

Schapiro Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., COMEDY)
PARTNERS, COUNTRY MUSIC.)
TELEVISION, INC., PARAMOUNT)
PICTURES CORPORATION, and BLACK)
ENTERTAINMENT TELEVISION, LLC,)

Plaintiffs,)

vs.)

NO. 07-CV-2103)

YOUTUBE, INC., YOUTUBE, LLC,)
and GOOGLE, INC.,)

Defendants.)

-----)
THE FOOTBALL ASSOCIATION PREMIER)
LEAGUE LIMITED, BOURNE CO., et al.,)
on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

vs.)

NO. 07-CV-3582)

YOUTUBE, INC., YOUTUBE, LLC, and)
GOOGLE, INC.,)

Defendants.)

-----)
VIDEOTAPED DEPOSITION OF MIKA SALMI)
SAN FRANCISCO, CALIFORNIA)
FRIDAY, OCTOBER 16, 2009)

JOB NO. 17909

OCTOBER 16, 2009

9:30 a.m.

VIDEOTAPED DEPOSITION OF MIKA SALMI,
WILSON, SONSINI, GOODRICH & ROSATI, LLP,
One Market Street, Spear Street Tower,
San Francisco, California pursuant to notice,
and before, ANDREA M. IGNACIO HOWARD, CLR,
RPR, CRR, CSR License No. 9830.

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A P P E A R A N C E S:

FOR THE PLAINTIFFS VIACOM INTERNATIONAL, INC.:

JENNER & BLOCK, LLP

By: SCOTT WILKENS, Esq.

1099 New York Avenue, NW, Suite 900

Washington, D.C. 20001

(202) 639-6000 swilkens@jenner.com

FOR THE DEFENDANTS YOUTUBE, INC., YOUTUBE, LLC and
GOOGLE, INC.:

WILSON SONSINI GOODRICH & ROSATI, LLP

By: DAVID KRAMER, Esq.

CAROLINE WILSON, Esq.

650 Page Mill Road

Palo Alto, California 94304-1050

(650) 320-4741 dkramer@wsgr.com

ALSO PRESENT: Michelena Hallie, MTV Networks.

Lou Meadows, Videographer.

---oOo---

1 SALMI, M.

2 17:01:19 video was created by the band Daft Punk? Does that

3 17:01:24 tell you whether it was authorized to be on YouTube?

4 17:01:26 MR. WILKENS: Objection to the form.

5 17:01:28 THE WITNESS: No, no.

6 17:01:30 MR. KRAMER: Q. Do you know who this user --

7 17:01:37 what this user's relationship was with Daft Punk?

8 17:01:42 No idea.

9 17:01:42 Q Who do you think would know?

10 17:01:46 MR. WILKENS: Objection to the form.

11 17:01:47 THE WITNESS: Would know the relationship?

12 17:01:50 MR. KRAMER: Q. Between the user and Daft

13 17:01:53 Punk.

14 17:01:54 A The user Daft Punk. Maybe YouTube.

15 17:01:57 Q How would YouTube know, sir?

16 17:01:58 MR. WILKENS: Objection to the form.

17 17:02:02 THE WITNESS: They have the video on the

18 17:02:03 website.

19 17:02:05 MR. KRAMER: Q. So you believe that YouTube

20 17:02:06 should know whether all of the videos accessible

21 17:02:10 through the YouTube service were or were not

22 17:02:12 authorized by the copyright holders to those videos?

23 17:02:14 MR. WILKENS: Objection; mischaracterizes his

24 17:02:17 testimony.

25 17:02:17 THE WITNESS: I don't know if I have an

1 SALMI, M.

2 17:02:26 opinion on that.

3 17:02:26 MR. KRAMER: Q. When you were operating

4 17:02:28 AddictingClips, sir, did you, as Addicting -- as Atom

5 17:02:31 Entertainment, know whether all of the clips that were

6 17:02:33 uploaded to the AddictingClips service by users were

7 17:02:36 authorized to be there by their copyright holders?

8 17:02:39 A We did not know.

9 17:02:39 Q Why not?

10 17:02:40 A Because we were instructed by our lawyers not

11 17:02:43 to --

12 17:02:43 MR. WILKENS: Objection; I'm instructing you

13 17:02:45 not to get into attorney-client --

14 17:02:47 THE WITNESS: Right.

15 17:02:47 MR. WILKENS: -- communications.

16 17:02:48 THE WITNESS: Well, just -- yeah, this was

17 17:02:51 our -- our lawyer instructed us that we weren't

18 17:02:54 supposed to, you know.

19 17:02:55 MR. KRAMER: Okay.

20 17:03:09 THE WITNESS: 34 million views. No one -- no

21 17:03:12 one sent a takedown notice, so...

22 17:03:14 MR. KRAMER: I was about to ask you that.

23 17:03:16 Q Does the fact that this video has been

24 17:03:18 available on YouTube since June 2007 and has over

25 17:03:19 34 million views suggest to you that it might be

1 SALMI, M.

2 17:03:20 authorized to be on the site?

3 17:03:21 A It might be.

4 17:03:22 Q Assuming that it was not authorized by Daft

5 17:03:25 hands, or assuming that this clip was not authorized

6 17:03:29 by the copyright holder and the music on the

7 17:03:32 service -- sorry. Strike it again. Say it again.

8 17:03:35 Assuming that this clip was not authorized to

9 17:03:37 be on YouTube by the copyright holder and the music

10 17:03:42 that's shown in the video, should Mr. Clayman be

11 17:03:45 liable for copyright infringement for encouraging you

12 17:03:48 to view it?

13 17:03:49 MR. WILKENS: Objection; assumes facts and

14 17:03:51 calls for a legal conclusion.

15 17:03:52 THE WITNESS: Yeah, and this is a music

16 17:03:56 overlay of someone else's. This is not a -- this is

17 17:03:59 not a music video. This is -- this is a mash up.

18 17:04:02 MR. KRAMER: Q. Assuming that the --

19 17:04:04 A Mash ups have a whole other legal thing, I

20 17:04:07 know, which I'm not -- you know, I don't know the

21 17:04:08 exact details on.

22 17:04:10 Q Okay. But assuming that the copyright holder

23 17:04:13 in the music that's used in this video did not

24 17:04:15 authorize it to be on YouTube, should Mr. Clayman be

25 17:04:19 liable for copyright infringement for encouraging you

1 SALMI, M.

2 17:04:23 to watch it?

3 17:04:23 MR. WILKENS: Same objection, and asked and

4 17:04:25 answered.

5 17:04:25 THE WITNESS: I don't have an answer to that.

6 17:04:39 I don't know.

7 17:04:41 MR. KRAMER: Q. Well, should you be liable

8 17:04:43 for copyright infringement for watching it, assuming

9 17:04:45 it wasn't authorized to be on YouTube by the copyright

10 17:04:49 holder whose music is used in the video?

11 17:04:51 MR. WILKENS: Objection to form; calls for a

12 17:04:52 legal conclusion.

13 17:04:53 THE WITNESS: Yeah, I don't know if I should

14 17:04:54 be liable or not. It's not....

15 17:04:56 MR. KRAMER: Q. You don't have a view one

16 17:04:57 way or another?

17 17:04:58 A As an end user, probably not.

18 17:05:00 Q Why not?

19 17:05:09 MR. WILKENS: Objection to the form; calls

20 17:05:10 for a legal conclusion.

21 17:05:12 THE WITNESS: Are you waiting for a

22 17:05:25 question -- an answer? I don't know.

23 17:06:14 (Document marked Salmi Exhibit 36

24 17:06:15 for identification.)

25 17:06:15 MR. KRAMER: Exhibit 36, from Dan Lockwood to

1 SALMI, M.

2 17:06:26 you, an e-mail, with the subject "Business time."

3 17:06:32 Forwarding you a YouTube URL, a link to a video on

4 17:06:36 YouTube.

5 17:06:37 Q Do you recall receiving this one from

6 17:06:38 Mr. Lockwood?

7 17:06:42 A Yes.

8 17:06:42 Q What's this video, sir?

9 17:06:44 A Flight of the Conchords.

10 17:06:45 Q It is. You're correct, sir. It's a

11 17:06:47 recording of the concert by Flight of the Conchords;

12 17:06:50 right?

13 17:06:51 A I don't remember if it was a concert or their

14 17:06:52 TV show.

15 17:06:53 Q What is Flight of the Conchords?

16 17:06:55 A It's a New Zealand duo, comedy duo.

17 17:06:59 Q Do you know who owned the copyright to the

18 17:07:02 clip that you watched on YouTube?

19 17:07:04 MR. WILKENS: Objection; assumes fact.

20 17:07:05 MR. KRAMER: What fact does it assume?

21 17:07:07 MR. WILKENS: You haven't asked him whether

22 17:07:08 he watched the clip.

23 17:07:09 MR. KRAMER: He knew what it was, Scott. How

24 17:07:12 could he know what it was if he didn't watch the clip?

25 17:07:15 MR. WILKENS: That's your supposition.

1 SALMI, M.

2 17:07:16 THE WITNESS: I don't -- no, I have no idea.

3 17:07:21 MR. KRAMER: Q. Was the -- well, let me show

4 17:07:23 you the clip.

5 17:07:25 THE REPORTER: BlackBerry, please. Your

6 17:07:37 BlackBerry.

7 17:07:37 (Document marked Salmi Exhibit 37

8 17:07:38 for identification.)

9 17:07:39 MR. KRAMER: Michelena, your BlackBerry is

10 17:07:41 interfering with the --

11 17:07:44 MS. HALLIE: It's off.

12 17:07:45 MR. KRAMER: It's off.

13 Still a problem? Can you just check

14 BlackBerrys? How are you doing?

15 You can collect them all up and --

16 THE REPORTER: And throw them in a basket,

17 yeah.

18 MR. KRAMER: Is it a problem for you?

19 THE WITNESS: It's -- it's -- thank you.

20 17:08:28 MR. KRAMER: Q. Taking a look at Exhibit 37,

21 17:08:30 sir, does this refresh your recollection as to what

22 17:08:35 this video clip was that Mr. Lockwood sent to you in

23 17:08:40 Exhibit 36?

24 17:08:41 A Yes.

25 17:08:41 Q And what was it, sir?

1 SALMI, M.

2 17:08:44 A Looks like it's a live footage of Flight of
3 17:08:48 the Conchords singing "Business Time."

4 17:08:50 Q Exhibit 37 is a screen shot of a page using
5 17:08:55 URL that matches the URL in an e-mail that
6 17:08:59 Mr. Lockwood sent to you.

7 17:09:04 Was this clip authorized to be on the YouTube
8 17:09:07 service, sir?

9 17:09:08 MR. WILKENS: Objection to the form; calls
10 17:09:10 for a legal conclusion.

11 17:09:11 THE WITNESS: I don't know.

12 17:09:12 MR. KRAMER: Q. Do you know if the copyright
13 17:09:13 holder who holds the copyright to the Flight of the
14 17:09:17 Conchords' music authorized this to be up on the
15 17:09:19 service?

16 17:09:20 A I don't know.

17 17:09:20 Q But you still viewed it; right?

18 17:09:23 A Yes.

19 17:09:23 Q Can you tell whether it's authorized just by
20 17:09:26 looking at the clip?

21 17:09:30 A Maybe by a number of views it might have been
22 17:09:31 authorized.

23 17:09:32 Q But at the time you probably looked at this,
24 17:09:35 it didn't have the same number of views. This is the
25 17:09:37 number of views as of today.

