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,

Defendant.

NO. 3:10-CV-05293-KLS

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiff respectfully requests the Court deny the defendants' motion for summary judgment because (1) its arguments raise questions of fact, (2) the defendants have refused or stalled in producing discovery regarding those issues of fact, and (3) the discovery cut-off date in this case is not for another six months.

At the very least, the Court should continue the defendants' motion until after the discovery cut-off date so that Plaintiff actually has a chance to pursue discovery regarding the issues of fact raised by their motion.

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II. BACKGROUND FACTS

From prior motion practice, the defendants are well-aware of the genuine issues of material fact that exist over their contention that they fairly licensed the materials at issue from Eric Turnbow.

Plaintiff borrowed his girlfriend's video camera and purchased a tape to use it. The purpose of the video camera was for Plaintiff to record his "private memories" during a trip to Europe with his friend, Eric Turnbow. Plaintiff considered the resulting footage his property.[1]

Turnbow has admitted that Plaintiff, not Turnbow, brought the video camera and recorded the footage that appears in the defendants' movie, *Sicko*. He also admits that Plaintiff wrote the lyrics to the song "Oh, England" that Plaintiff is singing in the movie.[2]

When they returned, Turnbow offered to convert Plaintiff's video footage to VHS for easier viewing.[3] Turnbow converted Plaintiff's footage to VHS, but held onto the original.[4] Plaintiff asked Turnbow to return the footage, but Turnbow claimed he was still using it.[5] Although Turnbow had the original footage, Plaintiff considered it to be his property. He never sold it to Turnbow and he always expected it would be returned.[6]

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[1] Deposition of Ken Aronson, Dkt. 20, Ex. 1, at 12:14-24; at 11:8-20; at 14:20-15:1; at 34:22-24.

[2] Deposition of Eric Turnbow, Dkt. 20, Ex. 2, at 18:20-23; at 26:7-19; at 27:10-14; at 27:20-28:3; at 78:7-10; at 78:17-79:2; at 58:17-22; at 80:14-18; at 94:8-14; at 95:3-14.

[3] Deposition of Ken Aronson, Dkt. 20, Ex. 1, at 20:10-20; Deposition of Eric Turnbow, Dkt. 20, Ex. 2, at 22:11-23:11.

[4] Deposition of Ken Aronson, Dkt. 20, Ex. 1, at 24:11-25:3; Deposition of Eric Turnbow, Dkt. 20, Ex. 2, at 21:4-21:16.

[5] Deposition of Ken Aronson, Dkt. 20, Ex. 1, at 32:6-14

[6] *Id.* at 35:3-13; at 39:12-20; at 42:5; at 56:13-15; at 71:2-21.

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Years later, after they had a prolonged falling out, Turnbow "accidentally" called his old friend. He eventually mentioned the defendants were looking for stories regarding social medicine, and that he was communicating with the defendants about his experience that Plaintiff had filmed during their trip to Europe. After hearing this, Plaintiff asked Turnbow to return his footage, but Turnbow claimed the footage was stolen. Later, Turnbow changed his story and tried to convince Plaintiff he sold him the footage and the recorder. This was false – Plaintiff had no interest in selling his memories and the recorder belonged to someone else.[7]

Turnbow did not disclose that he was considering sending Plaintiff's video footage to the defendants. Instead of returning Plaintiff's original tape, he submitted a copy of it to the defendants without Plaintiff's consent, along with a copy of their CD, "I'm Alive," again without his consent.[8] A few months before the defendants' blockbuster movie was released, Turnbow finally disclosed that he had submitted Plaintiff's footage without his permission. This came as a surprise to Plaintiff because Turnbow did not have his permission and he did not believe Turnbow would "run out and show everybody" the footage.[9]

Turnbow's motives are well-illustrated by his reaction when Plaintiff confronted him about using the footage without permission: "… he started cussing at me on the phone, and he says, F you. You're trying to jump on my F-ing bandwagon. And I said, Excuse me.

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[7] *Id.* at 26:19-27:3; 31:11-32:23; at 34:7-24; at 46:16-22; at 48:1-9; at 49:12-50:1; at 71:2-21.

