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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 BRAVE NEW FILMS 501(C)(4),

No. C 08-04703 SI

9 Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

10 v.

11 MICHAEL WEINER a/k/a MICHAEL
SAVAGE, and ORIGINAL TALK
RADIO NETWORK, INC.,

12 Defendants.
13 _____/

14 Plaintiff has filed a motion for partial summary judgment. The motion is scheduled for a hearing
15 on June 12, 2009. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for
16 resolution without oral argument, and hereby VACATES the hearing. **The case management**
17 **conference scheduled for the same day remains on calendar.** Having considered the arguments of
18 the parties and the papers submitted, and for good cause shown, the Court hereby DENIES plaintiff's
19 motion for summary judgment.
20

21 **BACKGROUND**

22 Defendant Michael Weiner is a nationally syndicated talk show host who performs under the
23 name Michael Savage and hosts the talk show program "The Michael Savage Show." During his two-
24 hour broadcast of The Michael Savage Show on October 29, 2007, Savage made derogatory comments
25 about Muslims, Islam, and the Quran.¹ Shortly after the show aired, the Council for American-Islamic
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28 ¹ The Court GRANTS plaintiff's request for judicial notice of exhibit G to plaintiff's Request
for Judicial Notice. [Docket No. 50] Defendants do not dispute plaintiff's representation that this is an
audio recording of excerpts from the October 29, 2007 broadcast of The Michael Savage Show. The

1 Relations (“CAIR”), a Muslim civil rights group, posted a criticism of Savage on the CAIR website.
2 The posting included more than four minutes of audio excerpts from Savage’s October 29, 2007
3 broadcast. In response to this criticism, Savage filed a lawsuit against CAIR on December 3, 2007 in
4 this Court, Case No. C 07-6076 SI, alleging that CAIR infringed his copyright by posting audio excerpts
5 of the October 29 broadcast on the CAIR website. On July 25, 2008, the Court found that CAIR’s use
6 of the broadcast constituted fair use and granted CAIR’s motion for judgment on the pleadings on this
7 issue. *See* July 25 Order, at *13. [C 07-6076 SI, Docket No. 38] In the CAIR case, there was no dispute
8 that the October 29, 2007 broadcast was copyrighted and that Savage owned the copyrighted material.
9 *Id.* at *4. According to the records of the United States Copyright Office, Savage is the registered
10 copyright owner of the October 29, 2007 broadcast of The Michael Savage Show.²

11 The subject of this lawsuit is a video entitled “Michael Savage Hates Muslims” (“the Video”)
12 created by plaintiff Brave New Films 501(c)(4) (“Brave New Films”). Complaint, ex. B. The Video
13 is one minute and twenty-three seconds long and uses approximately one minute of audio excerpts from
14 the October 29, 2007 broadcast. *Id.* It also advertises a website, www.nosavage.com, and urges viewers
15 to “do something” about Savage. *Id.*

16 On January 18, 2008, Brave New Films uploaded the Video to the internet site owned by
17 YouTube, Inc. On September 29, 2008, defendant Original Talk Radio Network, Inc. (“OTRN”),
18 through its counsel, contacted YouTube concerning the Video and 258 other videos, almost all of which
19 apparently contain content from The Michael Savage Show. *See* Complaint, ex. C (“the September 29
20 letter”). OTRN syndicates and distributes talk radio content, including The Michael Savage Show, to

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22 excerpts include the following comments:

23 “I don’t want to hear one more word about Islam. Take your religion and shove it up your
24 behind. I’m sick of you.”

25 “Don’t tell me I need reeducation. They need deportation.”

26 “You can take your due process and shove it.”

27 “Throwback bastards. I’m so sick of them.”

28 “Every day another story sweet-selling Islam and the Quran. . . . Wherever you look on the
earth there’s a bomb going off, or a car going up in flames, and it’s Muslims screaming for the blood
of Christians, or Jews, or anyone they hate.”

² The Court GRANTS plaintiff’s request for judicial notice of exhibit E to plaintiff’s Request
for Judicial Notice. [Docket No. 50] Defendants do not dispute that this is an accurate copy of the U.S.
Copyright Office’s website registration record of the October 29, 2007 broadcast of The Michael Savage
Show. The registration reflects that Michael Weiner/Savage holds the copyright to this broadcast.

1 more than 300 affiliate radio stations. In the September 29 letter, which was directed to YouTube’s
2 “DMCA Complaints” department,³ OTRN’s counsel claimed that its office “represents the owner of an
3 exclusive right infringed by” the 259 videos. The letter characterized The Michael Savage Show as
4 “OTRN Content.” It demanded that YouTube immediately remove all videos that contained content
5 from The Michael Savage Show, including the 259 videos listed in the letter. The letter also advised
6 YouTube that “OTRN does not, by this letter, disclaim, release or speak for the separate rights of
7 Michael Savage . . . with respect to any content” posted on YouTube. *See* Complaint, ex. C.