1 SALMI, M.

2 17:09:38 MR. WILKENS: Objection to the form.

3 17:09:41 MR. KRAMER: Q. So let's put aside the

4 17:09:42 number of views for the moment. Can you tell simply

5 17:09:45 by looking at this clip whether or not it was

6 17:09:48 authorized to be on the YouTube service?

7 17:09:49 MR. WILKENS: Objection; calls for a legal

8 17:09:50 conclusion.

9 17:09:50 THE WITNESS: Yeah, I don't -- yeah, maybe at

10 17:09:53 the beginning there was something that said something

11 17:09:54 or the ad or I don't -- I don't -- I've seen just this

12 17:09:57 screen shot. I don't -- I don't know at the time when

13 17:09:59 I saw it.

14 17:10:00 MR. KRAMER: Q. At the time, you watched the

15 17:10:02 whole thing; right?

16 17:10:02 A I don't remember.

17 17:10:04 Q Okay. Can you tell me what information you

18 17:10:06 would need -- well, let me ask you this: The clip was

19 17:10:08 posted by a user named Ellaelise. Does that help you

20 17:10:14 determine whether or not it was authorized?

21 17:10:17 A No.

22 17:10:17 Q Why not?

23 17:10:18 MR. WILKENS: Objection to the form.

24 17:10:19 THE WITNESS: That could be their manager.

25 17:10:21 MR. KRAMER: Q. It could be, but you have no

1 SALMI, M.

2 17:10:23 way of knowing one way or the other; right?

3 17:10:26 A Well, unless the clip -- if the clip said

4 17:10:30 "Buy our CD. Get a T-shirt. Come see the next show

5 17:10:34 at these dates. Here's a link to our home website."

6 17:10:36 I don't know. It might be -- it might be in there. I

7 17:10:38 didn't -- don't remember it though. I didn't --

8 17:10:39 Q Would that suggest to you that it was

9 17:10:41 authorized if it had those things in it?

10 17:10:45 A Possibly.

11 17:10:47 Q Do you know what the relationship was between

12 17:10:49 the user named Ellaelise and Flight of the Conchords?

13 17:10:53 A No idea.

14 17:10:54 Q Do you know who would know?

15 17:10:57 A Maybe Flight of the Conchords. Maybe

16 17:10:59 YouTube.

17 17:10:59 Q But the fact that this video has been

18 17:11:02 available on YouTube since July 2006 and has over

19 17:11:06 16 million views today suggests to you that it

20 17:11:09 probably was authorized to be on the service; right?

21 17:11:12 MR. WILKENS: Objection to the form.

22 17:11:14 THE WITNESS: I don't know how adamant this

23 17:11:18 band is about their clips on YouTube. I don't know.

24 17:11:20 MR. KRAMER: Q. Why would the number of

25 17:11:22 views as high as 16 million suggest to you that it may

1 SALMI, M.

2 17:11:27 have been authorized to be on the site?

3 17:11:28 A Well --

4 17:11:28 MR. WILKENS: Objection; it mischaracterizes

5 17:11:31 his testimony.

6 17:11:31 THE WITNESS: I think just by that point,

7 17:11:33 some point, if -- if it wasn't authorized, they would

8 17:11:35 have said, "Pull it down."

9 17:11:36 MR. KRAMER: Q. Same for the Daft Hands clip

10 17:11:38 that we looked at in Exhibit 35; right?

11 17:11:41 A Yeah. Like I said, that one, I think, is a

12 17:11:43 mash up. So I think that falls under some other -- I

13 17:11:46 don't know the legal stuff, but there's -- there's all

14 17:11:49 kind of holes in it out there.

15 17:11:54 Q You say "I think that by some point if it

16 17:11:57 wasn't authorized, they would have said, 'Pull it

17 17:11:58 down.'"

18 17:11:58 By that, you mean the copyright holder;

19 17:11:58 right?

20 17:12:00 A Yes.

21 17:12:00 Q If they objected to it, they would have

22 17:12:00 pulled it down before 16 million people viewed it;

23 17:12:03 right?

24 17:12:03 MR. WILKENS: Objection to the form.

25 17:12:04 THE WITNESS: You'd think so.

1 SALMI, M.

2 17:12:08 MR. KRAMER: Q. What number of views do you

3 17:12:14 think, sir, would be a reasonable threshold by which

4 17:12:18 you could make the assumption that the clip was

5 17:12:21 authorized or it would have been taken down?

6 17:12:23 MR. WILKENS: Objection to the form.

7 17:12:24 THE WITNESS: I have no idea.

8 17:12:28 MR. KRAMER: Let me take one more break, and

9 17:12:36 we'll wrap it up.

10 17:12:37 THE VIDEOGRAPHER: Off the record.

11 17:12:38 The time is 5:10 p.m.

12 17:12:42 (Recess taken.)

13 17:13:14 THE VIDEOGRAPHER: This marks the end of DVD

14 17:13:14 3.

15 17:13:16 Off the record.

16 17:13:17 The time is 5:11 p.m.

17 17:13:22 (Recess taken.)

18 17:25:26 (Document marked Salmi Exhibit 38

19 17:25:36 for identification.)

20 17:25:36 THE VIDEOGRAPHER: On the record.

21 17:25:50 This marks the beginning of DVD No. 4 in the

22 17:25:53 deposition of Mika Salmi on October 16th, 2009.

23 17:25:56 The time is 5:24 p.m.

24 17:25:58 We need to turn that BlackBerry off, please.

25 17:26:01 Thank you.

1 SALMI, M.

2 17:54:12 remained accessible on YouTube; right?

3 17:54:14 A No. The longer the content stayed up on

4 17:54:17 YouTube and hopefully in a deal form. That's what I

5 17:54:21 hoped for.

6 17:54:22 Q Putting aside your desire for a deal, the

7 17:54:25 longer it took Viacom to send its takedown notices,

8 17:54:27 the longer the content Viacom was complaining about

9 17:54:29 remained accessible to YouTube; right?

10 17:54:32 MR. WILKENS: Objection to form.

11 17:54:32 THE WITNESS: Say that again. The longer

12 17:54:34 Viacom was complaining about?

13 17:54:34 MR. KRAMER: No.

14 17:54:35 Q The longer it took Viacom to send takedown

15 17:54:38 notices for content on the YouTube service, the longer

16 17:54:41 that content was going to remain available on the

17 17:54:43 service; right?

18 17:54:45 MR. WILKENS: Objection to the form.

19 17:54:46 THE WITNESS: I suppose they're related,

20 17:54:54 yeah. It was a question of the deal getting done.

21 17:54:56 MR. KRAMER: I understand that.

22 17:54:56 THE WITNESS: The takedown -- I know you're

23 17:54:57 trying to connect takedown to something else, but it's

24 17:55:00 the -- the -- the takedown was related to the deal

25 17:55:03 process. Not to anything else.

1 SALMI, M.

2 17:55:13 MR. KRAMER: Yeah, let's take a look at this

3 17:55:15 one.

4 17:55:26 (Document marked Salmi Exhibit 41

5 17:55:27 for identification.)

6 17:55:27 MR. KRAMER: Q. Exhibit 41 is another e-mail

7 17:55:34 exchange dated December 18th, 2006. The subject line

8 17:55:41 is "Goo/Tube going sideways?" It starts with a

9 17:55:45 message from you to Ms. McGrath and Mr. Cahan, and you

10 17:55:50 say in your first-in-time message "Adam (copied) has

11 17:55:56 told me the deal with GooTube has hit an impasse and

12 17:56:00 that there's a good chance we may ask GooTube to pull

13 17:56:02 down all our content over 30 seconds. 9,000 clips?

14 17:56:05 "If this is the case, then we may need an

15 17:56:07 alternative for consumers to find and watch our video

16 17:56:11 than what we currently offer. Otherwise, we risk

17 17:56:13 being raked over the coals by consumers and the

18 17:56:17 press."

19 17:56:21 What did you mean when you wrote that Viacom

20 17:56:21 would be raked over the coals by consumers and the

21 17:56:21 press of consumers did not have an alternative to

22 17:56:21 YouTube to watch videos after a takedown?

23 17:56:30 A I believe I meant that consumers had been

24 17:56:33 habituated of seeing some of their favorite things

25 17:56:37 there, and if it was being taken down and we didn't

1 SALMI, M.

2 17:56:39 offer them to see it somewhere else, then they would

3 17:56:41 be upset.

4 17:56:43 Q So until Viacom had an alternative of its

5 17:56:46 own, it was okay with leaving content up on YouTube;

6 17:56:49 right?

7 17:56:49 MR. WILKENS: Objection to the form.

8 17:56:51 MR. KRAMER: Q. To satisfy consumer demand

9 17:56:54 for that content?

10 17:56:54 MR. WILKENS: Objection to the form.

11 17:56:55 THE WITNESS: Well, it -- we were hoping --

12 17:56:59 we were hoping the deal would get done. If the deal

13 17:57:03 got done, great. It could stay up there.

14 17:57:05 MR. KRAMER: Q. In your e-mail exchange

15 17:57:07 here, you were operating under the assumption that a

16 17:57:09 deal wasn't going to get done, and you were saying we

17 17:57:12 need an alternative for consumers to find and watch

18 17:57:15 our video; right?

19 17:57:17 MR. WILKENS: Objection to the form.

20 17:57:18 THE WITNESS: It says it hit an impasse,

21 17:57:22 which means it's -- you know, that we were having a

22 17:57:24 difficult time. So we needed to have an alternative

23 17:57:30 is basically what it says. We needed to have an

24 17:57:33 alternative.

25 17:57:36 MR. KRAMER: Q. Who made the decision, sir,

1 SALMI, M.

2 17:57:37 to hold off on sending takedown notices to Viacom --

3 17:57:41 sorry -- to YouTube as Viacom identified clips of what

4 17:57:44 it claimed to be its content on the service?

5 17:57:47 MR. WILKENS: Objection to the form.

6 17:57:49 THE WITNESS: I don't know. It's either

7 17:57:51 Michael Wolf, or Adam Cahan, or maybe Philippe Dauman.

8 17:58:31 (Document marked Salmi Exhibit 42

9 17:58:32 for identification.)

10 17:58:32 THE WITNESS: 42.

11 17:58:32 MR. KRAMER: Q. Exhibit 42, sir, is an

12 17:58:35 e-mail you sent to Ms. McGrath on December 29th, 2006,

13 17:58:40 the subject of which is "GooTube action." It was

14 17:58:44 produced to us by Viacom in discovery.

15 17:58:46 You say to Ms. McGrath, "Happy New Year. Not

16 17:58:50 quite sayonara in 2006 and there is the pending

17 17:58:54 GooTube legal action. How are you feeling about it?

18 17:58:57 The press release and Q+A made me queasy."

19 17:59:01 What press release -- what about the press

20 17:59:04 release and Q and A made you queasy at this time, sir?

21 17:59:08 A I think I was hopeful we would get a deal

22 17:59:10 done. So just reading kind of facts about our issues

23 17:59:13 with it, didn't make me feel good.

