

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

REED, et al.,)	
Plaintiffs,)	CASE NO. 1:08-CV-1761
)	
vs.)	JUDGE CHRISTOPHER A. BOYKO
)	
FREEBIRD FILM PRODUCTIONS, INC., et)	
al.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM IN SUPPORT OF LYNYRD SKYNYRD DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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I. PRELIMINARY STATEMENT

Plaintiffs Craig Reed (“Reed”) and Survivor Films, Inc. (“Survivor” and, together with Reed, “Plaintiffs”) filed this action against Defendants Freebird Film Productions, Inc., Fly On, Inc., Vector Management, Inc., Gary Rossington, Ross Schilling, and Lynyrd Skynyrd Productions, Inc. (collectively, the “Lynyrd Skynyrd Defendants”¹), and against other parties,² for the alleged breach of an agreement (Count I) concerning the use of Plaintiffs’ film footage in a documentary film and for alleged copyright infringement (Count II) concerning the use of Plaintiffs’ film footage in various audio-video products, music videos, and in conjunction with certain live Lynyrd Skynyrd concerts. All of Plaintiffs’ claims are the subject of this Motion.

II. STATEMENT OF ISSUES

Whether the Lynyrd Skynyrd Defendants are entitled to summary judgment because the undisputed facts show that there are no genuine issues of law on Plaintiffs’ claims for breach of contract and copyright infringement.

III. SUMMARY OF ARGUMENT

Summary judgment dismissing both counts is warranted. Plaintiffs’ Count I claim should be dismissed because the undisputed facts and documents produced by the Lynyrd Skynyrd Defendants and Hallmark/RHI clearly demonstrate that there has been no breach of the contract at issue and, therefore, no reasonable juror could find for Reed. With respect to the so-called “Reel 1” film footage, Count II should be dismissed because the use of the Reel 1 film footage in any manner or media in perpetuity is permitted by the governing contract as a matter of law. With respect to the so-

¹ Freebird Film Productions, Inc. (f/k/a Freebird Video Productions, Inc.) was the production company for “Freebird . . . the Movie”; Fly On, Inc. is a Lynyrd Skynyrd touring company; Vector Management, Inc. is the band’s management company; Gary Rossington is an original founder, guitarist, and songwriter for Lynyrd Skynyrd and still plays with the band; Ross Schilling is a management representative who works for Vector Management, Inc., and Lynyrd Skynyrd Productions, Inc. is the band’s original production company and owner of the Lynyrd Skynyrd trademarks.

² Plaintiffs also sued Judy Jenness, Cabin Fever Entertainment, Inc. (“Cabin Fever”), Hallmark Entertainment Dist., LLC (“Hallmark/RHI”), and Artisan Entertainment, Inc. Pursuant to the Court’s January 15, 2009 Order, Defendant Artisan Entertainment, Inc. and its successor-in-interest Lions Gate Films, Inc. have been dismissed from the case.

called “Reel 2” film footage, Count II should be dismissed because Reed granted the Lynyrd Skynyrd organization an express or implied license to use the footage in the products and in the manner alleged in the Complaint. In the alternative, and more fundamentally, Plaintiffs’ Count II copyright infringement claims should be dismissed because the use of any of Plaintiffs’ film footage by all or any of the Lynyrd Skynyrd Defendants is a fair use. The Lynyrd Skynyrd Defendants thus respectfully move this Court to enter summary judgment in their favor on all of Plaintiffs’ claims.

IV. STATEMENT OF UNDISPUTED FACTS

A. Lynyrd Skynyrd

Lynyrd Skynyrd is a world famous musical group known for Southern rock music.³ In fact, Lynyrd Skynyrd was inducted into the Rock and Roll Hall of Fame on March 13, 2006. Among other songs, the band is known for “Sweet Home Alabama,” “Simple Man,” “Saturday Night Special,” and, of course, “Free Bird.”⁴

B. The Film

During 1976 and 1977, Reed worked for Lynyrd Skynyrd as a roadie/stage hand and production assistant, setting up the band’s drums and tuning the band’s guitars, among other things.⁵ During this period, Reed shot approximately 90 minutes of “home movie-type” concert and “behind the scenes” footage of Lynyrd Skynyrd band members and crew with a Super 8 movie camera.^{6, 7}

Tragically, on October 17, 1977, a privately chartered plane carrying the Lynyrd Skynyrd band between concerts crashed, killing singer, lyricist, and leader Ronnie Van Zant, guitarist Steve Gaines, and back-up vocalist Cassie Gaines. Other members of the band and crew were seriously

³ Schilling Decl. ¶ 2; Haber Decl., filed under seal, ¶ 2. The Declarations of Ross Schilling (Vector Management, Inc.), Gary Rossington, and Johnny Van Zant are attached hereto. The Declaration of Gary Haber (Fly On, Inc.) is filed separately under seal.

⁴ *Id.*

⁵ Compl. ¶ 17.

⁶ *Id.* at ¶¶ 18, 24.

⁷ For purposes of this Motion, the Lynyrd Skynyrd Defendants are not arguing that Reed, a full-time employee, created the Film (as defined herein) as part of his employment duties and, thus, that the Lynyrd Skynyrd organization is the author of the Film as employer for hire. The Lynyrd Skynyrd Defendants reserve the right to raise this argument, however, should this case continue.

injured, including Reed.⁸ Following the crash, Lynyrd Skynyrd disbanded for approximately 10 years.⁹ Crash survivors Defendant Gary Rossington (“Rossington”), Billy Powell, Leon Wilkeson, and Artimus Pyle reformed Lynyrd Skynyrd in 1987, joined by deceased lead singer Ronnie Van Zant’s younger brother, Johnny Van Zant, on lead vocals.¹⁰ At some point, Reed edited his 1976 and 1977 home movie footage to create two reels of film entitled “Craig Reed – LYNYRD SKYNYRD – 8MM Film Reel – ONE” (“Reel 1”) and “Craig Reed – LYNYRD SKYNYRD – 8MM Film reel – TWO” (“Reel 2” and, together with Reel 1, the “Film”).¹¹

