 /s/ Ronald H. Severaid  
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