

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

The Honorable Karen L. Strombom

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,)
)
Plaintiff,)
)
v.)
)
DOG EAT DOG FILMS, INC., and)
GOLDFLAT PRODUCTIONS, LLC,)
)
Defendants.)

No. 3:10-CV-05293-KLS
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

**NOTE ON MOTION
CALENDAR: February 18, 2011**

**ORAL ARGUMENT
REQUESTED**

TABLE OF CONTENTS

Page

I. OVERVIEW OF ARGUMENT..... 1

II. STATEMENT OF FACTS 2

III. QUESTIONS PRESENTED 6

IV. ARGUMENT 6

 A. Fair Use Precludes Plaintiff’s Copyright Infringement Claims. 8

 1. The purpose and character of the use. 8

 2. The nature of the copyrighted work. 12

 3. The amount and substantiality of the portion used. 13

 4. The effect of the use upon the market for or value of the original work. 14

 B. Plaintiff’s Copyright Infringement Claim Relating to the Song “Oh England” Should Be Dismissed Because Plaintiff Has Not Met the Jurisdictional Requirements of 17 U.S.C. § 411, and Even If He Had, Defendant Used the Song Under a Valid License From Its Author..... 17

V. CONCLUSION 19

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Am. Geophysical Union v. Texaco, Inc.</i> , 60 F.3d 913 (2d Cir. 1994).....	15, 16
<i>Bencich v. Hoffman</i> , 84 F. Supp. 2d 1053 (D. Ariz.).....	18
<i>Bill Graham Archives v. Dorling Kindersly Ltd.</i> , 448 F.3d 605 (2d Cir. 2006).....	17
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006).....	9, 11
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	passim
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	8
<i>Harper & Row Pubs., Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	13, 14
<i>Hofheinz v. Discovery Commc'ns, Inc.</i> , 2001 U.S. Dist. LEXIS 14752 (S.D.N.Y. 2001).....	9, 10
<i>Hustler Magazine, Inc. v. Moral Majority, Inc.</i> , 796 F.2d 1148 (9th Cir. 1986).....	8
<i>Italian Book Corp. v. American Broad. Cos.</i> , 458 F. Supp. 65 (S.D.N.Y. 1978).....	14
<i>Kramer v. Thomas</i> , 2006 U.S. Dist. LEXIS 96714 (C.D. Cal. 2006).....	15, 18
<i>Leibovitz v. Paramount Pictures</i> , 137 F.3d 109 (2d Cir. 1998).....	16
<i>Lewis Galoob Toys, Inc. v. Nintendo of Am.</i> , 964 F.2d 965 (9th Cir. 1992).....	1
<i>Maxtone-Graham v. Burtchaell</i> , 803 F.2d 1253 (2d Cir. 1986).....	11, 14, 15

1	<i>Monster Commc'ns v. Turner Broad. Sys.</i> , 935 F. Supp. 490 (S.D.N.Y. 1996).....	9, 13, 14, 16
2		
3	<i>New Era Pub's Int'l ApS v. Carol Pub. Group</i> , 904 F.2d 152 (2d Cir. 1990).....	9
4		
5	<i>Norse v. Henry Holt and Co.</i> , 847 F. Supp. 142 (N.D. Cal. 1994)	7, 11
6		
7	<i>Oddo v. Ries</i> , 743 F.2d 630 (9th Cir. 1984).....	18
8		
9	<i>Ringgold v. Black Entm't Tel., Inc.</i> , 126 F.3d 70 (2d Cir. 1997).....	15
10		
11	<i>Sandoval v. New Line Cinema</i> , 973 F. Supp. 409 (S.D.N.Y. 1997).....	11
12		
13	<i>Sega Enters., Ltd. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992).....	11
14		
15	<i>Sofa Entm't Inc. v. Dodger Prods, Inc.</i> , 2010 U.S. Dist. LEXIS 114684 (C.D. Cal. 2010).....	13, 14
16		
17	<i>Sony Corp. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	7, 14
18		
19	<i>Stewart v. Abend</i> , 495 U.S. 207 (1990).....	12
20		
21	<i>Time Inc. v. Bernard Geis Assocs.</i> , 293 F. Supp. 130 (S.D.N.Y. 1968).....	14
22		
23	<i>Triangle Pub., Inc. v. Knight-Ridder Newspapers, Inc.</i> , 626 F. 2d 1171 (5th Cir. 1980).....	11
	<i>Wright v. Warner Books, Inc.</i> , 953 F.2d 731 (2d Cir. 1991).....	7, 16
	FEDERAL STATUTES	
	17 U.S.C. § 107	passim
	17 U.S.C. § 411	6, 17
	RULES	
	Fed. R. Civ. P. 56(a).....	8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

OTHER AUTHORITIES

Leval, Pierre N. *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111
(1990).....9

Sicko (Dog Eat Dog Films, Inc. 2007).....passim

Turnbow, Eric. *I’m Alive!* (Extraterrestrial ET Music 1998).....passim

1 **I. OVERVIEW OF ARGUMENT**

2 Through the fair use doctrine, the Copyright Act grants persons other than a
3 copyright owner a “privilege to use copyrighted material in a reasonable manner without
4 the consent of the copyright owner.” *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964
5 F.2d 965, 969 (9th Cir. 1992); *see* 17 U.S.C. § 107. Indeed, Section 107 of the Copyright
6 Act expressly recognizes that the “fair use of a copyrighted work . . . for purposes such as
7 criticism, comment, news reporting, . . . or research, is not an infringement of copyright.”
8 17 U.S.C. § 107.