C. The Documentary Agreement

On or about July 31, 1995, Defendant Freebird Film Productions, Inc. (f/k/a Freebird Video Productions, Inc.) (“Freebird Film Productions”) and Reed entered into a written agreement (the “Documentary Agreement”)¹² concerning the use of Reed’s footage in a documentary film, eventually called “Freebird . . . the Movie” (the “Documentary”).¹³ Reed now claims that Freebird Film Productions breached the Documentary Agreement by failing to pay him “2.5% of [Freebird Film Productions’] net profits derived from exploitation of the Documentary itself.”¹⁴

D. Use Of The Film

The Lynyrd Skynyrd Defendants do not dispute Plaintiffs’ allegation that the Lynyrd Skynyrd organization displayed portions of Reel 1 during Lynyrd Skynyrd’s live concerts in 1996, 1997, 2003, 2004, 2005, and 2007.¹⁵ To that end, Reed himself admits that he agreed to permit

⁸ Compl. ¶ 19.

⁹ Compl. ¶ 20; Schilling Decl. ¶ 4; Haber Decl., filed under seal, ¶ 4.

¹⁰ Schilling Decl. ¶ 5; Haber Decl., filed under seal, ¶ 4; Rossington Decl. ¶ 4; Van Zant Decl. ¶ 3.

¹¹ Compl. ¶ 24.

¹² See Avsec Decl. Ex. A (Documentary Agmt.).

¹³ Compl. ¶¶ 33, 44.

¹⁴ See Compl. Count I; Avsec Decl. Ex. A (Documentary Agmt.) at ¶ 4.

¹⁵ Compl. ¶ 55. Plaintiffs actually alleged that “Defendants” performed the “Film” (defined as Reel 1 and Reel 2 in the Complaint) at these concerts. However, it is undisputed, by Plaintiffs’ own admission, that “Plaintiff Reed retained Reel 2 in his sole and exclusive possession until 2002.” Compl. ¶ 47. Accordingly, any displays of Reed’s footage prior to 2002 had to have been displays of Reel 1 only.

portions of Reel 1 to be displayed at certain Lynyrd Skynyrd live concerts.¹⁶ One of these concerts, which took place on July 15, 1997 in Burgettstown, Pennsylvania, was filmed for commercial release. The resultant 97 minute video product called LYNYRD SKYNYRD – LYVE FROM STEEL TOWN contained just two minutes and 54 seconds of Reel 1 footage.¹⁷ Reed admits he was working for Lynyrd Skynyrd at the concert in question and that he knew that portions of the Film, i.e., Reel 1, were being shown during this concert.¹⁸ Notwithstanding this, Plaintiffs now allege that the use of Reel 1 in this 11 year old video infringes their copyright.¹⁹

In 2002, Reed tendered a copy of Reel 2 to Defendant Ross Schilling (“Schilling”) of Defendant Vector Management, Inc.²⁰ It is undisputed that Defendant Fly On, Inc., Lynyrd Skynyrd’s touring company, displayed portions of the Film during Lynyrd Skynyrd’s live concerts in 2003, 2004, 2005, and 2007 and that Plaintiffs allege that Reel 2 was shown at these concerts.²¹

It is further undisputed that in August 2003, after Reed turned the Reel 2 footage over, Reed had conversations with Schilling, Rossington, and Johnny Van Zant, “expressing . . . displeasure regarding the use and/or payment for the use of the Film during live concerts.”²² Schilling and Reed verbally agreed in one of those August 2003 conversations to terms for the use of certain historic footage, which the Lynyrd Skynyrd organization had already used in the music videos for “Simple Man” and “Free Bird,” for touring and for pay-per-view and DVD usage.²³ As a result, the Lynyrd Skynyrd organization, through Defendant Fly On, Inc., agreed to compensate Reed for the use of the footage at live Lynyrd Skynyrd concerts at a fee of \$75 per concert, later increased to \$100 per

¹⁶ See Avsec Decl. Ex. B (Plaintiffs’ Resps. to 1st Reqs. for Admis.) at 1.

¹⁷ See Avsec Decl. Ex. C (LYVE FROM STEEL TOWN video product’s packaging); Avsec Decl. Ex. D (Table produced by Plaintiffs indicating that 2 minutes and 54 seconds of Reel 1 was used in the 97 minute video product).

¹⁸ See Avsec Decl. Ex. B (Plaintiffs’ Resps. to 1st Reqs. for Admis.) at 17 and 18.

¹⁹ Compl. ¶¶ 59, 102.

²⁰ Compl. ¶ 52.

²¹ Compl. ¶ 53.

²² See Avsec Decl. Ex. E (Plaintiffs’ Resps. to 2nd Set of Interrogs.) at 1; Schilling Decl. ¶ 7.

²³ Schilling Decl. ¶ 8.

concert.²⁴ In addition, Reed agreed to be paid a \$2,500.00 fee for the use of two minutes and 52 seconds of the footage in the LYNYRD SKYNYRD LYVE – THE VICIOUS CYCLE TOUR DVD product (the “Vicious Cycle DVD”).²⁵ Corroborating these facts, it is undisputed that, on September 30, 2003, VC Partners, the Lynyrd Skynyrd production company that Lynyrd Skynyrd established to produce the Vicious Cycle DVD, issued a \$2,500.00 check to Reed.²⁶ It is also undisputed that, commencing August 29, 2003, Reed was issued numerous checks from Fly On, Inc.^{27, 28}

Plaintiffs have not yet identified exactly which music videos for the songs Simple Man, Free Bird, and Sweet Home Alabama they are referring to in ¶¶ 64-66 of the Complaint wherein they allege that “Defendants copied, used, displayed, and/or distributed excerpts of the Film” in the music videos.²⁹ Further, Plaintiffs originally alleged that excerpts of the Film were also included in a DVD entitled 2003 NASHVILLE LIVE,³⁰ but Reed now admits that he is “not presently aware” of such a product.³¹

E. This Lawsuit

Reed was terminated for cause by the Lynyrd Skynyrd organization in or around July 2005.³² Yet, it wasn’t until 2008, nearly three years later, when Reed first communicated to anyone affiliated with the Lynyrd Skynyrd organization that he objected to the organization’s uses of the Film.³³ In particular, Reed admits he did not voice any objections to anyone affiliated with the Lynyrd Skynyrd

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See* Avsec Decl. Ex. F (Reed’s cancelled check for the Vicious Cycle DVD), filed under seal.