8 YouTube responded to OTRN’s letter by disabling access to the Video and Brave New Films’
9 entire YouTube channel. Decl. of James Gilliam in Supp. of Pl. Mot. for Summ. J. (“Gilliam Decl.”)
10 ¶ 9. It also notified Brave New Films that the Video had been removed in response to OTRN’s letter.
11 *See* Complaint, ex. E. On October 3, Brave New Films sent a DMCA counter-notice to YouTube,
12 stating that the Video had been removed from YouTube in error. Gilliam Decl., ex. A. On October 10,
13 Brave New Films filed this lawsuit against Savage and OTRN, (1) seeking a declaratory judgment that
14 the Video does not infringe copyrights held by OTRN or Savage, and (2) alleging misrepresentation in
15 violation of the DMCA, 17 U.S.C. § 512(f). YouTube restored the Video to the YouTube site on
16 October 20. Gilliam Decl. ¶ 13.

18 LEGAL STANDARD

19 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and
20 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
21 material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.
22 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of
23 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has
24 no burden to negate or disprove matters on which the non-moving party will have the burden of proof
25 at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to
26 support the non-moving party’s case. *See id.* at 325.

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³ The “DMCA” apparently refers to the Digital Millennium Copyright Act.

1 an opinion advising what the law would be upon a hypothetical state of facts. . . .
2 Basically, the question in each case is whether the facts alleged, under all the
3 circumstances, show that there is a substantial controversy, between parties having
adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
declaratory judgment.

4 *See* 549 U.S. 118, 126 (2007) (internal quotations and citations omitted).

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6 **A. Declaratory Judgment Against Savage**

7 Brave New Films contends that declaratory judgment against Savage is warranted because
8 without this Court’s determination that the Video’s use of Savage’s copyrighted broadcast is protected
9 by the fair use doctrine, “Brave New Films will continue under a cloud of uncertainty and insecurity that
10 at any time Savage can issue another takedown notice or file a lawsuit.” Pl. Mot. at 8. Savage responds
11 that declaratory judgment is improper because there is no “actual controversy” between Brave New
12 Films and Savage, as required by the Declaratory Judgment Act. *See* 28 U.S.C. § 2201. That is, Savage
13 maintains that he has not himself threatened legal action against Brave New Films in conjunction with
14 the Video. Both defendants assert that while defendant OTRN owns the copyrights to most Michael
15 Savage Show broadcasts – including, presumably, to the “content” used in 258 of the videos listed in
16 the September 29, 2008 takedown letter – OTRN does *not* own the copyright to the October 29, 2007
17 broadcast. The copyright to that Michael Savage Show broadcast was, according to defendants,
18 assigned by OTRN to Michael Savage.⁴

19 Under these circumstances, the Court agrees with Savage that Brave New Films has not
20 demonstrated that it and Savage currently have “adverse legal interests.” *See MedImmune*, 549 U.S. at
21 126. Brave New Films maintains that declaratory judgment is necessary because Savage may issue
22 “another” takedown notice, but this contention assumes that Savage has sent a takedown letter in the
23 past. As discussed in this Court’s prior orders, there is a factual dispute as to whether OTRN acted as
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27 ⁴ In the papers presently before the Court, no copy of or details about the assignment from
28 OTRN to Savage are provided. The parties do, however, provide a copy of the U.S. Copyright Office’s
website registration record of the October 29, 2007 broadcast of The Michael Savage Show reflecting
that Michael Weiner/Savage holds the copyright to this broadcast. *See* footnote 2, *supra*.

1 Savage’s agent when it sent the September 29 letter.⁵ See Docket Nos. 66, 81. Viewing the evidence
2 in the light most favorable to Savage, the non-moving party, the Court must assume that Savage had no
3 role in sending the September 29 letter. Brave New Films’ second argument (that declaratory judgment
4 is warranted because Savage might file a lawsuit, presumably for copyright infringement) also fails.
5 Other than the September 29 letter, Brave New Films cites no evidence suggesting that Savage is
6 interested in filing a lawsuit against Brave New Films in conjunction with the Video.