9 Defendant Goldflat Productions, LLC’s¹ use of the video clips at issue is
10 paradigmatic fair use because the clips are used in a transformative manner as a brief part
11 of a documentary film that critically examines healthcare in America, which use does not
12 impact the licensing market (if any) for the clips. As set forth below, an analysis of all four
13 statutory fair use factors favors this Court’s finding non-infringing fair use:

14 (1) the purpose and character of the use of the clips in *Sicko* was to critically
15 examine and comment upon the state of healthcare in America in a documentary film, a
16 transformative use that illustrates *Sicko*’s social, political and cultural criticisms of
17 American healthcare and falls within Section 107’s categories of presumptive fair uses;

18 (2) the factual nature of the clips used in *Sicko* favors a finding of fair use;

19 (3) the portion used of the plaintiff’s registered work—just 0.8 percent of Plaintiff’s
20 registered work—is minimal, and the clips used do not constitute the heart of Plaintiff’s
21 work; and

22
23

¹ Dog Eat Dog Films, Inc. is incorrectly designated as a defendant in this case. The company that produced *Sicko* is Goldflat Productions, LLC (hereinafter “Goldflat” or “Defendant”).

1 (4) Defendant’s use of the clips had no detrimental effect on the market for, or
2 value of, Plaintiff’s registered work.

3 Because Defendant’s use of the clips qualifies as a fair use, for the reasons set forth
4 below, Defendant respectfully requests the Court grant this Motion for Summary
5 Judgment, and dismiss Plaintiff’s copyright claim with prejudice.

6 **II. STATEMENT OF FACTS**

7 Plaintiff alleges Defendant infringed his copyright in (1) an audiovisual work
8 entitled “Oh England,” in which he has registered the copyright and in (2) a song likewise
9 entitled “Oh England,” to which he claims to be a co-author of the lyrics. Five works are
10 germane to this motion—three home videos, a documentary film, and a song:

11 1. Original Work: the six-hours of home video footage from Eric Turnbow and
12 Plaintiff’s trip abroad in 1997. A true and correct copy of the Original Work is attached as
13 Exhibit B to the Answer, ECF No. 13. Aronson testified that Mr. Turnbow “probably”
14 recorded footage included in the Original Work. Dep. of Ken Aronson, Decl. of Thomas
15 B. Vertetis, Exhibit 1, ECF No. 20 (“Aronson Deposition”), at 15:5-16:3.

16 2. Licensed Work: the approximately four hours of home video footage from the
17 Original Work that Mr. Turnbow licensed to Defendant for use in a film about healthcare.
18 See Dep. of Eric Turnbow, Decl. of Thomas B. Vertetis, Exhibit 2, ECF No. 20 (“Turnbow
19 Deposition”), at 49:20-51:10. Defendant returned the Licensed Work to Mr. Turnbow. *Id.*
20 51:05-11. As Defendant did not keep a copy of the Licensed Work, the precise length of
21 the Licensed Work is unknown.
22
23

1 3. Registered Work: the home video Plaintiff purportedly completed in 1997, and
2 registered with the U.S. Copyright Office in 2008.² Certificate of Registration
3 Pau003431825, registered to Ken Aaronson [sic], Compl., Ex. A, ECF No. 1. The
4 Registered Work is attached as Exhibit A to the Declaration of Noelle Kvasnosky in
5 support of Defendant’s Motion for Summary Judgment (“Kvasnosky Declaration”). The
6 running time of the Registered Work is one hour, twenty-two minutes, and 50 seconds
7 (1:22:50). *See* Registered Work.

8 4. Sicko: a documentary film that critically examines the contemporary healthcare
9 crisis in America. *Sicko* includes investigative news reporting, criticism and commentary
10 by its director, Michael Moore. *Sicko* is attached as Exhibit D to the Answer, ECF No. 13
11 (“*Sicko*”). The running time of *Sicko* is two hours and 3 minutes (2:03:00). *See Sicko*.