²⁷ *See* Avsec Decl. Ex. G (Copies of checks paid to Reed for concerts), filed under seal. The Film was not shown at any live concerts in 2006 (Schilling Decl. ¶ 9), and Plaintiffs have not alleged it was. *See* Compl. ¶ 55.

²⁸ Additionally, since this action was filed, the Lynyrd Skynyrd Defendants have offered to pay Reed \$5,700.00 for the use of the Film at 57 concerts in 2007. *See* Avsec Decl. Ex. H (November 14, 2008 letter from counsel for the Lynyrd Skynyrd Defendants to Reed’s attorneys), filed under seal.

²⁹ The Lynyrd Skynyrd Defendants suspect that these videos may be excerpts of the DVD products already discussed, but are uncertain. Regardless, it is undisputed that these music videos have never been sold by any of the Lynyrd Skynyrd Defendants.

³⁰ Compl. ¶ 63.

³¹ *See* Avsec Decl. Ex. B (Plaintiffs’ Resp. to 1st Reqs. for Admis.) at 7.

³² Schilling Decl. ¶ 15; Haber Decl., filed under seal, ¶ 8.

³³ Plaintiffs did not communicate with the Lynyrd Skynyrd organization until their attorneys sent correspondence in 2008.

organization in 2004 or 2005, years in which portions of the Film were regularly being shown at concerts at which he worked as a production assistant.³⁴

On January 14, 2008 and January 16, 2008, the respective copyrights in Reel 1 and Reel 2 were registered with the Copyright Office on behalf of Survivor, who apparently acquired the rights from Reed by assignment.³⁵ Then, on January 18, 2008, Reed, through his attorneys, contacted Lynyrd Skynyrd Productions admitting that the Film had been “subject to numerous licensing agreements between Reed and Lynyrd Skynyrd since 1995,” but nevertheless asserting that “current” uses of the Film constituted copyright infringement.³⁶ On July 22, 2008, Plaintiffs filed this action against the Lynyrd Skynyrd Defendants and other defendants alleging a breach of contract with respect to the Documentary Agreement (Count I) and copyright infringement of the Film (Count II).

V. LAW AND ARGUMENT

A. Summary Judgment Standard

Granting summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.”³⁷ “A dispute over a material fact will only be genuine if ‘a reasonable jury could return a verdict for the nonmoving party.’”³⁸ Moreover, Rule 56 mandates the entry of summary judgment against a party who “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”³⁹ In this situation, there can be no genuine issue of material fact, and the moving party is “entitled to a judgment as a matter of law because the

³⁴ *Id.*

³⁵ See Avsec Decl. Ex. I (Registration for Reel 1); Avsec Decl. Ex. J (Registration for Reel 2).

³⁶ See Avsec Decl. Ex. K (January 18, 2008 letter).

³⁷ Fed. R. Civ. P. 56(c).

³⁸ *Thacker v. City of Columbus*, 328 F.3d 244, 252 (6th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

³⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.”⁴⁰

B. Plaintiffs’ Claim For Copyright Infringement Of Reel 1 Fails As A Matter Of Law Because Any And All Uses Of Reel 1 Are Permitted By The Documentary Agreement

The Documentary Agreement obligated Reed to turn over *all* of the footage he took during the “Summer of 1977.”⁴¹ Whether such footage included Reel 2 as well as Reel 1 is a question of fact because Reed has not yet identified when Reel 1 and Reel 2 were created.⁴² The subject copyright registrations indicate that both Reel 1 and Reel 2 were completed in 1977.⁴³ Regardless, it is undisputed that the footage Reed turned over in 1995 was Reel 1. Accordingly, accepting, for purposes of this Motion only, that the Documentary Agreement covered only that portion of the Film that Reed turned over in 1995 (Reel 1), the Lynyrd Skynyrd Defendants are entitled to judgment as a matter of law on Count II with respect to Reel 1 based on the plain and unambiguous terms in the Documentary Agreement.

The Documentary Agreement is silent regarding the governing law.⁴⁴ In the absence of a choice of law provision to the contrary, federal courts in the Sixth Circuit generally apply “the substantive law of the forum state to actions brought pursuant to [their] diversity jurisdiction.”⁴⁵ The forum state (selected by Reed) in this case is Ohio. The Lynyrd Skynyrd Defendants do not dispute that the Documentary Agreement should be governed by Ohio law. Therefore, this Court should apply Ohio law to the parties’ dispute.⁴⁶

⁴⁰ *Id.* at 322-23 (quotation marks omitted).

⁴¹ *See* Avsec Decl. Ex. A (Documentary Agmt.) at ¶ 1 (emphasis added).

⁴² This question of fact is not a material one, however, because, given the other undisputed facts in this case, it does not affect the outcome.

⁴³ *See* Avsec Decl. Ex. I (Registration for Reel 1); Avsec Decl. Ex. J (Registration for Reel 2).

⁴⁴ *See* Avsec Decl. Ex. A (Documentary Agmt.).

⁴⁵ *See, e.g., Savedoff v. Access Group, Inc.*, 524 F.3d 754, 762 (6th Cir. 2008).

⁴⁶ *See id.* (“As the parties do not dispute that the student loan contracts at issue are governed by Ohio law, we apply Ohio law to the parties’ contractual dispute.”).