[8] *Id.* at 46:5-10; at 46:16-47:3; at 47:8-15; at 50:8-14; at 51:24-52:15; at 63:15-20; at 84:2-6; at 85:1-5.

[9] *Id.* at 36:21-37:4; at 51:24-53:13; at 83:19-84:17; at 87:7-23; at 88:3-6

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You're taking my footage and calling it your bandwagon."[10] Turnbow was so eager for the spotlight that he lied to Plaintiff when the defendants invited him to the *Sicko* premier.[11]

In total, Plaintiff asked Turnbow to return the tape three or four times between the time they returned from Europe and the time the tape was sent to the defendants.[12] Tellingly, Turnbow now claims the footage was "misplaced."[13]

While the defendants may be desensitized to misappropriating smaller works for their blockbuster movies, those smaller works are meaningful to Plaintiff because everything used was either written, sang, or videotaped by Plaintiff, not by Turnbow and not by the defendants.[14] "I want somebody to come in contact with me and say, ["]Do we have permission to use your footage, your video, your image, your voice, and your song in a movie that's going to be shown to millions of people across the world[?"][15]

Plaintiff was equally surprised the defendants never asked for his permission:

> Q: If Michael Moore were to use your video footage in the movie, did you have any expectation as to whether he would try to contact you?
>
> A: I would have assumed that most definitely because of the legal ramifications behind things that he would have contacted me. If he would have questioned Eric concerning the video of who this is with you, whose video is it, whose song that you are signing, and all the questions that surround the video that he used in his movie, and nobody contacted me at all.[16]

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[10] *Id.* at 62:17-63:4.

[11] *Id.* at 65:1-24.

[12] *Id.* at 32:24-33:7.

[13] Deposition of Eric Turnbow, Dkt. 20, Ex. 2, at 30:14-18.

[14] *Id.* at 57:21-58:7; at 63:21-25.

[15] *Id.* at 59:17-60:1.

[16] *Id.* at 85:17-86:1.

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B. The Defendants Acknowledges the Value of Plaintiff's Intellectual Property

Although he initially thought the defendants wanted his personal story on socialized medicine, Turnbow eventually learned Plaintiff's intellectual property was the focus:

> "… the thing of Abbey Road was what [Michael Moore] was focusing on most; that he thought he could use it because of the socialized medicine there and the way it tied into his film. … That was the focus of interest eventually. It took us a while to get to that, but that's what caught Michael Moore's eye. … Mainly all he wanted was the Abbey Road. That's the only thing he wanted. … That's the major thing that he needs."[17]

After Turnbow sent the defendants a "very edited" copy of Plaintiff's video footage, the defendants called back and said they "like it," "it was awesome," and they wanted him to send the higher-quality originals: "She said it was awesome and that the quality was a little grainy. And, if at all possible, Michael would like to have the original tapes that were actually inserted in the camera." Turnbow complied, sent the defendants more of Plaintiff's footage, and was told "[t]hey liked what they saw."[18]

In addition to Plaintiff's footage, Turnbow also sent the defendants a copy of a CD, "I'm Alive," that contained lyrics written by Plaintiff. The only lyrics from that CD that appear in the defendants' movie are the lyrics that were written by Plaintiff and that Plaintiff is shown singing in the movie. Turnbow conceded in his deposition that his motive for giving more of Plaintiff's intellectual property to the defendants was his desire for "exposure."[19]

As with Plaintiff's video footage, the defendants liked Plaintiff's lyrics: "They listened to it and liked it very much. They said, We like your work. We think you have

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[17] Deposition of Eric Turnbow, Dkt. 20, Ex. 2, at 40-52; *see id.* at 44:12-14, 45:4-46:9; at 48:3-15; at 50:19-24.
[18] *Id.* at 51:22-52:11; at 53:7-19; at 53:7-19; at 53:20-54:6; at 55:5-22; at 56:4-11.
[19] *Id.* at 56:22-57:3; at 58:17-59:5; at 93:19-94:7; at 94:8-14.