24 17:59:16 Q So you weren't queasy about the statement

25 17:59:19 that follows, that you "wish we had a few more months

Schapiro Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., COMEDY)	
PARTNERS, COUNTRY MUSIC)	
TELEVISION, INC., PARAMOUNT)	
PICTURES CORPORATION, and BLACK)	
ENTERTAINMENT TELEVISION LLC,)	Case No.
)	1:07CV02103
Plaintiffs,)	
)	
vs.))	
)	
YOUTUBE, INC., YOUTUBE, LLC,)	
and GOOGLE, INC.,)	
)	
Defendants.)	
_____)	

VIDEOTAPED DEPOSITION OF TOM FRESTON

New York, New York

Friday, September 11th, 2009

REPORTED BY:
ERICA RUGGIERI, CSR, RPR
JOB NO: 17617

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September 11, 2009

9:52 a.m.

VIDEOTAPED DEPOSITION OF TOM
FREESTON, held at the offices of Mayer
Brown, 1675 Broadway, New York, New York,
pursuant to notice, before Erica L.
Ruggieri, Registered Professional Reporter
and Notary Public of the State of New
York.

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A P P E A R A N C E S

FOR THE PLAINTIFFS:

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ALSO PRESENT:

MARK C. MORRIL, ESQ., Viacom
SALLIANNE BROWN, Videographer

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FRESTON

people you were with, and then you say at the end "Adam is smart."

Do you see that?

10:49:00 A. (Witness nods.)

Q. So you were saying here that if the model worked out, if the model was right, you should buy YouTube, correct?

MR. KENDALL: Well, it misstates what it actually says.

Q. You may answer.

A. I can imply that that's what this means here, yes.

It's hard to say, you know, one line of copy.

Q. And, of course, the model had to be right?

A. Right.

Q. That's a big if, correct?

10:49:28 A. That's always a big if.

Q. In the next e-mail, among other things, Ms. McGrath says, "YouTube, I'm banging my shoe. Let's do it."

Did she ever use that expression with you, "banging my shoe"?

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FRESTON

A. I used to say to her, if you really want something, you should bang your shoe on the table Nikita Khrushchev style. So she would throw that back to me from time to time, in the e-mail parlance we developed over the year.

Q. So the translation in McGrath -- of McGrath Freston speak here would be YouTube, I really want it, let's do it?

A. Correct.

Q. Then you responded to her, "If we get YouTube, I want to run it." You were enthusiastic, too, about the idea at least, correct?

A. Yeah. I loved the idea of YouTube.

Q. And Ms. --

A. And it would seem that would have been a good job.

Q. And Ms. McGrath said -- expressed her desire to run it as well, right? She said, "You'll have to kill me to get to it first," right?

A. Yes.

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FRESTON

Q. Now, in or around that time period, do you recall whether you ever had the occasion to meet Chad Hurley, one of the founders of YouTube?

10:50:50 A. Yes. I met Chad a couple of times.

Q. What was your impression of him?
MR. KENDALL: Overbroad. Vague and ambiguous.

10:50:58 A. Well, I was -- I had great admiration for him and what he had done. It was a classic two guys in a garage, and he was a very personable, smart guy. I can't say I spent a lot of time with him, but favorable impression.

10:51:11 Q. Now, in the e-mail we just looked at, you used the phrase, "On the way out."
10:51:31 Do you remember that? "Talked about YouTube a lot on the way out"?

A. Yeah. I don't know why I was on the way out at all. I can't recall.

Q. Do you recall whether you were on a flight to or from one of the coasts

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FRESTON

THE VIDEOGRAPHER: The time is
1:40 p.m., and we are back on the
record.

01:40:58 A. I have no recollection of
receiving such a notice.

Q. Have you preserved any documents
of relevance?

A. I have no documents at all
01:41:16 preserved, with the exception of personal
files about insurance, pension, that type
of stuff.

Q. When you were CEO of Viacom, did
you ever use instant messaging to discuss
01:41:36 work matters?

A. No.

Q. Did you use any e-mail accounts
other than your Viacom account, for work
purposes?

A. No.
01:41:46

Q. What happened to your hard copy
files after you left, to the extent that
you know?

MR. KENDALL: Calls for
01:41:57 speculation.

1 FRESTON

2 A. They were left there. My
3 offices were basically packed up and sent
4 to me, memorabilia, pictures, that sort of
5 01:42:12 thing. So I didn't really get sent any
6 documents, with the exceptions of the ones
7 I already outlined.

8 Q. And what happened to -- do you
9 know what happened to your -- the computer
10 01:42:28 that you used at work, after you left?

11 A. I don't know.

12 Q. Did you have a personal laptop
13 computer on which you did Viacom-related
14 work?

15 01:42:41 A. No.

16 Q. Did you have a personal desktop
17 computer on which you did Viacom-related
18 work?

19 A. No.

20 01:42:50 Q. I think you told us a little
21 earlier that you were unaware of any
22 instance in which YouTube failed to
23 respond to a take-down notice, correct?

24 A. Correct.

25 01:43:13 Q. Can you think of anything,

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FRESTON

during the time that you were CEO of
Viacom, can you think of anything that
YouTube did not do that you believe it
01:43:27 should have done to help protect Viacom's
content?

MR. KENDALL: Objection. Calls
for opinion testimony. Calls for
expert testimony. Overbroad. Calls
01:43:37 for speculation and lacks foundation.

A. No.

MR. SCHAPIRO: Mr. Freston,
thank you for your time. I don't have
anything further. I don't think the
01:43:50 other lawyers do.

MS. KOHLMANN: I'm going to have
a few questions.

Can you hear me with this okay?

THE VIDEOGRAPHER: Yes.

01:43:59 EXAMINATION BY

MS. KOHLMANN:

Q. Mr. Freston, you recall that
Mr. Schapiro asked you some questions
about the promotional value of having
01:44:13 content up on the Internet earlier today?

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FRESTON

A. Yes.

Q. Is it your belief that if an entire show or program is found on the Internet, that that is promotional?

A. It could be.

Q. Well, it would not be promotional if, for example, a movie was posted on the Internet, and it was still running in the theaters, would it?

MR. SCHAPIRO: Objection, leading.

A. Definitely not.

Q. And with respect to programs like -- programs that are found on Comedy Central, are those -- those programs contain content that are particularly designed to have short clips or skits; is that true?

MR. SCHAPIRO: Objection. Vague and ambiguous, lacks foundation, calls for speculation, leading.

A. Some programs would have, you know, sort of self-contained shorter segments within the context of a

1 FRESTON

2 half-hour, hour show, but not necessarily
3 all.

4 Q. Those programs that have
5 01:45:37 self-contained shorter segments, if those
6 self-contained segments were found on the
7 Internet in their entirety, would you view
8 those segments to be promotional?

9 A. In many cases.

10 01:45:52 Q. And are they -- would any
11 segment of it -- would any posting of it
12 be promotional?

13 MR. SCHAPIRO: Objection, vague.

14 A. Could you clarify what you mean
15 01:46:05 by that, please.

16 Q. In fact, isn't it true that
17 Viacom, and many of the -- virtually every
18 Viacom entity has particular departments
19 that are devoted to marketing and
20 01:46:18 promotion?

21 A. Right.

22 Q. And do you -- there are, are
23 there not, many people within the Viacom
24 enterprise that are devoted to determining
25 01:46:39 exactly how to promote Viacom content; is

1 FRESTON

2 that correct?

3 A. Yes.

4 Q. And what are the important
5 01:46:45 facets of determining what is and is not
6 promotional, by those entities?

7 A. Well, I don't know if there's
8 any hard ironclad rules. I mean that
9 really depends on the circumstance at the
10 01:47:03 time, what it is you want to promote and
11 achieve. So you know, there's a range of
12 decisions that get made about that, but
13 generally by people down in the marketing
14 and promotional departments.

15 01:47:16 Q. And those are people who have
16 dedicated their careers to determining
17 exactly what is and is not promotional; is
18 that correct?

19 A. Correct.

20 01:47:24 Q. Is that an important function in
21 the Viacom enterprise?

22 A. Well, sure. Increasingly.

23 Q. And do those people also decide
24 when to promote a particular content?

25 01:47:42 A. They would decide everything,

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FRESTON

when, where, how.

Q. And for a content company,
having control over the decisions about
01:47:52 promotion is extremely important, isn't
it?

A. Well, I think if you were to ask
any content company, would you like to
have control over your promotion or not,
01:48:02 they would all say, of course, I'd like to
have control over it.

MS. KOHLMANN: I have no further
questions.

MR. SCHAPIRO: I have a question
01:48:11 or two.

BY MR. SCHAPIRO:

Q. Sometimes a decision to leave up
on the Internet material that may have
been posted by a third party can be a
01:48:27 promotional decision, correct?

A. Yes. Sometimes you might find
that somebody uploaded something in a
clever way or a clever piece or something
that you didn't think of yourself.

01:48:39 Q. That happened sometimes at

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FRESTON

Viacom when you were there, correct?

MR. KENDALL: Lacks foundation.

Overbroad.

01:48:45 A. I'm sure.

MR. SCHAPIRO: Nothing further.

THE VIDEOGRAPHER: The time is
1:48 p.m. on September 11, 2009. And
this completes the videotape

01:48:57 deposition of Tom Freston.

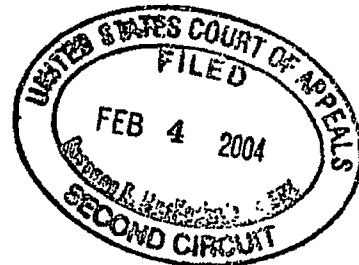
(Time noted: 1:48 p.m.)

Schapiro Exhibit 3

03-9136

United States Court of Appeals

for the
Second Circuit



SANDRA KANE,

Plaintiff-Appellant,

— against —

COMEDY PARTNERS, THE DAILY SHOW,
VIACOM and TIME WARNER CABLE,

RECORD COPY
PLEASE RETURN TO ROOM
1802

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(00-Civ-158-GBD)

BRIEF FOR DEFENDANTS-APPELLEES COMEDY PARTNERS, THE DAILY SHOW AND VIACOM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendants-Appellees Comedy Partners, The Daily Show and Viacom, hereby certifies that:

Defendant The Daily Show is a television program appearing on Comedy Central.

Defendant Comedy Partners is the owner of Comedy Central.

Defendant Viacom International Inc. and a wholly owned subsidiary of Viacom International Inc. are general partners of Defendant Comedy Partners. Viacom is a publicly traded entity, as is Blockbuster Inc., a consolidated subsidiary. Viacom or one of its consolidated subsidiaries, or assumed as part of a merger, the outstanding debt of the following companies:

Viacom Inc.
Viacom International Inc.
CBS Corporation
CBS Broadcasting Inc. (f/k/a CBS Inc.)
Westinghouse Electric Corporation
Westinghouse Credit Corporation
Paramount Communications Inc.
Go Outdoor Systems Holdings SA

Either Viacom or one of its consolidated subsidiaries files a Schedule 13-D or 13-G report with respect to the following companies which have public equity:

Blockbuster Inc.
MarketWatch.com, Inc.
SportsLine.com, Inc.
World Wrestling Entertainment, Inc.
Westwood One, Inc.

Dated: New York, New York
February 4, 2004

DAVIS WRIGHT TREMAINE

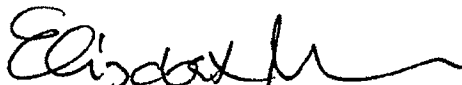
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3 J. McCarthy, McCarthy on Trademarks and
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COUNTER-STATEMENT OF THE ISSUES

1. Should the District Court's grant of summary judgment on the issue of "fair use" be affirmed where it is undisputed that The Daily Show, a satirical news program, used a 2-second excerpt from plaintiff's 29-minute public access show in a segment entitled "Public Excess," which lampooned the world of public access television?