“Under Ohio law, the interpretation of written contract terms, including the determination of whether those terms are ambiguous, is a matter of law for initial determination by the court.”⁴⁷

If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. However, if a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term.⁴⁸

In this case, the Documentary Agreement clearly and unambiguously provides the following terms:

- “You [Reed] agree that we [Freebird Film Productions] shall have the right to utilize and include the Footage [defined in Paragraph 1 as “all of your existing Super 8 movie footage of the original Lynyrd Skynyrd band taken during the summer of 1977”], or any portion or portions thereof, within the documentary film project we are producing which comprises concert footage of the original Lynyrd Skynyrd band (the ‘Documentary’) [Freebird . . . the Movie].”⁴⁹
- “We shall also have the right to exploit the Documentary, including the Footage, in any manner or media throughout the universe in perpetuity without restriction and without obligation, financial or otherwise to you, except as set forth herein. Our rights hereunder shall be assignable without restriction.”⁵⁰
- “[W]e agree to pay you 2.5% of our net profits derived from exploitation of the Documentary itself in any manner or media. We shall pay you your percentage of net profits as and when we receive monies, it being understood that there is no guarantee of any profits being generated.”⁵¹

The Documentary Agreement could not be more clear. Freebird Film Productions has the right to exploit the Documentary, i.e., “Freebird . . . the Movie,” in any manner or media in perpetuity. Moreover, Freebird Film Productions and its assignees (without restriction)⁵² also have the right to exploit the “Footage” in any manner or media throughout the universe in perpetuity. The plain, unambiguous meaning of this provision is that Freebird Film Productions and its assignees

⁴⁷ *Id.* at 763.

⁴⁸ *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.*, 474 N.E.2d 271, 272-73 (Ohio 1984) (citation omitted).

⁴⁹ See Avsec Decl. Ex. A (Documentary Agmt.) at ¶ 3 (emphasis added).

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.* at ¶ 4 (emphasis added).

⁵² “Transfer of a right on a nonexclusive basis does not require a written agreement.” Circular 1, U.S. Copyright Office.

without restriction, including the Lynyrd Skynyrd Defendants, have the right to exploit Reel 1 in any manner or media whatsoever, including, without limitation, in the 97 minute video product called LYNYRD SKYNYRD – LYVE FROM STEEL TOWN, in the Sweet Home Alabama music video, in the Free Bird and Simple Man music videos, in the 120 minute Vicious Cycle DVD, at or in conjunction with all or any Lynyrd Skynyrd live concerts, and/or in any other manner or media without restriction.

Therefore, so far as Plaintiffs’ copyright infringement claims pertain to Reel 1, the Lynyrd Skynyrd Defendants are entitled to judgment that Plaintiffs’ copyright infringement claims (Count II) fail as a matter of law.

C. Plaintiffs’ Claim For Breach Of Contract Fails As A Matter Of Law Because Freebird Film Productions Has Never Received Any Net Profits From The Documentary

Plaintiffs’ breach of contract claim, Count I, also fails as a matter of law because Freebird Film Productions only had an obligation to pay Reed 2.5% of its net profits “as and when” it received monies derived from exploitation of the Documentary, i.e., the “Freebird . . . the Movie” VHS video or DVD product, itself. However, it cannot be disputed that Freebird Film Productions has never received any net profits from Cabin Fever or its successors-in-interest.

Hallmark/RHI, Cabin Fever’s successor-in-interest, produced in this case the most recent financial statements for the Documentary.⁵³ It is undisputed that the most recent statement (from inception through June 30, 2008) indicates that the “Freebird . . . the Movie” project remains in an unrecovered state. The current deficit is \$147,821. Because Freebird Film Productions has not received any net profits in connection with the Documentary,⁵⁴ it owes nothing to Reed⁵⁵ and there has been no breach of contract.

⁵³ See Avsec Decl. Ex. L (Financial statements), filed under seal.

⁵⁴ In fact, if sales and recoupment continue at the present pace, it will be more than 20 years before the project recoups and, accordingly, before royalties would be due Freebird Film Productions (who would only then have an obligation to pay other stakeholders such as Reed).

The multitude of documents produced by the Lynyrd Skynyrd Defendants and Hallmark/RHI in this case unequivocally establish that: (1) the Documentary has not yet turned a profit; (2) Freebird Film Productions has not received any net profits from Cabin Fever or Hallmark/RHI; (3) accordingly, Freebird Film Productions owes no share of “net profits” to Reed under the Documentary Agreement; and (4) therefore, there has been no breach of the Documentary Agreement. In short, no reasonable jury could return a verdict for Reed as to Count I. Therefore, Freebird Film Productions is entitled to judgment in its favor as a matter of law on Count I.

D. Plaintiffs’ Claim For Copyright Infringement Of Reel 2 Fails As A Matter Of Law Because Reed Expressly And/Or Impliedly Licensed The Use Of Reel 2

When Reed ultimately turned over the Reel 2 footage in 2002, Schilling understood that Reed intended for the band to start using it, so the band did.⁵⁶ During the August 2003 conversations among Reed and Schilling, Rossington, and Johnny Van Zant regarding the Lynyrd Skynyrd organization’s use of the Film, Schilling was not sure what Reed’s rights were concerning the footage he turned over in 2002.⁵⁷ As mentioned previously, Schilling (on behalf of the Lynyrd Skynyrd organization) and Reed entered into an oral agreement in one August conference concerning the Lynyrd Skynyrd organization’s use of the Film “for touring and for pay-per-view and DVD usage.”⁵⁸ According to Schilling, the oral agreement with Reed was offered as a courtesy and to avoid any hard feelings.⁵⁹

Then, on August 29, 2003, Fly On, Inc. systematically began issuing checks to Reed for every live concert at which the Film (including Reel 2 footage) was shown, and Reed cashed them

⁵⁵ The 1997 Cabin Fever royalty statement evidences unrecouped advances of \$732,857 and \$339,362, representing the Documentary’s significant production expenses directly paid to third parties by Cabin Fever during the Documentary’s production. *See* Avsec Decl. Ex. L (Financial statements), filed under seal. Indeed, Hallmark/RHI has produced hundreds of pages of documents during the initial discovery phase of this case to support that the Documentary’s approximately \$1 million in production costs has not yet been earned back from sales of the Documentary. *See* Avsec Decl. Ex. M (December 2, 2008 letter from Hallmark/RHI’s attorneys to Plaintiffs’ counsel) at ¶ 6.