12 5. Oh England: a song registered to Mr. Turnbow to which Plaintiff claims to be a
13 co-author of the lyrics. In 1999, Mr. Turnbow registered the copyright to the words, music
14 and sound recordings on the compact disc “I’m Alive!”, which includes a song entitled
15 “Oh England.” *See* Exhibit B to the Kvasnosky Declaration, Eric Turnbow, “Oh England”,
16 on I’m Alive! (Extraterrestrial ET Music 1998) (“I’m Alive!”), at track 9. A certified copy
17 of Mr. Turnbow’s Certificate of Registration, SRu 402-834, is attached as Exhibit C to the
18 Kvasnosky Declaration. A four-second snippet of the song “Oh England” is sung a capella
19 in *Sicko*. “I’m Alive!” was created in 1998. *Id.*

20 Plaintiff alleges that Defendant infringed his copyright in the Registered Work by
21 including clips in *Sicko* without Plaintiff’s permission. One of the short vignettes in *Sicko*

22 _____
23 ² As all of the footage in the Registered Work is taken from the longer Original Work, it suggests Plaintiff
created the Registered Work as a derivative work of the Original Work, perhaps solely for purposes of this
litigation. However, Defendant sets this factual question aside, as Defendant concedes for the limited
purposes of this motion that Plaintiff is the sole copyright owner in the Registered Work.

1 shows Mr. Turnbow being treated for a shoulder injury in a U.K. hospital. *Sicko*,
2 00:53:51-00:54:11. In 1997, Mr. Turnbow and Plaintiff recorded home video footage of a
3 trip they took to England and Amsterdam. Decl. of Eric Turnbow in Supp. of Def.’s
4 Special Mot. to Strike, ECF No. 16 (“Turnbow Declaration”) ¶ 1. In 2006, Mr. Turnbow
5 sent video footage from his 1997 trip to Defendant. *Id.* ¶ 2. Mr. Turnbow subsequently
6 sent an email to Christine Fall on October 27, 2006, describing the specific materials he
7 had granted Defendant permission to use in signing the Standard Materials Release. *Id.*
8 ¶ 2. A true and correct copy of that email is attached as Exhibit C to the Turnbow
9 Declaration, ECF No. 16. Mr. Turnbow understood and agreed that he would not be paid
10 by Defendant for the license. Turnbow Dep. 62:14-22.

11 Only two short clips of video that appear in the Registered Work — one thirty-
12 second clip and one twelve-second clip, for a total of forty-two seconds — were used in
13 *Sicko*. *Cf. Sicko* at 00:53:20-00:53:50 with Registered Work at 1:19:07-37; and *cf. Sicko* at
14 00:53:51-00:54:02 with Registered Work at 1:20:28-39. The two clips used show: (1) Mr.
15 Turnbow preparing to walk across London’s Abbey Road on his hands, then injuring his
16 shoulder during the attempt, and (2) Mr. Turnbow’s subsequent treatment of the injury in a
17 U.K. hospital. *Id.* Defendant used audio from only part of one of the clips in *Sicko*, with
18 subtitles added where audio was used. *Cf. Sicko* at 00:53:24-00:53:43; 00:53:47-00:53:49
19 with Registered Work at 1:19:11-25; 1:19:33-36. Defendant added voiceover commentary
20 and music when it used the clips. *Cf. Sicko* at 00:53:20-53:23 with Registered Work at
21 1:19:07-11; and *cf. Sicko* at 00:53:51-00:54:02 with Registered Work at 1:20:28-39. The
22 clips used in *Sicko* constitute only 0.8 percent of the Registered Work and only 0.6 percent
23 of *Sicko*. See Registered Work; *Sicko*.

1 Twenty-nine seconds of footage licensed by Mr. Turnbow to Defendant appears in
2 *Sicko* but not in the Registered Work. *Cf.* Registered Work *with* Original Work. All of the
3 footage in the Registered Work also appears in the Original Work, with different sequential
4 editing. *Cf.* Original Work *with* Registered Work.

5 There is no evidence that Defendant’s use of the clips caused harm to any market
6 for licensing the clips. Indeed there is no evidence the clips have ever been licensed, other
7 than the license by Mr. Turnbow to Defendant, and Plaintiff’s testimony shows he had no
8 intention to ever license the clips. Rather, Plaintiff testified that he “never expected [the
9 home video] to go beyond Eric’s house and beyond our—you know, him [sic] and my
10 eyes. I didn’t expect it to go further than that.” Aronson Dep. 39:14-16; *see also* Pl.’s
11 Opp’n to Special Mot. to Strike, ECF No. 19, at 3. Mr. Aronson testified that “I didn’t
12 think anything would ever transpire with my footage of the vacation that we went on.” *Id.*
13 at 34:16-18. Plaintiff has represented to this court that “plaintiff had no interest in selling
14 his memories.” Pl.’s Opp’n to Special Mot. to Strike, ECF No. 19, at 3. Additionally,
15 Plaintiff admits the footage is of poor quality:

16 It was my first time using a video camera, and [Mr. Turnbow]—
17 you know, he told me what a rotten job of filming I did, which I
18 agree. I’d never used a camera prior to that point. And you
know, like I said, it was just—it was just a poor quality
everything and no experience behind the camera.