2. Should the District Court's grant of summary judgment on plaintiff's Lanham Act and unfair competition claims be affirmed where no likelihood of confusion can reasonably exist when The Daily Show, in its "Public Access" segment, is clearly the source of the segment and no one can reasonably be confused as to who created the segment's mocking critique of plaintiff's public access show?

3. Should the District Court's grant of summary judgment on plaintiff's Lanham Act and unfair competition claims be affirmed where any risk of consumer confusion is outweighed by the danger that suppressing artistically relevant segments like "Public Excess" will unduly restrict expression under the First Amendment to the United States Constitution?

4. Should the District Court's grant of summary judgment on plaintiff's misappropriation claim under New York Civil Rights Law Sections 50-51 be affirmed where The Daily Show's use of the brief excerpt from The Kane Show in the "Public Excess" segment was editorial commentary about public access television and outside the scope of the statute's narrow boundaries for "advertising" and "trade" and its use in a promotion for the show falls within the statute's incidental use exception?

COUNTER-STATEMENT OF FACTS

A. The Parties¹

Plaintiff-Appellant Sandy Kane is a comedienne and former stripper.² Her performances involve the telling of sexually explicit jokes and puns while standing, singing or dancing on the stage wearing little or no clothing.³ Kane's "performance style" has "garnered" attention in several magazines, including "Juggs," appearing on its cover, "Hustler" and "Over 40!"⁴

Since 1995, Kane has produced a cable television show entitled *The Sandy Kane Blew Comedy Show* (the "Kane Show").⁵ The show also is identified by the names *The Sandy Kane T.V. Show!* and *The Sandy Kane Comedy Show*.⁶ Kane has registered *The Sandy Kane T.V. Show!* as service mark with the State of New York.⁷

¹ Solely for the purposes of summary judgment before the District Court, Defendants-Appellees Comedy Partners, The Daily Show and Viacom ("Defendants" or "Comedy Central") accepted the *factual* allegations of plaintiff's Amended Complaint as true. Accordingly, defendants' Fed. R. Civ. P. 56.1 Statement of Undisputed Facts and their Supplemental Rule 56.1 Statement were not contested by plaintiff before the District Court. Nor did plaintiff file an affidavit under Fed. R. Civ. P. 56(f) seeking additional discovery to oppose defendants' summary judgment motion. All of the facts described below, are thus, undisputed by the parties.

² Joint Appendix, filed by Plaintiff-Appellant on January 5, 2004 ("A") 64, 370.

³ A64, A370.

⁴ A64.

⁵ A64, A370.

⁶ A64.

⁷ A64, A370.

The Kane Show aired on the Manhattan Neighborhood Network, a public access cable network in New York City.⁸ The Kane Show is similar to her club act, and also includes some guest performers.⁹ Through the airing of the Kane Show, Kane has developed an audience within New York City, who would come to see her live comedic performances in New York City nightclubs.¹⁰

The Daily Show is a nightly news and comedy show airing on the national cable television channel Comedy Central.¹¹ The half-hour show “mimics the format of a news program and analyzes current events from a comic and satirical perspective.”¹²

B. The “Public Excess” Segment

In 1998, The Daily Show developed a segment entitled “Public Excess,” which became a regular feature of The Daily Show.¹³ According to Kane’s own Complaint, the “Public Excess” segment presents “commentary and parody of video clips of public access television shows.”¹⁴ Kane’s Show was one of the shows featured as an example of the “excess” one can

⁸ A64.

⁹ A64.

¹⁰ A64.

¹¹ A64-65, A371. Defendant Comedy Partners is the owner of Comedy Central. Viacom International Inc and a wholly owned subsidiary of Viacom International Inc are general partners of Defendant Comedy Partners. Plaintiff voluntarily dismissed her claims against Defendant Time Warner Cable.

¹² A371.

¹³ A65.

¹⁴ A9, A65.

find on public access. Jon Stewart, the host of The Daily Show, introduces that "Public Excess" segment as follows: "They say some of the best shows on television are on public access. If you happen to see any, please let us know. Until then, here is Rich Brown with Public Excess."¹⁵

The "Public Excess" segment begins with a photo montage of clips from various public access shows that in total lasts six seconds. It opens with a full screen image from the Kane Show showing Kane in a two-piece bikini patterned after the American Flag dancing for less than one second.¹⁶ The title of her show *The Sandy Kane T.V. Show* can be seen in the background as it appeared when her show aired on public access. The graphic "Public Excess" flashes across the middle of the screen while the "Public Excess" music is being played. The clip of the Kane Show then shrinks to the left hand portion of the screen and three other clips from public access shows form a square video collage. The words "Public" and "Excess" quickly flash in the boxes of the collage. The clip in the upper left corner of the collage is a man cutting someone's hair; the upper right corner is a sock puppet; Kane is in the lower left corner; and the lower right corner is a women in front of a flower bed. The collage then disappears, followed by 1/2 second full screen clips from four other public access shows. The screen then turns blue and the graphic "Public Excess" appears again. In total, the clip from the Kane Show, full screen and shrunken, lasts only 2 seconds during the opening portion of "Public Excess."¹⁷

¹⁵ A65, A371, Supplemental Joint Appendix, filed on February 3, 2004 ("SA") 395 (videotape of "Public Excess" segment), SA398 (videotape of the Kane Show).

¹⁶ A65-66, A371, SA395.

¹⁷ A65-66, A371, SA395.

After this six second introduction to the “Public Excess” segment, Rich Brown, the segment’s commentator, appears in front of a black curtain and introduces the selected examples of the “excess” of public access shows. The segment that included the Kane Show – and from which the two second clip in the introduction was taken – also featured “Elton and Betty White, public access’s favorite married couple, singing ‘Shake It Oh Baby’ and help[ing to] set the cause of integration back 40 years.”¹⁸

After the Whites, Brown appears and introduces three other public access excerpts: a clip of Tommy Rifalo’s head singing a song and flying through what appears to be the Swiss alps, a clip of “Oreal Desire and Strive” singing the Andrew Lloyd Webber classic “Don’t Cry for Me Argentina”, and a clip of Peter Filiapolis, who pretends to be tied up and being whipped, and intones “I’m not going to talk!” as he contorts his face and body to reflect the imagined whipping.¹⁹

Following the Filiapolis excerpt, Brown says “Wow, that was intense. How about a little cheesecake with Sandy Kane.” A five second clip of the Kane Show is then shown. It shows Kane, kicking up her left leg and jiggling her breasts, while singing the song “I Love Dick” and grabbing her crotch with her hand. The two seconds of video that appears in the introduction to Public Excess is taken from this excerpt.²⁰ The “Public Excess” segment concludes with Brown saying “I’m Rich Brown with

¹⁸ A66-67, SA395.

¹⁹ A67, SA395.

²⁰ A67, A372, SA395.

Public Excess. And, Pete's still not talking," followed by another 4 second clip of Pete Filiapolis doing his whipping act.²¹

Kane also complains about a promo for The Daily Show. The sixteen second promo includes representative clips from The Daily Show, together with commentary, to promote the content of the program.²² One of the clips selected is a half second image from The Daily Show's introduction to its "Public Excess" segment. The image is of The Kane Show with the "Public Excess" tagline clearly running across the center of the screen. The narrator to the piece says "The Daily Show, special reports, comprehensive, extensive and offensive." The narrator "hits the word 'offensive' in conjunction with the appearance of the half-second clip from 'The Sandy Kane Show.'"²³

C. Kane's Complaint

Kane's Complaint seeks \$11 million dollars in damages and alleges eleven causes of action.²⁴ All of the claims, except for the defamation claim, however, stem from the same challenged conduct: the use of the clip from the public access Kane Show in the "Public Excess" introduction. Kane's Complaint did not object to the use of the excerpt from the Kane Show when it was featured in the body of the "Public Excess" segment.²⁵

²¹ According to the Complaint, but never established, the introduction to "Public Excess" (the "bumper"), incorporating the two second snippet from the Kane Show, aired at least 600 times in connection other "Public Excess" segments. A67.

²² A372, SA399-400, SA397 (videotape of the promo).

²³ A372, SA397.

²⁴ A6.

²⁵ A9, A372.

Comedy Central answered the Complaint, denied the substantive allegations, and brought a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment, pursuant to Rule 56(c).

D. The District Court's Decision Granting Summary Judgment To Comedy Central

On October 15, 2003, the District Court granted Comedy Central's motion for summary judgment, and dismissed all of Kane's claims ("Opinion and Order").²⁶

1. Dismissal of Copyright Claim

On the copyright infringement claim, the District Court found that the use of Kane's image in the "Public Excess" introduction and "The Daily Show" promo was a fair use. "The Daily Show," which appears nightly on Comedy Central, "mimics the format of a news program and analyzes current events from a comic and satirical perspective."²⁷ In this context, as to the first fair use factor (the purpose and character of the use), the District Court found that the "Public Excess" segment "mocks" certain public access programs and that "by airing plaintiff's clip in a segment called 'Public Excess' and adding some derisive commentary, defendants unquestionably used her material for the purpose of criticism."²⁸ Distinguishing cases in which a defendant attempts to "usurp plaintiff's material in order to avoid the drudgery in working something fresh," the District Court held found the

²⁶ A370-385.

²⁷ A371.

²⁸ A372; A376.

use to be plainly transformative and that by presenting plaintiff's clip, Comedy Central "sought to critically examine the quality of plaintiff's public access television show."²⁹ The District Court concluded that the first factor of the fair use inquiry, "strongly favors defendants."³⁰

The District Court gave little, if any, weight to the second fair use factor (the nature of the copyrighted work). While this factor generally affords "creative" works, like Kane's show, greater protection, the District Court held that "this factor may be of less (or even of no) importance when assessed in the context of certain transformative uses."³¹

As to the third factor (the amount and substantiality of the use), the District Court found this factor in favor of Comedy Central because the two-second clip used by Comedy Central amounted to only "one-tenth of one percent of plaintiff's [29-minute] television show."³² The District Court rejected Kane's argument that the clip used was the "heart" of her show because it included her signature song "I Love Dick," noting the difficulty in applying the "heart" test to cases involving criticism or commentary: "Given this difficulty, the inaudibility of the song, and the infinitesimal portion of the material use, the Court finds this factor favors defendants."³³

With respect to the fourth factor (the effect upon the potential market), the District Court recognized that though both "The Sandy Kane Blew Comedy Show" and "The Daily Show" may serve a similar market for

²⁹ A377.

³⁰ A377.

³¹ A377.

³² A378.

³³ A378-379.

comedy, “defendants use of plaintiff’s material is highly unlikely to negatively affect the market for plaintiff’s show.”³⁴ Explaining that even if the audience for both “a satirical news program and a scantily clad singing dancer were identical, it cannot be credibly argued that defendants’ use of two seconds of plaintiff’s show in the introduction to ‘Public Excess’ would have the effect of siphoning away demand for her comedy routine.”³⁵ The District Court further found that fans of plaintiff’s television show would not choose to watch “The Daily Show” instead of “The Sandy Kane Show” because of Comedy Central’s use of plaintiff’s clip.³⁶

The District Court also rejected plaintiff’s argument that by “misleading her into believing that copyright law did not apply to public access television and using a clip of her show without consent,” defendants exercised bad faith.³⁷ The District Court found that defendants’ effort to contact plaintiff and “inform her of their plan to use her show are evidence of defendants’ *good faith* effort to initially seek her informed consent.”³⁸ (emphasis added.) Finally, “defendants’ unauthorized use of plaintiff’s television show” is not evidence of bad faith because “it is a rare exception that a work of criticism and commentary is authorized by the target artist.”³⁹

³⁴ A379.