⁵⁶ Schilling Decl. ¶ 6.

⁵⁷ Schilling Decl. ¶ 7.

⁵⁸ Schilling Decl. ¶ 8.

⁵⁹ Schilling Decl. ¶ 7.

all—first, at a rate of \$75.00 per concert, and then at a rate of \$100.00 per concert.⁶⁰ Approximately one month later, on September 30, 2003, Reed was paid \$2,500.00 for the use of certain footage in the Vicious Cycle DVD.⁶¹ Reed was listed as an “assistant production manager” on the DVD packaging, so he obviously worked at the concert that was filmed for the DVD.⁶² As with other instances of the Film’s use by the Lynyrd Skynyrd organization, Reed never objected to the use of the footage in the Vicious Cycle DVD until 2008, more than five years after he accepted payment for its use.

“Courts have held that the existence of an implied license to use the copyright for a particular purpose precludes a finding of infringement.”⁶³ A “non-exclusive license may be granted orally, or may be implied from conduct.”⁶⁴ Because: (1) Reed and Lynyrd Skynyrd worked and traveled together for three years after he turned over the Reel 2 footage; (2) Reed was listed as a Production Assistant on the 2003 Vicious Cycle DVD packaging; (3) Reed saw the Film night after night being used in conjunction with the live concerts while he was on tour with Lynyrd Skynyrd (and Reed now admits that Reel 2 was used);⁶⁵ (4) months after turning over Reel 2, Reed entered into an agreement with the Lynyrd Skynyrd organization in August 2003 concerning the use of the Film and then was systematically issued \$16,800.00 worth of checks (\$2,500.00 for the Vicious Cycle DVD and \$14,300.00 for live concerts), all of which were cashed; and (5) Reed did not bring his claim until six years after he turned over his Reel 2 footage and approximately three years since the preceding (1-4) events occurred, this Court should find that a license agreement concerning the use of Reel 2 in the Vicious Cycle DVD and in conjunction with live concerts existed by implication from the parties’

⁶⁰ See Avsec Decl. Ex. G (Copies of checks paid to Reed for concerts), filed under seal; Haber Decl., filed under seal, ¶ 7.

⁶¹ See Avsec Decl. Ex. F (Reed’s cancelled check for the Vicious Cycle DVD), filed under seal; Haber Decl., filed under seal, ¶ 7.

⁶² See Avsec Decl. Ex. N (Vicious Cycle DVD packaging).

⁶³ *Johnson v. Jones*, 149 F.3d 494, 500 (6th Cir. 1998). “It is also well-settled that a non-exclusive license is not a transfer of ownership, and is not, therefore, subject to the writing requirement of § 204.” *Id.*

⁶⁴ *Id.* (quoting M. Nimmer and D. Nimmer, 3 NIMMER ON COPYRIGHT § 10.03[A], at 10-38 (1994)).

⁶⁵ Compl. ¶ 53.

conduct.⁶⁶ Any failure by the Lynyrd Skynyrd organization to pay Reed for concerts in 2007 was not copyright infringement,⁶⁷ but simply an accounting oversight and, at most, an unintentional breach of Fly On, Inc.'s and Reed's agreement that Reed would receive \$100 per concert.

In a similar case, the district court sitting in the Eastern District of Michigan granted summary judgment to Shirley MacLaine against a claim of copyright infringement in *Silva v. MacLaine*.⁶⁸ The claim was based on MacLaine's alleged copying of material from Silva's book about his experience with extraterrestrials, in her own book, "Out On A Limb."⁶⁹ The court found that (1) where both parties had traveled together and discussed each other's work together, (2) where Silva had reviewed MacLaine's manuscript and given her three pages of written comments, and (3) where she had made clear that she intended to publish this manuscript, Silva had granted an oral, nonexclusive license to use material from his book.⁷⁰ The court also took particular note of the fact that Silva did not bring his claim until six and a half years after MacLaine's book was published, even though he knew that she was writing it because she showed him the manuscript.⁷¹ The same result should obtain in this case because, given the overwhelming evidence supporting Reed's acquiescence, Reed cannot now reasonably deny that he granted the Lynyrd Skynyrd organization

⁶⁶ This Court should not permit Reed to assert now, so many years after the fact, "I did not know Reel 2 was used then" and allow him to sue for copyright infringement. Plaintiffs' own attorney admitted that the Film was the subject of numerous licensing arrangements. See Avsec Decl. Ex. K (January 18, 2008 letter).

⁶⁷ See, e.g., *Ladas v. Potpourri Press, Inc.*, 846 F. Supp. 221 (E.D.N.Y. 1994) (plaintiff artist was held to have granted a non-exclusive implied license to Potpourri, a giftware company for which she had created giftware designs, to sell the giftware she had designed after she stopped working with (and being paid by) Potpourri); *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996) (affirming a lower court decision that Shaver, an architect, who had been hired to design architectural plans for an air cargo/hangar building, had granted an implied non-exclusive license for use of his architectural drawings after he was no longer involved in the project); *Keane Dealer Services, Inc. v. Harts*, 968 F. Supp. 944 (S.D.N.Y. 1997) (implied license by conduct was found where there was knowledge of, and acquiescence in, the use of software, but the court also held that an implied license was revocable where no consideration was given for it); *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749 (11th Cir. 1997) (where plaintiff wrote song for baseball team, gave team a master recording, and granted exclusive license in consideration of team's promise to reimburse expenses and afford credit, implied license was found even though plaintiff was not reimbursed expenses and afforded credit where plaintiff attended some of the games where song was played and sent team a letter encouraging it to play it).

⁶⁸ 697 F. Supp. 1423 (E.D. Mich. 1988).

⁶⁹ *Id.* MacLaine, who had talked extensively with Silva and traveled with him during her research for her book, claimed in defense that Silva had given her an implied non-exclusive license to draw upon his book. *Id.* at 1426.

⁷⁰ *Id.* at 1426, 1430.