19 *Id.* at ¶ 38:4-11. Moreover, plaintiff testified that “I wouldn’t have agreed [to] have any of
20 my image or my voice or me signing a song that I wrote in the footage.” Opp’n to Special
21 Mot. to Strike, ECF No.19, at 4-5; Aronson Dep. 58:19-21. Although Plaintiff was aware
22 that Mr. Turnbow had sent footage from the Original Work to Defendant prior to its
23 inclusion in the film, he made no effort to contact the Defendant. Aronson Dep. 51:18-

1 53:19. Plaintiff did not inform Defendant of Plaintiff’s purported copyright; Plaintiff did
2 not seek to negotiate a license with Defendant; and Plaintiff did not request that Defendant
3 not use the footage. See *id.* Indeed, it was only after *Sicko* was released that anyone
4 attempted to contact Defendant on Plaintiff’s behalf, with Plaintiff himself never
5 attempting to contact Defendant, and Plaintiff never asking Mr. Turnbow to contact
6 Defendant to ask that the footage not be used. *Id.* 51:18-53:19; 53:14-57:14; 60:15-61:20.

7 As of the filing of this motion, Plaintiff has not registered or preregistered a
8 copyright in a song entitled “Oh England.” Neither the song nor its lyrics appear in the
9 audiovisual work Plaintiff registered with the U.S. Copyright Office. See Registered
10 Work.

11 Plaintiff’s claims for invasion of privacy and misappropriation of likeness were
12 dismissed by this Court’s order of August 31, 2010. Only Plaintiff’s claim of copyright
13 infringement remains for this Court to decide.

14 III. QUESTIONS PRESENTED

15 1. Whether Defendant’s use of clips from Plaintiff’s copyrighted work was a
16 fair use pursuant to 17 U.S.C. § 107?

17 2. Whether Plaintiff’s claim of copyright infringement of the song “Oh
18 England” is precluded by Plaintiff’s failure to meet the prerequisites to maintain a
19 copyright infringement claim under 17 U.S.C. § 411, or alternatively, fails because the
20 song was used under a valid license?

21 IV. ARGUMENT

22 As the Supreme Court has explained, the fair use doctrine balances “the interests of
23 authors . . . in the control and exploitation of their [works] . . . on the one hand, and

1 society's competing interest in the free flow of ideas, information, and commerce on the
2 other hand." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). To
3 facilitate this balancing process, Section 107 of the Copyright Act sets forth four non-
4 exclusive factors that a court considers in determining whether a particular use of a
5 copyrighted work is a fair use:

- 6 (1) the purpose and character of the use, including whether such use is of a
7 commercial nature or is for nonprofit educational purposes;
- 8 (2) the nature of the copyrighted work;
- 9 (3) the amount and substantiality of the portion used in relation to the
10 copyrighted work as a whole; and
- 11 (4) the effect of the use upon the potential market for or value of the
12 copyrighted work.

13 17 U.S.C. § 107(1)-(4).

14 Within this framework, the fair-use doctrine "calls for case-by-case analysis."
15 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Because no single fair-use
16 factor is dispositive, "the moving party is not required to prevail on every factor" to
17 establish fair use, *Norse v. Henry Holt and Co.*, 847 F. Supp. 142, 145 (N.D. Cal. 1994)
18 and "need not 'shut out' her opponent on the four factor tally to prevail." *Wright v.*
19 *Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991). Instead, all four factors must be
20 "weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578.

21 Here, all four factors weighed together favor a finding that Defendant's use of the
22 video clips from the Registered Work is a protected fair use.
23

1 **A. Fair Use Precludes Plaintiff’s Copyright Infringement Claims.**

2 Summary judgment is appropriate when, viewing the facts in the light most
3 favorable to the non-moving party, the movant “shows that there is no genuine dispute as
4 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
5 Civ. P. 56(a). Once the moving party satisfies its burden, it is entitled to judgment if the
6 non-moving party fails to designate, by affidavits, depositions, answers to interrogatories
7 or admissions on file “specific facts showing that there is a genuine issue for trial.”
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

9 At summary judgment on whether the use of copyrighted material is a fair use, the
10 Court is guided by the Ninth Circuit’s instruction:

11 “Fair use is a mixed question of law and fact.” If there are
12 no genuine issues of material fact, or if, even after resolving
13 all issues in favor of the opposing party, a reasonable trier of
14 fact can reach only one conclusion, a court may conclude as
15 a matter of law whether the challenged use qualifies as a fair
16 use of the copyrighted work.

17 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986).

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

19 The “central purpose” of the first prong’s inquiry is to ascertain whether the
20 allegedly infringing work merely “supersedes” the original, or whether it “adds something
21 new, with a further purpose or different character, altering the first with new expression,
22 meaning, or message.” *Campbell*, 510 U.S. at 579 (citations omitted). “It asks, in other
23 words, whether and to what extent the new work is ‘transformative.’” *Id.* A
transformative use is one that “employ[s] the quoted matter in a different manner or for a
different purpose from the original.” Pierre N. Leval, *Toward a Fair Use Standard*, 103
Harv. L. Rev. 1105, 1111 (1990). Indeed, “transformative works thus lie at the heart of the