7 In sum, Savage’s only connection to this lawsuit is through the September 29 letter and the
8 parties disagree about whether Savage caused that letter to be sent. So long as the issue of Savage’s
9 involvement in the September 29 letter remains unresolved, there are disputed factual issues which
10 preclude summary judgment.⁶

11 None of the cases relied on by Brave New Films is applicable here as they all involve situations
12 in which the defendant had at least threatened to pursue legal remedies against the plaintiff. See, e.g.,
13 *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164, 1167 (W.D. Wash. 2008) (in the past, defendant had
14 sent DMCA takedown notices regarding plaintiff’s product to internet auction site eBay and defendant’s
15 attorney threatened to take further action against plaintiff if he continued to sell his product); *Cardtoons,*
16 *L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 966 (10th Cir. 1996) (defendant sent cease
17 and desist letter and had history of suing other companies in similar situations). Here, Savage contends
18 that he has never taken any action against Brave New Films with regard to the Video, other than to
19 defend himself in this lawsuit.

20 For these reasons, the Court DENIES plaintiff’s motion for summary adjudication of its claim
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22 ⁵ Brave New Films argues in its reply brief that the case-or-controversy requirement is met as
23 to Savage because the sender of the September 29 letter stated that it “represents the owner of an
24 exclusive right infringed by” the 259 videos referenced in the letter; those videos include the Video,
25 which contains content from the October 29 broadcast; and Savage owns the copyright to the October
26 29 broadcast. See Complaint, ex. C. Brave New Films’ argument fails as it assumes that because the
27 author of the September 29 letter stated that he represented the owner of a copyright infringed by the
28 videos, the lawyer must have been acting with Savage’s authority. This is precisely what Savage
disputes.

⁶ Plaintiff points out that while Savage asserts that he has not yet threatened legal action against
Brave New Films, he does not state – either through counsel or through a declaration under oath – that
he will not do so in the future. Whether Savage would be judicially estoppel from further legal action
is a question for another day.

1 for declaratory judgment against Savage.

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3 **2. Declaratory Judgment Against OTRN**

4 Brave New Films also seeks a judicial declaration against OTRN that the Video's use of the
5 October 29 broadcast constitutes fair use. The Court finds that Brave New Films has not demonstrated
6 that declaratory judgment is warranted. It is undisputed that Savage is the exclusive copyright holder
7 of the October 29 broadcast. *See, e.g.*, Pl. Reply at 3:23-24. A declaration by this Court that Brave New
8 Films' use of the October 29 broadcast is fair use would not "touch[] the legal relations of parties"
9 because OTRN does not possess the copyright to this broadcast. *See MedImmune*, 549 U.S. at 126
10 (2007).

11 Brave New Films argues that OTRN's September 29 letter demonstrates that these parties
12 dispute the legality of Brave New Films' use of the October 29 broadcast. OTRN responds that it does
13 not dispute the legality of the Video and that it included the Video in its list of 259 purportedly
14 infringing videos by mistake. *See OTRN Opp. to Pl. Mot. for Summ. J.* at 7:18. Brave New Films
15 disputes whether the Video's inclusion in the September 29 letter was truly a mistake. However, the
16 question of OTRN's intention in sending the letter, which is germane to the complaint's Second Claim
17 for misrepresentation in violation of 17 U.S.C. § 512(f), does not change the fact that OTRN now asserts
18 that it has no legal entitlement to assert a copyright infringement claim with regard to the Video.

19 Brave New Films attempts to analogize this case to *SanDisk Corp. v. STMicroelectronics, Inc.*,
20 in which the Federal Circuit held that a case or controversy exists "where a patentee asserts rights under
21 a patent based on certain identified ongoing or planned activity of another party, and where that party
22 contends that it has the right to engage in the accused activity without license," even though the patentee
23 has not yet brought a suit for infringement. 480 F.3d 1372, 1381 (Fed. Cir. 2007). *SanDisk* is
24 inapposite. Unlike the patent holder in *SanDisk*, OTRN does not hold the copyright at issue here. To
25 the contrary, it is undisputed that OTRN has no grounds to file a suit for copyright infringement in
26 conjunction with the Video.

27 In any event, even if OTRN had some legal basis for bringing an infringement claim against
28 Brave New Films for its use of the October 29 broadcast, this circumstance would not necessarily

1 demonstrate that there is a live controversy between the parties. *See Lenz v. Universal Music Corp.*,
2 2008 WL 962102 *5 (N.D. Cal. 2008 Apr. 8, 2008) (finding case-or-controversy requirement not met
3 when defendant sent takedown notice to YouTube, plaintiff sent counter-notice, defendant did not file
4 an infringement action, and YouTube restored plaintiff's video to its site).

5 For these reasons, the Court DENIES plaintiff's motion for summary adjudication of its claim
6 for declaratory judgment against OTRN.

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CONCLUSION

9 For the foregoing reasons, and for good cause shown, the Court hereby DENIES plaintiff's
10 motion for partial summary judgment.

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IT IS SO ORDERED.

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Dated: June 10, 2009

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SUSAN ILLSTON
United States District Judge