⁷¹ *Id.* at 1430.

permission to use Reel 2, or any portion of his Film, and certainly cannot reasonably assert now that he did not know while he was working with the band that Reel 2 was being used, yet somehow knows it now.⁷²

For the foregoing reasons, even so far as Plaintiffs' copyright infringement claims asserted in Count II pertain to Reel 2, the Lynyrd Skynyrd Defendants are entitled to judgment in their favor as a matter of law.

E. Plaintiffs' Claims For Copyright Infringement Fail As A Matter Of Law Because The Use Of The Film By The Lynyrd Skynyrd Defendants Is A Fair Use

In the alternative, and more fundamentally, this Court should find that the doctrine of fair use, codified at 17 U.S.C. § 107, permits all of the uses of the Film by the Lynyrd Skynyrd Defendants complained of by Plaintiffs in Count II. District courts routinely adjudicate fair use on summary judgment.⁷³ In order to determine whether any particular use is fair, and not copyright infringement, the Copyright Act sets forth four factors to be considered:

- (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

⁷² Similarly, in *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999), the plaintiff had written jingles for a radio station for seven years without any written agreement and without receiving any compensation. After she left the station, she objected to the station's continuing to play one jingle and she sued for copyright infringement. *Id.* at 1292. The Eleventh Circuit affirmed that she had granted an implied non-exclusive license to the station to play the jingle: "Korman wrote jingles for WQBA for seven years, and during that time she allowed the station to air those jingles, including the one at issue in this case. Given that conduct, she 'cannot reasonably deny' that she granted WQBA a nonexclusive license to use her jingle." *Id.* at 1293.

⁷³ See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (affirming district court's dismissal of the plaintiff's copyright infringement action against the defendants on the defendants' motion for summary judgment on the basis of fair use); *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001) (granting the defendants' motion for summary judgment and dismissing the plaintiff's copyright infringement action on the basis of fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (affirming the district court's grant of summary judgment in favor of the defendants on the plaintiff's copyright infringement on the basis of fair use); *Lyons P'ship, L.P. v. Giannoulas*, 14 F. Supp. 2d 947 (N.D. Tex. 1998) (granting the defendants' motion for summary judgment and dismissing the plaintiff's claim for copyright infringement with prejudice on the basis of fair use), *aff'd*, 179 F.3d 384 (2d Cir. 1999); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (affirming the district court's grant of summary judgment in favor of the defendants on the plaintiff's copyright infringement action on the basis of fair use).

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁴

Applying these four factors to the undisputed facts of this case, this Court should conclude that any and all uses of the Film by the Lynyrd Skynyrd Defendants as alleged by Plaintiffs in Count II are fair uses. Accordingly, Plaintiffs' copyright infringement claims fail as a matter of law and the Court must dismiss Count II in its entirety.

1. Factor One: Purpose And Character Of The Use, Including Whether Such Use Is Of A Commercial Nature Or Is For Nonprofit Educational Purposes

a. *Purpose And Character Of The Use*

"Most important to [any] court's analysis of the first factor is the 'transformative' nature of the work."⁷⁵ The question is "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, altering the first with new expression, meaning, or message."⁷⁶ By Plaintiffs' own admission, Reed's purpose in shooting the Film was to create "home movies."⁷⁷ Indeed, any other purpose, e.g., a commercial purpose, would have been illegal in the absence of Reed securing permissions from the band members.⁷⁸

On the other hand, Lynyrd Skynyrd used the Film in the various videos, in the Lynyrd Skynyrd concert DVD products attached hereto for the Court's review,⁷⁹ and in live concerts: (1) as historical artifacts to document the actual occurrence of original Lynyrd Skynyrd concert events;⁸⁰

⁷⁴ 17 U.S.C. § 107.

⁷⁵ *Bill Graham Archives*, 448 F.3d at 608.

⁷⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citations and quotation marks omitted) (alteration in original).

⁷⁷ Compl. ¶ 24.

⁷⁸ Commercial uses would have violated the band members' right of publicity. The Ohio Supreme Court recognized the right of publicity in 1976 in *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977), *remanded to* 376 N.E.2d 582 (Ohio 1978). (The subsequent history in *Zacchini* involved the Ohio Supreme Court's holding regarding constitutional privilege, and not the basic proposition that a cause of action lies for a violation of the right of publicity.)

⁷⁹ See Avsec Decl. Ex. O (LYNYRD SKYNYRD – LYVE FROM STEEL TOWN DVD) (the 97 minute concert contains 2 minutes 54 seconds of Reel 1); Avsec Decl. Ex. P (Vicious Cycle DVD) (the 120 minute concert contains 2 minutes 53 seconds of the Film).

⁸⁰ See *Bill Graham Archives*, 448 F.3d at 609-10 (finding the use of concert posters to be transformative where they were miniaturized and served as historical artifacts to document and represent the actual occurrence of Grateful

(2) to educate and remind the audience about the history and biography of the band;⁸¹ and (3) to pay homage to the band members who died in the plane crash, including founder, singer, and lyricist Ronnie Van Zant, who was ultimately replaced by his younger brother, Johnny Van Zant.⁸² These are purposes patently different from Reed's original purpose for shooting the Film (for home movies).⁸³

Moreover, the various DVDs, videos, and Lynyrd Skynyrd concerts that incorporated the Film have never functioned as replacements for it. As the DVDs themselves evidence,⁸⁴ the concerts and DVDs added something new, injecting Reed's Film "with a further purpose or different character, altering [it] with new expression, meaning, or message."⁸⁵ The uses were transformative and the amounts used were reasonable in light of the transformative purposes. Therefore, the first sub-part of the first factor favors a finding of fair use.

b. Commercial Use

The U.S. Supreme Court, in *Campbell v. Acuff-Rose Music, Inc.*, has made plain that a commercial use is not presumptively unfair:

Dead concert events, which was different from which the original purpose for which they were created (i.e., artistic expression and promotion)). To the extent that the secondary use "adds something new, with a further purpose or different character," the value generated goes beyond the value that inheres in the original and "the goal of copyright, to promote science and the arts, is generally furthered." *Campbell*, 510 U.S. at 579.

⁸¹ "While there are no categories of presumptively fair use, courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects." *Bill Graham Archives*, 448 F.3d at 609 (internal citation omitted).