1 fair use doctrine’s guarantee of breathing space.” *Blanch v. Koons*, 467 F.3d 244, 251 (2d
2 Cir. 2006). There is a strong presumption that the use of a copyrighted work is
3 transformative when it falls within the categories delineated in Section 107. *New Era*
4 *Pub’s Int’l ApS v. Carol Pub. Group*, 904 F.2d 152, 155 (2d Cir. 1990) (as long as the
5 infringing work constitutes criticism, scholarship or research “the assessment of the first
6 fair use factor should be at an end.”). “Documentaries . . . fall within the protected
7 categories of § 107, and are entitled to the presumption the use of the copyrighted material
8 is fair.” *Hofheinz v. Discovery Commc’ns, Inc.*, 2001 U.S. Dist. LEXIS 14752, *11
9 (S.D.N.Y. 2001); *see also Monster Commc’ns v. Turner Broad. Sys.*, 935 F. Supp. 490,
10 493-94 (S.D.N.Y. 1996) (documentary film about boxer Muhammad Ali “undeniably
11 constitutes a combination of comment, criticism, scholarship and research, all of which
12 enjoy favored status under § 107”).

13 The use of video clips to illustrate, contextualize, and expand upon a
14 documentary’s overarching theme is a transformative use. In *Hofheinz*, defendant used
15 clips from plaintiff’s films about aliens in documentary television programs that examined
16 the “common themes and political contexts of alien visitation films.” *Hofheinz*, 2001 U.S.
17 Dist. LEXIS 14752 at *11. The court found that use of the film clips was transformative,
18 as they were employed for various purposes, including illustrating the documentaries’
19 over-arching themes, demonstrating examples of the subject the documentary discussed,
20 and providing contrasts between early science fiction films and more recent science fiction
21 films. *Id.* at *14. “Indeed,” the *Hofheinz* court noted, “it is difficult to imagine a use of a
22 short clip in a commentary/documentary that would not qualify as transformative.” *Id.* at
23 *16 n.7.

1 Defendant's use of the clips fits comfortably within several of the statutory
2 categories of use that Congress has indicated as fair uses, including criticism, commentary,
3 news reporting, and research. *See* 17 U.S.C. § 107. The use of the clips in *Sicko* is
4 transformative: the clips are used as part of a critical examination of healthcare—one of the
5 most significant contemporary public issues of the last two decades—and the cultural,
6 societal, and personal impact healthcare has on every American, a transformation from the
7 raw home video footage in the Registered Work. The clips are used in *Sicko* to contrast
8 socialized medicine in the U.K. with the healthcare system in the United States, by
9 contextualizing how Mr. Turnbow came to receive care from a U.K. hospital. Moreover,
10 Defendant's use of the clips is transformative in adding detailed voice-over commentary
11 from the director and editing the clips to concisely contextualize Mr. Turnbow's story,
12 while removing much of the clips' substandard audio.

13 The forty-two seconds of clips used in *Sicko* do not substitute for viewing the entire
14 one-hour twenty-three minute home video Plaintiff registered. The Registered Work is
15 archetypal home video: it is a sprawling repository of various events during a vacation,
16 apparently presented chronologically, and without much editing beyond turning off and on
17 the camera. This is in sharp contrast to the transformative use of the clips in *Sicko*, which
18 shows the healthcare available in the U.K. through the lens of Mr. Turnbow's individual
19 story, as just a short part of a feature-length documentary film.

20 Importantly, the Supreme Court has emphasized that whether the use is for a
21 commercial or nonprofit purpose "is only one element of the first factor enquiry into its
22 purpose and character." *Campbell*, 510 U.S. at 584. Where the new work is "substantially
23 transformative . . . the significance of other factors, [including] commercialism[,] are of

1 [less significance].” *Blanch v. Koons*, 467 F.3d at 254 (citing *NXIVM Corp. v. Ross Inst.*,
2 364 F.3d 471, 478 (2d Cir. 2004), and quoting *Campbell*); see also *Sega Enters., Ltd. v.*
3 *Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992). As the Court explained, if
4 “commerciality carried presumptive force against a finding of fairness, the presumption
5 would swallow nearly all of the illustrative uses listed in the preamble paragraph to § 107,
6 including news reporting, comment, criticism, teaching, scholarship, and research, since
7 these activities ‘are generally conducted for profit in this country.’” *Id.* at 584. Other
8 courts repeatedly have endorsed this rule. See, e.g., *Maxtone-Graham v. Burtchaell*, 803
9 F.2d 1253, 1262 (2d Cir. 1986) (“[w]e do not read Section 107(1) as requiring us to make a
10 clear-cut choice between two polar characterizations, ‘commercial’ and ‘non-profit’. Were
11 that the case, fair use would be virtually obliterated, for ‘[a]ll publications presumably are
12 operated for profit.’”) (citations omitted). Since the for-profit nature of a defendant’s
13 activities is not dispositive in the fair-use analysis, the first factor of the test has been found
14 to favor a wide spectrum of uses in commercial endeavors, including commercial films.
15 See, e.g., *Sandoval v. New Line Cinema*, 973 F. Supp. 409, 412-13 (S.D.N.Y. 1997); see
16 also *Triangle Pub., Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171, 1175-76 (5th
17 Cir. 1980); *Norse*, 847 F. Supp. at 145-46. Where, as here, the use of the copyrighted
18 work at issue is clearly transformative, the commercial success of the secondary-user’s
19 work is less important. Accordingly, even considering *Sicko*’s commercial release,
20 because of the transformative nature of the clips, and because *Sicko* is a documentary film
21 that involves commentary, criticism, and news reporting, the first factor weighs in favor of
22 a finding of fair use.