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potential. We enjoy it. We might use some of it in the movie." The defendants liked the lyrics enough that they included them, and footage of Plaintiff singing them, in its movie.[20]

Eventually, Turnbow gave the defendants "permission to use whatever they wanted to, because I was absolutely thrilled to be in the movie and be a part of [the] project." This included free, carte blanche permission to use Plaintiff's video footage and Plaintiff's lyrics.[21]

Despite informing the defendants that Plaintiff was with him, despite the fact that Plaintiff appears on the video footage, despite the fact that Plaintiff's name is listed as the author of the lyrics, and despite the fact that someone other than Turnbow obviously filmed his fall on Abbey Road and the subsequent footage, the defendants never asked Turnbow about Plaintiff and never asked him to obtain Plaintiff's permission.[22]

The defendants were very happy to give Turnbow free "exposure." At both the movie premiere and after, they repeatedly thanked Turnbow for "his" intellectual property: "They thanked me over and over and said that my part in the movie really made the movie. It was humorous antidote (sic), is what they said." Since the defendants learned they were not going to get away with using Plaintiff's intellectual property, they have not returned "many, many" calls from Turnbow.[23]

C. Defendants Have Stalled in Producing Key Discovery and the Discovery Cut-Off Date is Almost Six Months Away

In the Court-ordered Combined Joint Status Report and Discovery Plan Pursuant to FRCP 26(f), the defendants agreed discovery in this case would include evidence regarding

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[20] *Id.* at 60:10-61:5.

[21] *Id.* at 46:10-22; at 62:3-63:3.

[22] *Id.* at 65:16-66:23; at 67:5-16; at 67:21-68:14.

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"the license to Defendant to use the underlying copyrighted work at issue in Sicko" and "whether Defendant's use of the underlying copyrighted work was a fair use."[24] The defendants went so far as to argue that this discovery should occur as a "first phase" prior to any discovery regarding Plaintiff's damages.[25]

Despite this joint discovery plan, the defendants' initial disclosures did not include any evidence regarding their purported "license" or their "fair use" defense, other than self-serving evidence showing they had acquired a "license" from Turnbow.[26]

Likewise, when the defendants answered Plaintiff's first set of discovery requests in late October, they claimed they "fact checked" the use of materials in *Sicko*, but they provided no discovery about whether they fact checked their use of Plaintiff's materials. They also claimed they were still searching for responsive materials, would provide more discovery regarding these issues after a protective order was entered, and offered to make materials available for inspection.[27]

Plaintiff follow-up with the defendants and asked them to draft whatever protective order they believed was appropriate under the circumstances, asked for a time to review the materials they had withheld, asked the defendants to identify their employees who purportedly obtained the license from Turnbow, asked the defendants to identify the "fact checkers" who supposedly fact-checked their use of Plaintiff's intellectual property, asked the defendants to identify who in their employ was responsible for deciding to use Plaintiff's property, and

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[23] *Id.* at 63:11-19; at 70:10-71:3; at 71:12-72:11; at 76:2-12.
[24] Dkt. 22 at 2:17-23.
[25] *Id.* at 3:1-5.
[26] Vertetis Decl., at ¶ 2.

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asked the defendants to produce materials related to their decision to use the video footage at issue.[28]

When the defendants responded three weeks later, they "supplemented" their discovery responses and identified Stephanie Palumbo as someone who may have worked with Turnbow regarding the video footage, but they refused to identify the person(s) who actually decided to use Plaintiff's intellectual property rather than someone else's. And while the defendants disclosed more materials showing that they used "fact checkers" on *Sicko*, they refused to identify the individuals who supposedly checked to see whether the defendants had obtained a license to use Plaintiff's intellectual property.[29]

A few days later, Plaintiff again asked the defendants to identify the supposed fact-checkers who reviewed their use of Plaintiff's materials, or to provide Plaintiff with the names of all fact-checkers on Sicko so he could do the legwork on his own.[30]

The defendants responded by candidly acknowledging they are "not aware whether a Goldflat employee communicated with Mr. Turnbow about the materials he provided to Goldflat Productions," and finally identifying two individuals who may have provided some of the fact-checking about the materials at issue.[31] Neither of these individuals, nor Ms. Palumbo, were identified by the defendants in their initial disclosures, despite the relevant

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[27] Vertetis Decl., at ¶ 3.

[28] Letter from Vertetis to Kvasnosky, dated November 8, 2010, Vertetis Decl., Ex. 1.