³⁵ A379.

³⁶ A380.

³⁷ A381.

³⁸ A381.

³⁹ A381.

2. Dismissal of Lanham Act Claims

The District Court also dismissed Kane's Lanham Act claims, finding that Comedy Central did not "make any attempt to pass the trademark off as their own."⁴⁰ Rather, Comedy Central made "it clear that someone else's work is being displayed and ridiculed." Quoting the Tenth Circuit's decision in *Jordache v. Hogg Wyld*, 828 F.2d 1482 (10th Cir. 1987), the District Court held that the "requirements of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same as a right not to be made fun of."⁴¹

3. Dismissal of State Law Claims

As to Kane's state law claims for unfair competition, the District Court concluded that Kane had not introduced any evidence that the audience for "The Daily Show" is reasonably likely to be confused by the appearance of Kane in the "Public Excess" introduction and "The Daily Show" promo.⁴²

Kane's right of publicity claim under New York Civil Rights Law 50-51 failed because "presenting and criticizing plaintiff's comedy routine falls within the 'entertainment and amusement' branch of the newsworthy exception."⁴³ The Daily Show promo did not change this conclusion since it was "designed to illustrate the type of humor an audience could expect from 'The Daily Show' and was, therefore, an incidental use."⁴⁴

⁴⁰ A382.

⁴¹ A382-383.

⁴² A383.

⁴³ A384.

⁴⁴ A384. The District Court also dismissed Kane's defamation claim, premised on calling her show "offensive." The District Court held that such a statement was protected opinion because of the "impossibility of

COUNTER-STATEMENT OF STANDARD OF REVIEW

Because “fair use is a mixed question of law and fact,” this Court reviews the District Court’s conclusions on this issue *de novo*, “though [the Court] accept[s] [the District Court’s] subsidiary findings of fact unless clearly erroneous.” *American Geophysical Union v. Texaco*, 60 F.3d 913, 918 (2d Cir. 1995).

SUMMARY OF ARGUMENT

The Daily Show is a satirical news program that provides commentary on current political and culture events and airs nightly on the cable channel Comedy Central. “The crux of the show,” as the Court below found, “concerns itself with ridicule. Virtually any clip appearing on this show is implicitly accompanied by a comment on its absurdity.”⁴⁵ Yet, it is precisely that type of commentary that gives rise to plaintiff’s copyright infringement action. Plaintiff takes issue with The Daily Show’s use of a 2-second excerpt from plaintiff’s 29-minute public access television show in a regular segment entitled “Public Excess,” which critiques and comments on the utter outrageousness of certain public access television shows. Plaintiff’s public access show – which consists of plaintiff telling “sexually explicit jokes and puns” while wearing “little or no clothing” – was featured as but one representative example of the “excess” that can be found on public access television. Comedy Central’s use of the brief snippet, accompanied by its critical commentary, constitutes a classic transformative

proving it true or false.” On appeal, Kane does not challenge the dismissal of her defamation claim.

⁴⁵ A376.

use protected by the Copyright Act, 17 U.S.C. § 107 (“fair use of a copyrighted work ... for purposes such as criticism [and] comment ... is *not* infringement of copyright.” 17 U.S.C. § 107 (emphasis added).

Applying the four “fair use” factors to the undisputed facts, compels the dismissal of plaintiff’s Complaint: the use is a brief, patently satiric commentary on a previously published work that does not usurp its market. When, as here, the four fair use factors weigh in favor of defendants, courts consistently find fair use as a matter of law and dismiss the action. The District Court did the same, and this Court should affirm. (*See* Point I, below).

Plaintiff’s Lanham Act and various state law claims also were properly dismissed as legally without merit. Because the “Public Excess” segment clearly, as the Court below found, “mocked” plaintiff’s show and that it is plain that “someone else’s work is being displayed and ridiculed,” plaintiff failed to satisfy her burden of demonstrating that The Daily Show misrepresented the source of the Kane Show or that any consumer could reasonably be misled into believing that Kane sponsored or endorsed this ridicule of her act by The Daily Show. (*See* Point II.A, below). Moreover, any risk of consumer confusion is significantly outweighed by the danger that suppressing “artistically relevant” segments like “Public Excess” will “unduly restrict expression” under this Court’s balancing test set forth in *Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989). (*See* Point II.B, below).

Plaintiffs’ misappropriation claim, under New York Civil Rights Law §§ 50-51, is also without merit. The Daily Show’s use of the brief excerpt from The Kane Show in the “Public Excess” segment and in incidental advertising for the show unquestionably was editorial commentary about

public access television and was outside the scope of the statute's narrow boundaries for "advertising" and "trade." (See Point III, below).

Accordingly, this Court should affirm the grant of summary judgment.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY FOUND THAT COMEDY CENTRAL'S USE OF A TWO SECOND CLIP FROM KANE'S PUBLIC ACCESS TELEVISION SHOW IN ITS "PUBLIC EXCESS" SEGMENT CONSTITUTES A FAIR USE

The Daily Show's use of a snippet from the Kane Show in its "Public Excess" segment, as commentary on the "excesses" of public access television, is a quintessential fair use under the Copyright Act. Section 107 of the Copyright Act explicitly provides that the "fair use of a copyrighted work ... for purposes such as criticism [and] comment ... is *not* infringement of copyright." 17 U.S.C. § 107 (emphasis added). Developed at common law and now codified in Section 107, the fair use doctrine permits the use of copyrighted material in a reasonable manner "without the owner's consent." *Leibovitz v. Paramount Pictures*, 137 F.3d 109, 112 (2d Cir. 1998). By encouraging others to borrow copyrighted matter in order to create new works – particularly, as here, in the context of commentary and satire – the fair use doctrine "fulfill[s] copyright's very purpose, '[t]o promote the progress of science and useful arts.'" *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., art. I, § 8, cl. 8). And despite plaintiff's apparent desire to prevent any critique of her public access show, the fair use limitation on the copyright holder's right to control all uses of her intellectual property has been a central element of copyright law in America for well over 150 years. *Leibovitz*, 137 F.3d at 112. Section 107

sets forth four non-exclusive factors that courts must consider in determining whether a particular use of a copyrighted work is a fair use.⁴⁶ These four factors must be considered together, and none may be “treated in isolation.” *Campbell*, 510 U.S. at 578.

Courts in this Circuit routinely resolve fair use cases by way of summary judgment where, as here, there are *no* disputed issues of material fact. *E.g.*, *Castle Rock Entertainment v. Carol Publishing Co.*, 150 F.3d 132, 137 (2d Cir. 1998) (“[t]his court has on a number of occasions resolved fair use determinations at the summary judgment stage”); *Leibovitz*, 137 F.3d at 110 (same); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (2d Cir. 1980) (“the essential character of the fair use doctrine as an “equitable rule of reason” ... makes it all the more appropriate for the court itself to decide whether the fair use defense applies when the ... facts underlying each of the four factors are not disputed).

Plaintiff’s contention that summary judgment should not have been granted because no discovery was taken ignores the record.⁴⁷ By failing to file a Rule 56(f) affidavit, plaintiff waived the right to obtain additional discovery to oppose summary judgment. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir.1994); *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir.1999). Additionally, because Comedy Central *accepted* the factual allegations of plaintiffs’ Complaint as true solely for the purposes of

⁴⁶ The four factors are: (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. 17 U.S.C. § 107.

⁴⁷ Plaintiff’s Opening Appeal Brief “Plts. Br.” at 12.

summary judgment, and because plaintiff failed to contest Comedy Central's Rule 56.1 statements,⁴⁸ there are no disputed issues of material fact. Thus, the material facts concerning the use of plaintiff's show are not subject to dispute – nor could they be since the use can be gleaned from the videos – and the District Court properly resolved the issue by summary judgment, concluding that The Daily Show's use of a brief excerpt to critique the Kane Show constitutes a fair use.

A. **The Daily Show's Use Of The Kane Show In Its "Public Excess" Segment Is A Substantial Transformative Use Under The First "Fair Use" Factor, Regardless Of Whether Or Not It Is A "Parody"**

Plaintiff's opposition focuses on her argument that The Daily Show's use of a two second snippet from the Kane Show is not a "parody."⁴⁹ Plaintiff seems to be under the mistaken impression that parody is the only use protected as "fair use." It is not. Whether one describes The Daily Show's depiction of The Kane Show as parody, commentary, satire, or criticism, the use is plainly transformative and therefore entitled to protection under the first fair use factor. Parody is accorded the protection it rightfully deserves, not because there is something unique to parody (as the plaintiff argues), but because parody contains (as the District Court

⁴⁸ "If the opposing party then fails to controvert a fact so set forth in the moving party's Rule 56.1 statement that fact will be deemed admitted." *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003) (citing Local Rule 56.1(c)). Plaintiff initially appeared *pro se* in opposition to defendants' motion. After the District Court submitted the case to the Pro Bono Panel, counsel appeared for the plaintiff, submitted a memorandum on plaintiff's behalf and failed to dispute the Rule 56.1 facts and failed to object regarding discovery. Plaintiff has now waived that argument.

⁴⁹ Plts. Br. at 13-15.

recognized) “elements of commentary and criticism.” And The Daily Show’s use of the clip from the Kane Show was quintessential criticism: it was included in a segment critiquing public access television called “Public Excess” and through the succession of public access clips, accompanied by “derisive” and “smirking” commentary,⁵⁰ The Daily Show demonstrated the utter absurdity of certain programming. In short, the first fair use factor, which evaluates the “purpose and character” of The Daily Show’s use, overwhelmingly weighs in favor of a finding of fair use. And this is so even though The Daily Show, like most of television, is a for-profit entity.

In its most recent fair use decision, the Supreme Court emphasized that the “purpose and character” analysis under Section 107(1) is to be “guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like[,]” rather than by the defendant’s status as a commercial or non-profit entity. *Campbell*, 510 U.S. at 578-79, 584. If mere “commerciality carried presumptive force against a finding of fairness,” the Court explained, such a “presumption would swallow nearly all of the illustrative [fair] uses listed in the preamble paragraph to § 107, ... since these activities are generally conducted for profit in this country.” *Id.*, 510 U.S. at 584.⁵¹

⁵⁰ A376.

⁵¹ Similarly, both before and after *Campbell*, this Court has held that favored statutory uses receive fair use protection regardless of any “concurrent commercial purpose.” *Arica Institute v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992). As this Court held in *Wright v. Warner Books*, if “the allegedly infringing work fits the description of uses described in section 107 [like here] ... assessment of the first fair use factor should be at an end ... even though, as will often be the case, the [defendants] anticipate profits.” 953 F.2d 731, 737 (2d Cir. 1991).

Far from a commercial/non-commercial dichotomy, the “central purpose” of the first factor analysis is to determine “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character.” *Campbell*, 510 U.S. at 579 (brackets in original; citation omitted). A court must determine, “in other words, whether and to what extent the new work is ‘transformative;’” the “more transformative” a defendant’s use, the more likely the court is to find fair use. *Id.*

A use is transformative when it “adds something new, with a further purpose or different character, altering the [copyrighted material] with new expression, meaning or message.” *Castle Rock*, 150 F.3d at 145 (listing “parody, criticism, scholarship” as examples of transformative uses); *see, e.g., Ringgold v. Black Entertainment Television*, 126 F.3d 70, 79 (2d Cir. 1997) (“[i]f a TV news program produced a feature on [artist] Faith Ringgold and included camera shots of her [artwork], the case for a fair use defense would be extremely strong”); *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142, 146-48 (2d Cir. 1984) (finding fair use where magazine used portion of copyrighted letter in reporting on controversy between magazine and letter’s author); *Baraban v. Timer Warner*, 54 U.S.P.Q.2d 1759, 1762 (S.D.N.Y. 2000) (because “defendants reproduced [plaintiff’s] photo for the purpose of commentary and criticism, the first factor weighs heavily in favor of fair use”).