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

2 In analyzing the second prong, courts consider two issues: whether the plaintiff's
3 work was unpublished before the defendant's alleged infringement, and whether the
4 plaintiff's work is highly creative. *Campbell*, 510 U.S. at 586. "In general, fair use is
5 more likely to be found in factual works than in fictional works." *Stewart v. Abend*, 495
6 U.S. 207 (1990) (citing *Nimmer on Copyright*, § 13.05[A], pp. 13-77 to 13-78
7 ("[A]pplication of the fair use defense [is] greater . . . in the case of factual works than in
8 the case of works of fiction or fantasy.")). While Defendant does not contend that
9 Plaintiff's home video amounts to historical footage on par with invaluable historical
10 material like the Zapruder tapes, the Registered Work is a visual record of events that took
11 place on Mr. Turnbow and Plaintiff's visit to the U.K., including the factual circumstances
12 surrounding Mr. Turnbow's injury and subsequent medical care. *Sicko* uses this record of
13 Mr. Turnbow's injury on Abbey Road as a catalyst to examine how socialized healthcare
14 in the U.K. compares with American healthcare. The Registered Work has none of the
15 hallmarks of a fictional work, such as identifiable creative themes or plot elements.
16 Notwithstanding the factual nature of the clips, Defendant used them in a transformative
17 way in *Sicko*: Defendant adds music and voiceover commentary to the clips, eliminates
18 poor-quality audio, and tells how Mr. Turnbow came to receive medical treatment in the
19 U.K. as a story, rather than just providing raw, minimally edited footage. While, if
20 unpublished, the Registered Work might otherwise be afforded more weight in the second
21 prong, "the fact that a work is unpublished shall not itself bar a finding of fair use if such
22 finding is made upon consideration of all the [Section 107] factors." *Harper & Row Pubs*,

1 *Inc. v. Nation Enters*, 471 U.S. 539, 563 (1985); 17 U.S.C. § 107. Given the factual nature
2 of the clips used from the Registered Work, the second factor favors a finding of fair use.

3 **3. The amount and substantiality of the portion used.**

4 The third factor includes both a quantitative and qualitative component. *Campbell*,
5 510 U.S. at 586. Regarding the qualitative nature of the work used, the court looks to see
6 whether “the heart” of the copyrighted work is taken — in other words, whether the
7 portion taken is the “most likely to be newsworthy and important in licensing
8 serialization.” *Id.* “[I]n analyzing the third factor, it is also appropriate to consider the
9 secondary user’s reason for using the portion of the copyrighted work.” *Sofa Entm’t Inc. v.*
10 *Dodger Prods, Inc.*, 2010 U.S. Dist. LEXIS 114684, *26 (C.D. Cal. 2010).

11 In *Monster Communications*, where the defendant used the plaintiff’s copyrighted
12 film clips of Muhammad Ali in a documentary about the boxer, the court found that the
13 third factor “cuts very heavily in favor of [the defendant].” *Monster Comm’ns*, 935 F.
14 Supp. at 496 (S.D.N.Y. 1996). The court emphasized there that only from “0.7 to 2.1
15 percent” of the defendant’s documentary consisted of clips from the plaintiff’s film. *Id.*
16 “From any quantitative standpoint,” the court declared, “the allegedly infringing use is
17 small.” *Id.* The court in *Monster Communications* also found that the third factor favored
18 a finding of fair use because the plaintiff’s film was “by no means the focus” of the
19 defendant’s documentary. *Id.* While the plaintiff’s film dealt almost exclusively with the
20 celebrated 1974 heavyweight title fight in Zaire between Ali and George Foreman, the
21 defendant’s work covered the boxer’s entire life. *Id.* This difference between the two
22 works tipped the third factor “strongly” in the defendant’s favor. *Id.*

1 As in *Monster Communications*, quantitatively, Defendant used a very small
2 amount of the Registered Work, only 0.8 percent. Qualitatively, the clips used to do not
3 represent the “heart” of Plaintiff’s home video, and like in *Monster Communications* the
4 clips are “by no means the focus” of *Sicko*. While Plaintiff’s home video meanders
5 seemingly unguided through a free-wheeling vacation, with minutes of footage devoted to
6 banalities such as airplanes taking off, in *Sicko* the clips are used succinctly to show the
7 disparity in affordable healthcare available in the U.K. and U.S., as just one short segment
8 of many in the documentary. Plaintiff has presented no evidence that the clips taken go to
9 the “heart” of the work, and his subjective view of what constitutes the “heart” of the work
10 is not dispositive. *Sofa Entm’t*, 2010 U.S. Dist. LEXIS 114684, *26. As the Registered
11 Work has no discernible plot or resolution, the use of the clips in *Sicko* does not impinge
12 any such creative aspects of the Registered Work. The clips are but a brief, sequential
13 moment in the underlying work. Accordingly, the third factor favors a finding of fair use.