⁸² Schilling ¶ 11; Van Zant Decl. ¶ 4.

⁸³ No less recognition of the educational and historical value of these purposes is warranted simply because the subject matter concerns a rock band. See *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1374 (2d Cir. 1993) (noting that a work of and about "pop culture" is not removed from the scope of Section 107 simply because it is not erudite).

⁸⁴ See Avsec Decl. Ex. O (LYNYRD SKYNYRD – LYVE FROM STEEL TOWN DVD); Avsec Decl. Ex. P (Vicious Cycle DVD).

⁸⁵ *Campbell*, 510 U.S. at 579. See also *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 628-29 (9th Cir. 2003) (finding the use of television clips to be transformative where "the clips play for only a few seconds and are used for reference purposes while a narrator talks over them or interviewees explain their context in Elvis' [sic] career," but not to be transformative where "[t]he purpose of showing these clips likely goes beyond merely making a reference for a biography, but instead serves the same intrinsic entertainment value that is protected by Plaintiffs' copyrights"); *Hofheinz*, 146 F. Supp. 2d at 446-47 (ruling that unauthorized inclusion of film clips in a biographical film about an actor was protected fair use because the biography "was not shown to recreate the creative expression reposing in plaintiff's [copyrighted] film, [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business") (footnote omitted).

If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.⁸⁶

Admittedly, all of the DVD products at issue are sold commercially and people purchased tickets to see Lynyrd Skynyrd perform in concert when portions of the Film were shown. However, the Film was never sold as a stand-alone product, and it was never advertised to promote the sale of any of these products or to promote any of the concerts.⁸⁷ As set forth above, Lynyrd Skynyrd's motive in using the Film was not to profit from it—rather, it was to remind and educate the audience about the band's founding members who died in the plane crash and to honor them.⁸⁸ Further, though various factors can affect fees for concert revenues,⁸⁹ including size of the venue, the market, the economy, and the local promoter,⁹⁰ it would be incredible to suggest that the Film had any bearing on those revenue numbers. It is undisputed that Lynyrd Skynyrd's concert revenues never stemmed directly from the use of the Film.⁹¹ And, Lynyrd Skynyrd enjoyed some of its largest grosses ever in 2008 after this action was filed when the Film was no longer shown at all.⁹²

⁸⁶ *Campbell*, 510 U.S. at 584 (internal quotation marks omitted).

⁸⁷ Schilling Decl. ¶ 12; *see also Bill Graham Archives*, 448 F.3d at 611-12 (finding it significant, for purposes of the first factor, that the defendant did not use any of the plaintiff's images in commercial advertising or in any other way to promote the sale of the book in which they appeared). Significantly, the court concluded this even though the book was being sold by the defendant, a for-profit enterprise.

⁸⁸ Schilling Decl. ¶ 13; Rossington Decl. ¶ 7; Van Zant Decl. ¶ 6.

⁸⁹ *See* Avsec Decl. Ex. Q (Lynyrd Skynyrd's concert revenues for 2005, 2007, and 2008), filed under seal. Portions of the Film were shown at some of these concerts and were not shown at others. The Film was not shown at any 2006 concerts. Schilling Decl. ¶ 9; Compl. ¶ 55.

⁹⁰ Schilling Decl. ¶ 14.

⁹¹ *See generally Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1994) (finding that defendant was not gaining direct commercial advantage from the photocopying at issue in a fair use case, i.e., Texaco's profits, revenues, and overall commercial performance were not tied to its making copies of certain articles; thus, Texaco's photocopying was an "intermediate use" tilting the commercial use v. non-profit/educational use sub-part of the first factor in favor of Texaco, though ultimately the Second Circuit Court of Appeals concluded there was no fair use after considering all of the factors); *cf. Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991) (revenues of reprographic business stemmed directly from selling unauthorized copies of copyrighted books tilting the commercial use v. non-profit/educational use sub-part of the first factor in favor of the copyright holders).

⁹² Haber Decl., filed under seal, ¶ 6. *See* Avsec Decl. Ex. Q (Lynyrd Skynyrd's concert revenues for 2005, 2007, and 2008), filed under seal. (Specifically, note revenues for Noblesville, Indiana concert on August 15, 2008; Mansfield, Massachusetts concert on August 23, 2008; West Bend, Wisconsin concert on August 27, 2008; and Atlantic City concerts on November 28 and 29, 2008.)

Accordingly, this Court should conclude that the first fair use factor weighs in favor of the Lynyrd Skynyrd Defendants because their uses of the Film were transformative of the Film's original home movie purpose and the Lynyrd Skynyrd Defendants' motive clearly was not to directly exploit it for commercial gain.

2. Factor Two: Nature Of The Copyrighted Work

The second factor, "the nature of the copyrighted work," "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."⁹³ With due respect to Reed, pointing and shooting a Super 8 movie camera does not require extraordinary skill. Nevertheless, the Lynyrd Skynyrd Defendants concede that the Film meets the basic threshold of a work entitled to copyright protection.⁹⁴ However, this Court should not ignore that the degree of protection that properly may be afforded to historical film clips is arguably somewhat less than that afforded fanciful works.⁹⁵ Furthermore, this second factor should have limited weight in the Court's analysis because the purpose of the Lynyrd Skynyrd Defendants' use was to emphasize the images' historical rather than creative value.⁹⁶

3. Factor Three: Amount And Substantiality Of The Portion Used In Relation To The Copyrighted Work As A Whole

The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" is reasonable in relation to the purpose of the copying.⁹⁷ With this factor, courts must consider how much of the copyrighted work was used in the infringing work(s)

⁹³ *Campbell*, 510 U.S. at 586.

⁹⁴ "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression" 17 U.S.C. § 102(a).

⁹⁵ See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) ("Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works.").

⁹⁶ See *Bill Graham Archives*, 448 F.3d at 612-13 (holding that even though the plaintiff's images were creative works, which are a core concern of copyright protection, the second factor had limited weight because the purpose of the defendant's use was to emphasize the images' historical rather than creative value).