Here, The Daily Show’s use of the Kane clip in the “Public Excess” segment constitutes a clear transformative use of the Kane Show. In the context of a critique of public access television, as the District Court properly found, “airing plaintiff’s clip in a segment called ‘Public Excess’ and adding some derisive commentary, defendants unquestionably used her

material for the purpose of criticism.”⁵² From the obvious pun of the segment’s title, to the selection of Kane’s stripping, accompanied by her off-key singing of “I Love Dick” while wearing a stars and stripes bikini, to other public access “excesses” such as a singing floating head superimposed over the Alps, the critical commentary was transparent *and* transformative. In short, the “Public Excess” segment alters the copyrighted material of the Kane Show by infusing it with a new “meaning and message,” whether one calls it parody, satire, commentary or criticism, and that is a protectible transformative use. *Campbell*, 510 U.S. at 578-79.

Plaintiff’s contention that The Daily Show did no more than “took a verbatim clip from Ms. Kane shows and juxtaposed it with clips from other shows”⁵³ simply ignores the record. Unlike *Princeton Univ. Press v. Mich. Documents Services*, 99 F.3d 1381 (6th Cir. 1996), cited by Kane, the “Public Excess” segment is an “original” work “created” by The Daily Show. The show created a video montage of eight representative examples of outrageous public access shows, accompanied by commentary, its own music and a satiric title, that serves as the lead-in to the longer critiques of selected works. As this Court held in *Castle Rock*, if “copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” 150 F.3d at 142.

Plaintiff argues, without support, that “The Daily Show is not a ‘news show’ but an entertainment show, and, therefore the laws that apply to news

⁵² A376.

⁵³ Plts. Br at 25.

shows do not apply to The Daily Show.”⁵⁴ But neither the law (nor reality) creates such stark dichotomies. The Daily Show is, as the undisputed record established, a “news program” that “analyzes current events from a comic and satirical perspective.”⁵⁵ And contrary to plaintiff’s unsupported assertion, the doctrine of “fair use” applies to *all* forms of expressive conduct, not just to standard “news shows” or shows designed to “educate.” As this Court explained, “a comment is *as eligible* for fair use protection when it concerns ‘Masterpiece Theater’ and appears in the New York Review of Books as when it concerns ‘As the World Turns’ and appears in Soap Opera Digest.” *Twin Peaks v. Publications*, 996 F.2d 1366, 1374 (2d Cir. 1993) (emphasis added.)

Moreover, plaintiff’s reliance on *Castle Rock*⁵⁶ is perplexing since the case demonstrates why Comedy Central’s use of the Kane Show was in fact highly transformative. In *Castle Rock*, the producers of *Seinfeld* brought a copyright action against the publisher of a book, called the *Seinfeld Aptitude Test* (the “SAT”), containing trivia questions about the program. Citing “definitive” evidence by the publisher and the SAT itself – and in contrast to the undisputed evidence here – this Court concluded that the SAT was not created to “criticize, ‘expose,’ or otherwise comment upon *Seinfeld*.” 150 F.3d at 142.

Significantly, this Court noted – in language that aptly describes The Daily Show’s use of Kane’s Show – that if the SAT had contained commentary about the “pitifully vacuous reflection of a puerile and

⁵⁴ Plts. Br. at 27.

⁵⁵ A371.

⁵⁶ Plts. Br. at 26-27.

pervasive television culture,” the defendants’ use could have been transformative. *Id.* Here, of course, the “Public Excess” segment was criticizing some of the ridiculous and absurd programs on public access television and used Kane’s admittedly over-the-top show as a prime example.

In sum, the “Public Excess” segment is clearly a new work that has “a further purpose” and “different character” (*Campbell*, 510 U.S. at 579), and the District Court properly concluded the first fair use factor “strongly favors defendants.”⁵⁷

B. Because Kane’s Show Is A Previously Published Work And The Daily Show’s Use Was A Critical Commentary, The Second “Fair Use” Factor Favors The Daily Show

The second factor in the fair use analysis is the “nature of the copyrighted work.” 17 U.S.C. § 107(2). In assessing this factor, it is of significant import that the clip from the Kane Show is a published, previously distributed work. “Whether or not a work is published is critical” to the second fair use factor because “the scope of fair use is narrower with respect to unpublished works,” such as private memoirs or letters. *New Era Pub. v. Carol Publishing*, 904 F.2d 152, 157 (2d Cir. 1990); *see also Wright*, 953 F.2d at 737 (“[u]npublished works are the favorite sons of factor two”). By contrast, previously published works, such as films and books, receive no such special deference. Thus, this Court has found that where the plaintiff’s work has already been published, this fact alone supports a finding of fair use under the second statutory factor. *See Arica*, 970 F.2d at 1078.

⁵⁷ A377.

Plaintiff, however, contends that because The Kane Show is “expressive” the second fair use factor favors her.⁵⁸ The second factor does favor creative over factual works. However, because commentary and criticism often target “creative” works, this factor carries little, if any, weight. As this Court explained, the second factor “may be of less (or even of no) importance when assessed in the context of certain transformative uses” (*Castle Rock*, 150 F.3d at 144), which is precisely the case here.⁵⁹ Accordingly, because Kane’s show is a previously published work and The Daily Show’s use was a satiric commentary on the absurd programming that can be found on public access television, the District Court properly concluded that this factor is “without much force.”⁶⁰

C. **The Daily Show’s Use of Only A 2 Second Snippet from The 29 Minute Kane Show Weighs the Third “Fair Use” Factor Heavily in Its Favor**

The third factor in the fair use analysis is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). As the District Court properly found, because The Daily Show used only a miniscule and representative snippet from the Kane Show, this factor weighs decisively in Comedy Central’s favor. And, plaintiff has not cited a single authority supporting a finding of infringement when a comparable taking existed.

The third fair use factor has both a quantitative and qualitative component. The court must first consider whether “the portion used formed

⁵⁸ Plts. Br. at 29-30.

⁵⁹ Plaintiff’s attempt to limit this self-evident observation to only parodies is without foundation. Plts. Br. at 29.

⁶⁰ A378.

a significant percentage of the copyrighted work.” *Warner Books*, 953 F.2d at 738. In addition, the court must also consider whether “the portion used was ‘essentially the heart’ of the copyrighted work.” *Id.* Finally, the Supreme Court has declared that the third fair use factor “harken[s] back to the first of the statutory factors, for ... the extent of permissible copying varies with the purpose and character of the use.” *Campbell*, 510 U.S. at 586-87. As indicated in *Campbell*, more liberal use of a copyrighted work is permitted in connection with transformative uses. *Id.*

Here, The Daily Show used a mere 2 seconds from the 29 minute Kane Show. This amounts to only .11% of the show (or one tenth of one percent) – a truly miniscule amount.⁶¹ Indeed, in granting summary judgment, courts interpreting Section 107(3) have consistently held that use of much larger amounts – even 4% to 8% of the copyrighted work – constitutes use of a small or insignificant portion that requires a fair use finding as a matter of law. *E.g.*, *Maxtone-Graham*, 803 F.2d at 1263 (defendant’s use of 4.3% of plaintiff’s book supported finding of fair use); *New Era Pubs.*, 904 F.2d at 158 (finding fair use where defendant’s book used between 5 and 8% of 21 of plaintiff’s copyrighted works).

Plaintiff, however, argues that The Daily Show’s use of The Kane Show contained her “theme” song – “I Love Dick” – and that The Daily

⁶¹ As the District Court found, this analysis would not change even if the complaint included the five second clip from plaintiff’s show that was used in the body of the “Public Excess” segment. A372, A378-9. Moreover, the two second snippet used in the intro was taken from the five second excerpt of the featured Kane Show. The five second snippet in the body of the “Public Excess” segment constitutes .28% of the Kane Show. In turn, the half-second snippet used in The Daily Show promo was taken from the two second snippet from the “Public Excess” introduction. The half-second snippet constitutes .028% of the Kane Show.

Show, thus, took the “heart” of her show.⁶² Plaintiff makes no showing that this song is somehow distinguishable from the rest of her dancing, singing and telling “sexually explicit jokes” while wearing “little or no clothing.”⁶³ The Daily Show merely took this representative snippet – which shows Kane singing another person’s song while kicking her leg in the air and grabbing her crotch – to comment upon the utter outrageousness of public access television. Even assuming arguendo that it was the “heart” of her show, it was that “heart” that plainly warranted The Daily Show’s critique. *Contrast Harper & Row v. Nation Enterprises*, 471 U.S. 539, 564-56 (1985) (without any transformative use, defendant took 300 to 400 words from President Ford’s *unpublished* memoir describing the Nixon pardon took the “heart” and “the most interesting and moving parts of the entire manuscript”). The District Court properly found that the third factor favors a finding of fair use.

D. Plaintiff’s Receipt of “Clip” Fees From Other Companies Does Not Show That The Daily Show’s Use Supplanted the Market For The Kane Show Under the Fourth “Fair Use” Factor

The fourth factor evaluates the “effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Here, The Daily Show’s use of a brief snippet from the Kane Show in a satiric critique of public access television did not in any manner usurp the market for the Kane Show nor interfere with any legitimate licensing market. Thus,

⁶² Plts. Br. at 31-32. Plaintiff misconstrues the District Court’s decision when she argues that it resolved a disputed issue of fact concerning the import of “I Love Dick.” The Court merely found, as is self-evident from a review of the videos in evidence, that the song cannot be heard in the introductory or promotional uses and can barely be heard when used in the body of the “Public Excess” segment. A378.

⁶³ A7.

the District Court properly found that fourth factor also weighs in favor of The Daily Show.⁶⁴

“The fourth factor is aimed at the copier who attempts to usurp the demand for the original work,” such as where “too much is copied” or where “the entire plot [of a movie] is revealed” by the accused work. *Consumers Union v. General Signal*, 724 F.2d 1044, 1051 (2d Cir. 1983); *see also Castle Rock*, 150 F.3d at 145 (fourth factor looks to “whether the secondary use usurps or substitutes for the market of the original work”). As this Court explained, the fourth factor will favor the secondary user when the use “filled a market niche that the [copyright owner] simply had no interest in occupying.” *Twin Peaks*, 996 F.2d at 1377.

Here, it is patently obvious that The Daily Show’s brief use of the Kane Show as part of the “Public Excess” segment does not in any manner compete with, nor substitute for, The Kane Show itself. If consumers wanted to watch The Kane Show, they would simply not be “satisfied” in watching only the 2 second clip of Kane in the “Public Excess” introduction. *See Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986). Quite simply, the two works do not fulfill the same demand. *E.g., Monster Communications v. Turner Broadcasting*, 935 F.Supp. 490, 495 (S.D.N.Y. 1998) (use of 14 clips totaling two minutes from 84 minute film was “too small in relation to the whole” to “undercut the market for [the movie]”).