14 **4. The effect of the use upon the market for or value of the**
15 **original work.**

16 The fourth and final factor is “undoubtedly the single most important element of
17 fair use” analysis. *Harper & Row Publishers*, 471 U.S. 539, 566 (1985). A “use that has
18 no demonstrable effect upon the potential market for, or the value of, the copyrighted work
19 need not be prohibited in order to protect the author’s incentive to create.” *Sony*, 464 U.S.
20 at 450. If the allegedly infringing use “is not in competition with the copyrighted use,” the
21 fair use defense generally must be sustained. *Italian Book Corp. v. American Broad. Cos.*,
22 458 F. Supp. 65, 69-70 (S.D.N.Y. 1978); *see also Maxtone-Graham*, 803 F.2d at 1264 (fact
23 that copyrighted work and allegedly infringing work served “fundamentally different
functions” weighed in favor of fair use finding on fourth factor); *Time Inc. v. Bernard Geis*

1 *Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (fair use found where there is “no
2 competition between plaintiff and defendants”).

3 In analyzing the fourth factor, courts look only to whether there exists a licensing
4 market for the *specific use at issue*, rather than a licensing market in general, since to do
5 otherwise, would broaden the inquiry beyond the facts of the challenged use. *See, e.g.*,
6 *Ringgold v. Black Entm’t Tel., Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (where defendant used
7 artist’s quilt as a set decoration, court focused only on “a market for licensing her work as
8 set decoration”); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994)
9 (“[o]nly an impact on potential licensing revenues for traditional, reasonable or likely to be
10 developed [licensing] markets should be legally cognizable” under the fourth fair use
11 factor).

12 No evidence demonstrates Plaintiff has licensed the clips in *any* context, let alone
13 in documentary films, and there is neither evidence of actual or potential market harm nor
14 that *Sicko* was in “direct competition” (or in any competition, for that matter) with
15 Plaintiff’s Registered Work. Indeed, Plaintiff testified to his expectation that the footage
16 would not be of interest or value for use in a film. Aronson Dep. 52:16-53:4. This is
17 insufficient evidence to sustain any allegation of market harm. *See Maxtone-Graham*, 803
18 F.2d at 1264 (where plaintiff was “unable to point to a single piece of evidence portending
19 future harm”, it “makes any such claim far too speculative to sustain upon mere
20 allegation.”). The use of the clips in *Sicko* did not usurp any market for Plaintiff’s full-
21 length home video (assuming one exists), as no one would watch *Sicko* as a substitute for
22 Plaintiff’s 120-plus minute home video footage. *See Kramer v. Thomas*, 2006 U.S. Dist.
23 LEXIS 96714, *30 (C.D. Cal. 2006) (fair use found where court agreed nobody who

1 wanted to listen to the compositions at issue would do so by paying for a longer work
2 where the compositions are “anonymously nested in less than 1% of the work.”).
3 Moreover, the use of the clips in *Sicko* does not impair any non-transformative licensing
4 market for the clips. *See Wright*, 953 F.2d at 739 (where only “marginal amounts of
5 expressive content were taken” from plaintiff’s work, “[i]mpairment of the market . . . is
6 unlikely”); *Monster Commc’ns*, 935 F. Supp. at 495-96 (use of 14 clips totaling two
7 minutes from 84-minute film was “too small in relation to the whole” to undercut the
8 licensing market for such clips).

9 Even taken in the light most favorable to Plaintiff, a screening of the Registered
10 Work vis-à-vis *Sicko* dispels the notion that a reasonable jury would ever determine a
11 market currently exists, or might ever materialize, for licensing Plaintiff’s clips for use in
12 documentary films, let alone that any such market has been harmed by Defendant’s use of
13 the clips in *Sicko*. Plaintiff himself has testified he did a “rotten job of filming” the
14 footage, and that he “didn’t think [the film] would end up in a movie.” Aronson Dep.
15 38:5-6; 53:22-23. And, Plaintiff has testified that he was only concerned that Defendant
16 had been given the footage by Mr. Turnbow after *Sicko*’s release, *id.* at 55:3-8; 62:2-6,
17 which is inconsistent with any assertion that Plaintiff intended to license the clips.

18 That Defendant did not compensate Plaintiff for using the video clips is irrelevant
19 to the fourth factor: a plaintiff cannot prevail on this factor by alleging a defendant harmed
20 the “market” by depriving the plaintiff of a license fee for a fair use of a copyrighted work.
21 *See Am. Geophysical Union*, 60 F.3d at 930 n.17. The Second Circuit underscored this
22 rule in *Leibovitz v. Paramount Pictures*, 137 F.3d 109, 116-17 (2d Cir. 1998), holding that
23 a plaintiff is “not entitled to a licensing fee for a work that otherwise qualifies for the fair

1 use defense.” The court in *Bill Graham Archives v. Dorling Kindersly Ltd.*, 448 F.3d 605,
2 614 (2d Cir. 2006) agreed, noting that “were a court automatically to conclude in every
3 case that potential licensing revenues were impermissibly impaired simply because the
4 secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor
5 would always favor the copyright holder.” Regardless, as Mr. Turnbow’s arms-length
6 transaction in licensing the footage to Defendant evidences, the value of a license for this
7 footage is zero. At bottom, no market harm is present, and the fourth fair use factor
8 overwhelmingly favors a finding of fair use.