⁹⁷ 17 U.S.C. § 107(3).

and why,⁹⁸ examining both the quantitative and qualitative aspects of the portion of the copyrighted material taken.⁹⁹

Here, it is undisputed that Reed shot 90 minutes of footage.¹⁰⁰ It is also undisputed that only a fraction of that 90 minute work was used in any single video, DVD product, or live concert.¹⁰¹ Plaintiffs' logs indicate that appreciably less than five percent of the 90 minute Film was used in almost every instance.¹⁰² Even if Reel 1 and Reel 2 are considered separate works, based on the minimal minutes and seconds used in any single video, DVD product, or live concert, this Court should easily find that this factor favors the Lynyrd Skynyrd Defendants.

4. Factor Four: Effect Of The Use Upon The Potential Market For Or Value Of The Copyrighted Work

The fourth factor, the most important,¹⁰³ considers “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰⁴ “It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹⁰⁵

This Court should find that this factor heavily weighs in favor of the Lynyrd Skynyrd Defendants because their use of the Film has had no effect upon the actual or potential market for Reed's Film. This is because there is no market for Reed's Film other than Lynyrd Skynyrd's sanctioned use of it. Any commercial use of the Film by Reed would require the consent of the

⁹⁸ *New Era Publ'ns Int'l, ApS v. Carol Publ'g Group*, 904 F.2d 152, 158-59 (2d Cir. 1990).

⁹⁹ *See Campbell*, 510 U.S. at 586.

¹⁰⁰ Compl. ¶ 19.

¹⁰¹ *See* Avsec Decl. Ex. R (Plaintiffs' logs indicating the “Reel Source” and “Time Used” of Reel 1 and Reel 2 in each allegedly infringing work).

¹⁰² *See id.*

¹⁰³ The effect of the use upon the potential market for or value of the original is “undoubtedly the single most important element of fair use.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

¹⁰⁴ 17 U.S.C. § 107(4).

¹⁰⁵ *Campbell*, 510 U.S. at 590 (omission in original).

members of Lynyrd Skynyrd (or their estates) because their likenesses are embodied in it.¹⁰⁶ Accordingly, the only legitimate market for Reed left to exploit is the fair use market, e.g., to provide footage to a museum such as the Rock and Roll Hall of Fame and Museum (the “Museum”) to use for its own educational and historical purposes—itself a fair use.¹⁰⁷ To date, Reed has not licensed the Film for any non-fair use, commercial purpose. Moreover, it is hard to imagine how *any* market for the Film, including a commercial market if one legitimately exists or a fair use market in which Reed can earn fees, has been adversely affected because, for example, Johnny Van Zant and Gary Rossington had the opportunity to publicly honor their deceased brother and friends by showing a few minutes of home movies Reed shot while he was being paid as a full-time employee of the band.¹⁰⁸

Reed cannot even argue in this case that he was deprived of a license fee. To be sure, Reed is not entitled to a license fee for a fair use. But despite this, the undisputed facts of this case evidence that Reed *was paid*, and not insignificantly. Irrespective of the fact that the Lynyrd Skynyrd Defendants deny that they used any portion of the Film without Plaintiff Reed’s consent and agreement, the fact is they could have used it and still can use it if fair use applies, even if Reed originally refused permission or even if he now purports to withdraw it.¹⁰⁹ As a result, if the Lynyrd Skynyrd Defendants failed to pay Reed any agreed-upon price for use of the Film, Reed may

¹⁰⁶ The right of publicity “has been defined as the inherent right of every human being to control the commercial use of his or her identity.” *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).

¹⁰⁷ In fact, Reed has in the past received requests or access fees to provide portions of the Film to the Museum, to Long Grass Productions, which produces the “Hall of Fame” film for the Museum, to the Country Music Channel producing a documentary film on Southern rock, or to MTV Networks producing a documentary film (and the Lynyrd Skynyrd organization has never objected to these fair uses). On the other hand, the Lynyrd Skynyrd organization has objected when Reed has attempted to commercialize band members’ trademarks and images. *See* Avsec Decl. Ex. S (December 21, 2000 warning letter to Reed from the band’s general counsel).

¹⁰⁸ Schilling Decl. ¶ 11; Rossington Decl. ¶ 5; Van Zant Decl. ¶ 4.

¹⁰⁹ The fact that the defendant purposefully used the plaintiff’s work without the plaintiff’s permission even after a license was refused has generally not been a factor in a court’s fair use analysis. *See, e.g., Campbell* 510 U.S. at 572-73 (“I am aware of the success enjoyed by ‘The 2 Live Crews’, but I must inform you that we cannot permit the use of a parody of ‘Oh, Pretty Woman.’”); *Bill Graham Archives*, 448 F.3d at 607 (“Initially, [the defendant] sought permission from [the plaintiff] to reproduce the images. . . . Nevertheless, [the defendant] proceeded with publication of *Illustrated Trip* without entering a license fee agreement with [the plaintiff].”).

potentially have a breach of contract claim. But, he has no cognizable claim for copyright infringement.

In summary, there is no ready or even available market for Reed's Film other than a fair use market. Therefore, Reed cannot demonstrate market harm. Because the Lynyrd Skynyrd Defendants have not usurped or even diminished a market for Reed's Film by their use of it, this Court must find that the fourth factor favors the Lynyrd Skynyrd Defendants.

5. Fair Use Determination

Three of the four fair use factors, including the important fourth factor, heavily favor the Lynyrd Skynyrd Defendants. The second factor, at worst, does not cut against them and also likely favors them. Accordingly, this Court should find that the Lynyrd Skynyrd Defendants' use of the Film in any and all of the products and in any manner alleged in the Complaint, including, without limitation, in the DVD products, the videos, and the live concerts, were fair uses and did not infringe Plaintiffs' copyrights. Therefore, this Court must dismiss Count II in its entirety.

VI. CONCLUSION

For the foregoing reasons, the Lynyrd Skynyrd Defendants respectfully request that this Court grant its Motion for Summary Judgment, dismissing Plaintiffs' claims in their entirety.

Respectfully submitted,

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