Critical to the very concept of fair use is the basic principle that a protected “fair use” – as here – does not require The Daily Show to pay plaintiff any fee for the use of The Kane Show. A copyright plaintiff “is *not* entitled to a licensing fee for a [use] that otherwise qualifies for the fair use

⁶⁴ A379-80.

defense.” *Leibovitz*, 137 F.3d at 117. Stated differently, “[s]ince the issue” in every fair use case “is whether the copying should be compensable, the failure to receive licensing revenue cannot be determinative in the plaintiff’s favor.” *Ringgold*, 126 F.3d at 81. Thus, the fact that plaintiff did not receive a licensing fee in this case is irrelevant since, otherwise, the fourth fair use factor would indeed be circular and would always favor the copyright owner. *Castle Rock*, 150 F.3d at 145; *American Geophysical*, 60 F.3d at 930 n.17 (“[w]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder”).

Moreover, where, as here, the challenged use is for obvious criticism and commentary (a transformative purpose), courts have repeatedly held that unlicensed uses in these fair use areas do not, *as a matter of law*, constitute market harm even where the copyright owner has established a licensing market for uses of her property.⁶⁵ The Supreme Court has explained that because of the “unlikelihood that creators of imaginative works will license critical reviews or lampoons” of their works, “the law recognizes no derivative market for critical works.” *Campbell*, 510 U.S. at 591-592.

As this Court further held, “[a] copyright holder’s protection of its markets for derivative works of course cannot enable it to bar publication of

⁶⁵ Plaintiff focuses on the undisputed fact that she has received prior “clip” fees and argues that *The Daily Show* failed to develop a record on the relevant markets. Plts. Br. at 34. Yet, the argument misses the controlling point: no one disputes that Kane had in the past licensed clips from her show and that a licensing market does, indeed, exist. But, that market is irrelevant to brief excerpts for critical commentary when a license fee is not necessary.

works of comment, criticism or news reporting.” *Twin Peaks*, 996 F.2d at 1377; *Castle Rock*, 150 F.3d at 146 n. 11 (“by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets”). In addition, “[w]here marginal amounts of expressive content were taken from [plaintiff’s] works ... impairment of the market for these works is unlikely.” *Arica*, 970 F.2d at 1078-79.

Here, The Daily Show’s use of two seconds from The Kane Show as part of its “Public Excess” segment did not “substitute for a derivative market” that Kane “would in general develop or license others to develop.” *Castle Rock*, 150 F.3d at 145. The Daily Show’s use is highly critical of Kane’s show.⁶⁶ And it is for that very reason that such criticism is protected by fair use. To use the words of one court, “the effect of the use upon the potential market or value of the copyrighted work is nil.” *Keep Thomson v. Citizens of Gallen*, 457 F.Supp. 957, 961 (D.N.H. 1978).

The District Court, thus, properly found that The Daily Show’s use of a brief clip from the Kane Show in the “Public Excess” segment neither competed with the full-length show nor impaired any market for the Kane Show.

⁶⁶ Indeed, Kane complains that The Daily Show “paired [her] with public access amateurs” and called her a “no talent” – certainly not the type of portrayal plaintiff would want to license. A195.

E. The District Court Properly Concluded That Comedy Central Did Not Act In "Bad Faith"

Plaintiff's repeated assertion of Comedy Central's "bad faith"⁶⁷ is unfounded and does not alter the "fair use" conclusion. Allegedly calling plaintiff to "inform her that The Daily Show planned to use a clip from" The Kane Show and telling her that they did not need to pay her for the use of the clip (even if the reason allegedly given was inaccurate) does not, in any way, show "bad faith." The very nature of the "fair use" defense is that Comedy Central did *not* have to seek plaintiff's consent before using the clip and did *not* have to compensate her for the use. As the Supreme Court held in *Campbell*, "being denied permission to use a work does not weigh against a finding of fair use." 510 U.S. at 586 n.18. In *Maxtone-Graham*, this Court similarly found no "bad faith," even though the defendant sought permission to quote the plaintiff's words, which was denied, after which defendant used the quotes anyway. 803 F.3d at 1253.

Moreover, the cases cited by plaintiff on "bad faith" are not remotely similar to a call from Comedy Central to inform her of the plan to use her show. See *Roy Export v. Columbia Broadcasting*, 503 F.Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.3d 1095 (2d Cir. 1982) ("bad faith" shown where defendant *acquired* plaintiff's film print based upon a misrepresentation as to its intended use); *TCPIP Holding v. Haar Communications*, 244 F.3d 88, 102 (2d Cir. 2001) ("bad faith" shown where defendant registered numerous similar domain names after receiving

⁶⁷ Plts. Br. at 16-20. And plaintiff's argument that she was prejudiced because, if she had known of her rights, she would have obtained an injunction, is meritless. Enjoining The Daily Show's two second use of Kane's Show for the purpose of criticism would be unprecedented in this Circuit (or elsewhere).

plaintiff's demand letter and made "exorbitant demands" to sell domain names back to plaintiff).

In stark contrast to these cases, it is undisputed that there was no deception by Comedy Central in acquiring the previously published snippet used in the "Public Excess" segment. Comedy Central had the unqualified right to use a two-second clip from Kane's show for critical commentary, and statements allegedly made by Comedy Central in an "effort to initially seek her informed consent"⁶⁸ are irrelevant to the fair use analysis. Accordingly, the District Court properly concluded that Comedy Central did not act in "bad faith."

F. The District Court Properly Found That The Daily Show's Use Of The "Public Excess" Introduction To "Promote" The Daily Show Is A Protected Fair Use

Plaintiff further complains that a "promo" for The Daily Show also constitutes copyright infringement.⁶⁹ Yet, the "promo" is nothing more than a classic example of ancillary advertising where representative excerpts from a protected work are used to accurately depict and promote the work. An advertisement that uses a copyrighted work "does not necessarily mean that it infringes that copyright, if the product that it advertises constitutes a fair use of the copyrighted work." *Steinberg v. Columbia-Delphi Prod.*, 663 F.Supp. 706, 714 (S.D.N.Y. 1987) (citing *Warner Bros. v. ABC*, 720 F.2d 231, 242-44 (2d Cir. 1983)) (holding that promotional broadcasts for television series legally parodying the Superman comic strip character did not infringe copyright in Superman character).

⁶⁸ A381.

⁶⁹ Plts. Br. at 9.

Here, as described above, the use of the Kane clip in the “Public Excess” introduction was itself plainly a “fair use,” and the use of the *same* image in The Daily Show “promo” is likewise protected. The fact that the even briefer (half-second) excerpt was used as a representative example of the content of The Daily Show and encouraged viewers to watch the show does not alter the “fair use” analysis. Plaintiff hopelessly misconstrues this issue when she tries to distinguish *Leibovitz* by arguing that The Daily Show promo was not an “extension” of the show because Kane is not affiliated with the Daily Show.⁷⁰ See *Leibovitz*, 137 F.3d at 112 (photograph was protected “fair use,” even though the parody was plainly an advertisement for the defendant’s movie, *The Naked Gun*). Yet, the promo did not state or imply a Kane affiliation; rather, it accurately featured representative clips from The Daily Show to promote its satirical, critical and humorous commentary.

* * *

In sum, because all four fair use factors weigh heavily in favor of Comedy Central – the use is a brief, satiric commentary on a previously published work that does not usurp its market – the District Court properly granted summary judgment on plaintiff’s copyright claim.

⁷⁰ Plts. Br. at 24.

II.
**THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S
LANHAM ACT AND NEW YORK STATE LAW CLAIMS**

In addition to her copyright infringement claim, plaintiff's Complaint purports to state violations of § 32 and § 43(a) of the Lanham Act, as well as a state law unfair competition, trademark infringement, false advertising, deceptive trade practices, and dilution claims. These make-weight claims are based on precisely the same conduct as plaintiff's copyright claim – The Daily Show's use of a two second clip from the Kane Show in the "Public Excess" introduction and The Daily Show promo. As the District Court properly concluded, all of these claims are without merit.

A. **The District Court Properly Dismissed Plaintiff's Lanham Act And State Law Unfair Competition Claims Because Plaintiff Failed to Demonstrate A Likelihood of Consumer Confusion**

To prevail on a claim of trademark infringement under Section 32(1) of the Lanham Act, a plaintiff must show that the defendant (1) "without permission, copied, reproduced, or imitated the plaintiff's"; (2) "registered trademark in commerce"; (3) "as part of the sale or distribution of goods or services"; (4) and "that such use is likely to cause confusion between the two marks." 15 U.S.C. § 1114(1)(a); *Streetwise Maps v. Vandam*, 159 F.3d 739, 742-743 (2d Cir. 1998) (citing *Gruner + Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072, 1075 (2d Cir. 1993)). As the District Court properly found, The Daily Show's comedic commentary on Kane's public access show, which only incidentally includes her trademark, does not begin to state a Lanham Act claim.⁷¹

⁷¹ Kane inexplicably argues that the District Court erroneously found that the Lanham Act claims were duplicative of her copyright claim

The central inquiry is whether there is a “likelihood of confusion,” which means a “likelihood that more than an *appreciable number* of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question” or that “there may be confusion as to plaintiff’s sponsorship or endorsement of the junior mark.” *Hormel Foods Corp. v. Jim Henson Productions*, 73 F.3d 497, 502 (2d Cir. 1996) (emphasis added); *Estee Lauder v. The Gap*, 108 F.3d 1503, 1510 (2d Cir. 1997) (plaintiff must show that “numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question”) (quoting 3 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:2, at 23-10 to -11 (1996)). To support a finding of infringement, a *probability* of confusion, not a mere possibility, must exist. *See Gruner + Jahr*, 991 F.2d at 1077. Moreover, because Kane’s Lanham Act claim is based on the same conduct as her copyright claim, she must make a greater showing that the designation of origin was false, was harmful, and stemmed from “some affirmative act whereby [defendant] *falsely represented* itself as the owner.” *Lipton v. The Nature Co.*, 71 F.3d 464, 473-74 (2d Cir.1995) (emphasis added.)

Plaintiff’s claims under Section 43(a) of the Lanham Act and her state law claims for common law trademark infringement, unfair competition, false advertising and deceptive trade practices, all require a showing that

and that the state law unfair competition claims were preempted by the Copyright Act. Plts. Br. at 39-41. Yet, the Court’s observation of the obvious fact that the claims were indisputably duplicative (they rely on the precise same facts) was not determinative of its conclusion that there was no likelihood of confusion. And nowhere in the District Court’s decision is there a finding on preemption. A382-385.

consumers were likely to be confused, deceived or misled as to the source or sponsorship of the “Public Excess” segment or that “there may be confusion as to plaintiff’s sponsorship or endorsement” of “Public Excess.” See *Pristine Industries v. Hallmark*, 753 F.Supp. 140, 144 (S.D.N.Y. 1990); *Berlitz Schools of Languages v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980) (“The sine qua non of an action for trademark infringement, dilution of a trademark or unfair competition is a showing by the plaintiff of the likelihood of confusion as to the origin of the goods at the consumer level”).

Here, there can be no serious contention that The Daily Show misrepresented the source of the Kane Show – it was expressly identified as emanating from public access television – and that any consumer confusion resulted from The Daily Show’s use of the two second clip from The Kane Show, or that any consumer was misled into believing that Kane sponsored or endorsed the “Public Excess” segment or The Daily Show. Rather, the undisputed evidence establishes that the whole purpose of the “Public Excess” segment was to make fun of and criticize the Kane Show. One does not usually endorse such criticism. Nor is there a “right” not to be made fun of. *Jordache*, 828 F.2d at 1486.