9 As shown above, the analysis of the four fair use factors compels a finding that
10 Defendant’s use of the clips was a non-infringing fair use. Accordingly, Plaintiff’s claim
11 of copyright infringement should be dismissed with prejudice.

12 **B. Plaintiff’s Copyright Infringement Claim Relating to the Song “Oh**
13 **England” Should Be Dismissed Because Plaintiff Has Not Met the**
14 **Jurisdictional Requirements of 17 U.S.C. § 411, and Even If He Had,**
Defendant Used the Song Under a Valid License From Its Author.

15 Plaintiff claims that Defendant infringed his copyright in a song entitled “Oh
16 England,” to which Plaintiff claims to be a co-author. Am. Compl. at ¶ 1.1. However,
17 Plaintiff has not registered, or preregistered, a copyright in the song “Oh England.” The
18 song “Oh England” does not appear on the Registered Work. *See* Registered Work.
19 Section 411 of the Copyright Act states that “no action for infringement of the copyright in
20 any United States work shall be instituted until preregistration or registration of the
21 copyright claim has been made in accordance with this title.” 17 U.S.C. § 411. Because
22 Plaintiff has not met this jurisdictional precondition to maintain this action for copyright
23 infringement, his claim for copyright infringement relating to the song “Oh England”
should be dismissed.

1 Even if it is assumed for this limited purpose that Plaintiff jointly authored the song
2 “Oh England,” with Mr. Turnbow, and they are each co-owners of the work, this claim
3 must be dismissed because Defendant used the song under a valid license from
4 Mr. Turnbow. A joint author can exploit a work of which he is co-owner. *See, e.g., Oddo*
5 *v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984). Co-owners of a copyright are generally treated
6 as “tenants in common, with each co-owner having an independent right to use or license
7 the use of the work, subject to a duty of accounting to the other co-owners for any profits.”
8 *Bencich v. Hoffman*, 84 F. Supp. 2d 1053, 1056 (D. Ariz.). “Absent an agreement to the
9 contrary, one joint owner may always transfer his interest in the work to a third party,
10 including the grant of non-exclusive licenses.” *Kramer*, 2006 U.S. Dist. LEXIS 96714 at
11 *22.

12 In this case, Defendant received a license from Mr. Turnbow, the person in whose
13 name the copyright is registered. However, viewing the facts in the light most favorable to
14 Plaintiff, for the limited purposes of this Motion, Defendant accepts Plaintiff’s statement
15 that he is a co-author and concedes that Plaintiff is a joint owner of the work.
16 Mr. Turnbow did not receive a fee from licensing the work to Defendant, and even if he
17 had, Plaintiff’s remedy would be to look to Mr. Turnbow, not the valid licensee,
18 Defendant. *Oddo*, 743 F.2d at 633. As a co-owner of the song by virtue of joint
19 authorship, Mr. Turnbow would have an equal and undivided right to license the use of
20 “Oh England” on a nonexclusive basis. Accordingly, Plaintiff’s claim for copyright
21 infringement in the song “Oh England” must be dismissed with prejudice.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

V. CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant its motion for Summary Judgment and dismiss plaintiff's copyright claim with prejudice.

DATED this 21st day of January, 2011.

By /s/ Bruce E. H. Johnson

Bruce E. H. Johnson, WSBA # 7667

Noelle Kvasnosky, WSBA # 40023

Suite 2200

1201 Third Avenue

Seattle, Washington 98101-3045

Telephone: (206) 757-8069

Fax: (206) 757-7069

E-mail: brucejohnson@dwt.com

noellekvasnosky@dwt.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2011, I caused to be filed electronically the above and foregoing document with the court, using the CM/ECF system, which will send email notification of such filing to the below addressees, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

Attorneys for Plaintiff:

Thomas Brian Vertetis

Bryan D. Doran

Jason P. Amala

Pfau Cochran Vertetis Kosnoff PLLC

911 Pacific Avenue

Suite 200

Tacoma, WA 98402

_____ U.S. Mail

_____ Hand Delivery

_____ Overnight Mail

_____ Facsimile

X CM/ECF Notification via email

service to: tom@pcvklaw.com

jason@pcvklaw.com

bryan@pcvklaw.com

Thomas M. Fitzpatrick

Philip A. Talmadge

Talmadge Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

_____ U.S. Mail

_____ Hand Delivery

_____ Overnight Mail

_____ Facsimile

X CM/ECF Notification via email

service to: tom@tal-fitzlaw.com

phil@talmadgelg.com

Declared under penalty of perjury dated at Seattle, Washington this 21st day of January, 2011.

/s/ Bruce E. H. Johnson

Bruce E. H. Johnson