Further, as the Court below found, The Daily Show’s use of Kane’s striptease clip could not possibly give rise to confusion as to source or sponsorship.⁷² Indeed, in introducing the segment the host of The Daily Show expressly distances the show from the clips used in “Public Excess”: “They say some of the best shows on television are on public access. If you happen to see any, please let us know. Until then, here is Rich Brown with

⁷² A382.

Public Excess.”⁷³ That distance is then increased with the “smirking commentary” of the quality of the show’s content.⁷⁴ Similarly, The Daily Show promo makes clear that it merely is showing representative clips from The Daily Show, and in no way suggests that Kane is “sponsoring” or “endorsing” The Daily Show. In short, no viewer could reasonably believe that Kane “sponsored” or “endorsed” the “Public Excess” segment or The Daily Show.

Nor has plaintiff presented any evidence – which was her burden – showing that this Court’s eight factors required to analyze likelihood of confusion favor her. *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 391 (2d Cir. 1995) (citing *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961)).⁷⁵ Rather, the evidence adduced at summary judgment

⁷³ This conclusion is underscored by the fact that the introduction to “Public Excess” includes clips from *seven* other public access shows.

⁷⁴ A376.

⁷⁵ Plaintiff argues that she has established a “likelihood of confusion” because “after viewing The Daily Show, several friends and associates contacted Ms. Kane to ask when she became affiliated with The Daily Show.” But, the fact that, according to plaintiff, some friends were confused does not change the inescapable conclusion that it is patently clear “that someone else’s work is being displayed and ridiculed.” A382. *See, e.g., A&H Sportswear v. Victoria’s Secret Stores*, 237 F.3d 198, 227 (3d Cir. 2000) (affirming district court’s conclusion that eight instances of “actual confusion” were “isolated and idiosyncratic,” and did not support a finding of likelihood of confusion); *Information Clearing House v. Find Magazine*, 492 F.Supp. 147, 169 (S.D.N.Y. 1980) (testimony that plaintiff’s telephone operator had received a few misdirected calls regarding defendant’s magazine was “not sufficient to sustain the burden of proof” on likelihood of confusion.); *McGraw-Hill v. American Aviation*, 117 F.2d 293, 295 (D.C. Cir. 1940) (“probable confusion cannot be shown by pointing out that at some place, at some time, someone made a false identification”).

shows that her mark is weak; The Daily Show's use is highly dissimilar to the use made by plaintiff; The Daily Show's use did not compete with plaintiff's use; there is no actual confusion between The Daily Show's use and plaintiff's use; plaintiff is not going to "bridge the gap" by criticizing her own show; The Daily Show acted in good faith in using the clip; The Daily Show is a quality product; and the viewers of The Daily Show understand the nature of the show and its satiric segments. As the District Court properly found "neither in the body of the 'Public Excess' segment, the introduction, nor the [promo], do defendants make any attempt to pass the trademark off as their own. On the contrary, the narratives in all three instances make it clear that someone else's work is being displayed and ridiculed."⁷⁶ See, e.g., *Warner Bros.*, 720 F.2d at 247 ("if comparison of the works reveals no fair jury issue concerning likelihood of confusion, [there is no] Lanham Act violation").

B. Plaintiffs' Lanham Act and Unfair Competition Claims Were Properly Dismissed Because Any Risk Of Consumer Confusion Is Outweighed By The Public Interest In Free Expression

Even assuming *arguendo* that plaintiff had demonstrated a likelihood of confusion, her claims still would be unsupportable under the First Amendment. "Trademark rights [do not] entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view." *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 29 (1st Cir. 1987).

To protect expressive activity, like here, this Court has adopted a balancing test, weighing the public interest in avoiding consumer confusion

⁷⁶ A382.

against the public interest in free expression. See *Cliff Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989). Thus, to the extent there is any risk, let alone a “probability,” that The Daily Show’s use of clip from the Kane Show misled consumers as to the source, sponsorship or affiliation of the “Public Excess” segment, such risk is significantly outweighed by the danger that suppressing “artistically relevant” segments like “Public Excess” will “unduly restrict expression.” *Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989).⁷⁷ Notably, plaintiff’s brief does not even mention the balancing test adopted by this Court.

Accordingly, the District Court properly dismissed plaintiff’s Lanham Act claims and her state law claims for common law trademark infringement, unfair competition, false advertising, dilution, and deceptive trade practices.

III. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF’S MISAPPROPRIATION CLAIM

To sustain a claim for commercial misappropriation under New York’s Civil Rights Law § 51, plaintiff had to prove three distinct elements: (1) use of plaintiff’s “name, portrait or picture,” (2) for purposes of “advertising” or “trade,” (3) without written consent. *Cohen v. Herbal Concepts*, 482 N.Y.S.2d 457, 459 (1984). The New York Court of Appeals

⁷⁷ In addition, plaintiff’s Gen. Bus. Law Section 349 claim also requires a finding of “intentional deception of consumers in order for plaintiff to prevail.” *Eastern America Trio v. Tang*, 97 F.Supp. 2d 395, 423 (S.D.N.Y. 2000). Here, plaintiff has not adduced any evidence that The Daily Show’s use of the clip from the Kane Show was a deliberate attempt to “mislead and deceive” consumers into believing that defendants’ “Public Excess” segment “originates with” or is “sanctioned by the plaintiff.” *Id.*

has consistently held that the terms “advertising” and “trade” limit the scope of Section 51 to claims for *commercial* misappropriation. See *Messenger v. Gruner & Jahr Printing and Publishing*, 706 N.Y.S.2d 52, 55 (2000) (“the statute is to be narrowly construed and ‘strictly limited to nonconsensual, commercial appropriations of the name, portrait or picture of a living person.’”) (citing *Finger v. Omni Publs. Intl.*, 564 N.Y.S.2d 1014, 1016 (1990)).

Accordingly, the statute is applied to the traditional context of advertising and simply does *not* apply where publications concern newsworthy events or matters of public interest. *E.g.*, *Stephano v. News Group Publications*, 485 N.Y.S.2d 220, 224 (1984); *Messenger*, 706 N.Y.S.2d 52, 55 (2000) (same). This well-recognized exception is not limited to traditional news, but also includes “entertainment and amusement, concerning interesting phases of human activity in general.” *De Gregorio v. CBS*, 473 N.Y.S. 2d 922, 924 (Sup. Ct. 1984). Similarly, an “incidental use” exception is recognized for ads – like the promo at issue here – that “illustrate the content of the works being advertised.” *Groden v. Random House*, 61 F.3d 1045 (2d Cir. 1995).

Here, the court below found that The Daily Show’s use of the brief excerpt from The Kane Show in the “Public Excess” segment to “criticize plaintiff’s comedy routine falls within the ‘entertainment and amusement’ branch of the newsworthy exception” and the use of her image in the promo was “clearly designed to illustrate the type of humor an audience member could expect from ‘The Daily Show’ and was, therefore, an incidental use.”⁷⁸ The law and undisputed facts amply support these conclusions.

⁷⁸ A384.

Plaintiff nonetheless argues that the newsworthiness and the public interest exception has a “temporal” component.⁷⁹ It does not. Rather, “newsworthiness” is to be “broadly construed” and includes “not only descriptions of actual events, but also articles concerning political happenings, social trends or any subject of public interest.” *Messenger*, 706 N.Y.S.2d at 55. Indeed, courts regularly dismiss Section 51 claims dealing with past events or items of interest that are not necessarily “current.” In *Creel v. Crown Publishers*, for example, the First Department held that the plaintiff’s nude photograph in a guide to nude beaches fell within the exception. 496 N.Y.S.2d 219, 220 (1st Dep’t 1985). Likewise, the First Department in *Costanza v. Seinfeld* dismissed a right of publicity claim stemming from the Seinfeld television program, even though it had been on the air for years. 693 NYS 897, 900 (1st Dept. 1999).

Plaintiff similarly tries to argue that the incidental use exception should not apply to The Daily Show promo because the underlying use was no longer newsworthy. But, that argument misconstrues the exception: the “statute is not violated” when a representative example of a protected work is used in advertising “to illustrate the quality and content of [the show] in which it originally appeared” and newsworthiness simply is not relevant. *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11 (1st Dep’t 1975), *aff’d*, 386 N.Y.S.2d 397 (1976) (use of photograph of Joe Namath that had previously accompanied articles about Namath in *Sports Illustrated*, in subscription solicitations, was not prohibited by Section 51). *See also Costanza*, 719 N.Y.S.2d at 31 (“commercial” use of the Costanza character in advertising for Seinfeld television program was “incidental or ancillary to

⁷⁹ Plts. Br. at 49.

the permitted use”); *Velez v. WV Publ'g*, 524 N.Y.S.2d 186, 187 (1st Dep't), *app. denied*, 533 N.Y.S.2d 57 (1988) (photo of plaintiff as it had previously appeared on the cover of *The Village Voice*, in cartoon promotion for the newspaper protected under the incidental use exception).⁸⁰

In sum, as the District Court found, the “use of [Kane’s] image and name in the [promo here] was clearly designed to illustrate the type of humor an audience member could expect from The Daily Show, and was, therefore, an incidental use.”⁸¹ Accordingly, the District Court properly dismissed her misappropriation claim.⁸²

⁸⁰ See also *Hoepker v. Kruger*, 200 F.Supp. 2d 340, 351 (S.D.N.Y. 2002) (“[w]hile the brochures and newsletter distributed by [defendant to promote collage depicting photograph of plaintiff] may have been used for advertising purposes – specifically, to increase patronage ... – that use was related to the protected exhibition” of the collage itself”).

⁸¹ A384.

⁸² A384. Plaintiff’s argument that the promo was not “illustrative” because The Kane Show only appeared once in the body of “Public Excess” is without merit. The half-second clip used in the promo comes from the intro – the same intro to the “Public Excess” segment that she argues was aired more than 600 times. Further, Kane’s contention that the incidental use exception does not apply because The Daily Show promo allegedly suggested that Kane “endorsed” The Daily Show is unsupported. Plts. Br. at 48. Far from suggesting that Kane was “sponsoring” The Daily Show, the promo hits the word “offensive” as Kane’s image is displayed and it is patently clear that the promo was ridiculing Kane.

CONCLUSION

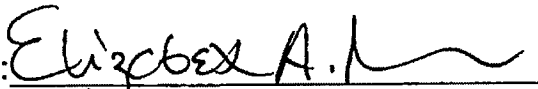
The Daily Show, a satiric look at today's news, used a 2 second clip from Kane's 29 minute burlesque show in the context of its "Public Excess" segment which humorously critiques and comments on the outrageousness of certain public access television shows. Plaintiff has not cited any case – because there are none – rejecting a fair use defense under similar circumstances. While plaintiff's *pro bono* counsel make a valiant attempt to keep her claims alive, they cannot be saved. As the District Court correctly concluded, all of her claims are legally without merit. For the foregoing

reasons, this Court should affirm the District Court's Opinion and Order granting summary judgment in favor of Comedy Central.

Dated: New York, New York
February 4, 2004

Respectfully submitted,

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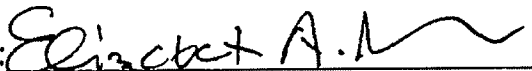
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing Defendants-Appellees' Opposition Brief is proportionately spaced, has a typeface of 14 points or more and contains 9466 words.

Dated: New York, New York
February 4, 2004

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