[29] Letter from Kvasnosky to Vertetis, dated November 29, 2010, Vertetis Decl., Ex. 2.

[30] Letter from Amala to Kvasnosky, dated December 2, 2010, Vertetis Decl., Ex. 3.

[31] Letter from Kvasnosky to Amala, dated December 10, 2010, Vertetis Decl., Ex. 4.

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knowledge they obviously possess regarding the defendants' decision to use Plaintiff's intellectual property and the purported license they obtained regarding the same.[32]

The record reflects that Plaintiff has diligently pursued discovery from the defendants, including discovery that they should have produced in their initial disclosures and in response to Plaintiff's first set of discovery requests. The deadline for disclosing expert witnesses is nearly four months away, the discovery cut-off date is almost six months away, and the deadline for filing dispositive motions, like the pending one, is almost seven months away.[33]

Prior to those deadlines, Plaintiff intends to continue pursuing the following discovery:

(1) Depose Christine Fall, who corresponded with Turnbow about the footage at issue;

(2) Depose Stephanie Palumbo, who corresponded with Turnbow about the footage at issue;

(3) Depose Joanne Dorosho, who provided legal advice as to fact-checking in *Sicko*;

(4) Depose David Schankula, who provided fact-checked certain portions of *Sicko*;

(5) Pursue discovery regarding other individuals who provided fact-checking regarding the intellectual property at issue, including what efforts the defendants made to verify their license was lawful;

(6) Pursue discovery regarding the defendants decision to use Plaintiff's intellectual property, including the value that it provided to *Sicko* and other materials they considered for the same role;

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[32] Defendant's Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1), Vertetis Decl., Ex. 5.

[33] Order Setting Trial, Pretrial Dates, and Ordering Mediation, Dkt. 28.

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(7) Pursue discovery regarding the value of the intellectual property at issue, including the value that defendants placed on other materials that were obtained for *Sicko*;

(8) Pursue discovery regarding the purported license between defendants and Turnbow regarding the intellectual property at issue, including whether it was obtained through lawful consideration; and,

(9) Obtain expert opinions on the damages that Plaintiff has suffered and the effect that Sicko has had on the market for Plaintiff's work.[34]

As explained below, the defendants' motion raises issues of fact regarding the four factors at issue for a fair use defense. Plaintiff cannot present the facts essential to justify his opposition regarding these four factors until he is finished conducting the aforementioned discovery.[35]

III. EVIDENCE RELIED UPON

This opposition brief relies upon (1) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy (Dkt. 20), and (2) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Vertetis Decl.").

IV. LEGAL ARGUMENT

Plaintiff respectfully requests the Court deny the defendants' motion for summary judgment because (1) its arguments raise questions of fact, (2) the defendants have refused or stalled in producing discovery regarding those issues of fact, and (3) the discovery cut-off date in this case is not for another six months.

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[34] Vertetis Decl., at ¶ 9.

[35] Vertetis Decl., at ¶ 9.

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To the extent the Court reviews any of the evidence submitted by the parties, all evidence must "be believed, and all justifiable inferences are to be drawn in plaintiff's favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. The Court Should Continue the Defendants' Motion Pursuant to Fed. R. Civ. P. 56(d)

The Court should continue the defendants' motion until after the discovery cut-off date so Plaintiff actually has a chance to pursue discovery regarding the issues of fact raised by their motion. The record shows that he has diligently pursued discovery, despite the defendants' best efforts to stall the same and despite their failure to identify key witnesses and documents in their initial disclosures, and he has explained by declaration why he cannot yet present facts essential to justify his opposition without that discovery.[36] Fed. R. Civ. P. 56(d); *Browne v. McCain*, 612 F.Supp.2d 1125, 1130 (C.D. Cal. 2009) ("The parties have not had a full opportunity to conduct discovery. As a result, Plaintiff is not yet aware of all relevant and material facts supporting his claim and potentially refuting RNC's fair use defense."); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) ("a district court should continue a summary judgment motion upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment").

As discussed below, a continuance is particularly appropriate given the factually-intensive nature of the defendants' arguments regarding "fair use," a doctrine for which summary judgment is disfavored even after the parties have finished discovery.

[36] Vertetis Decl., at ¶ 9.

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B. The Defendants' Fair Use Arguments Raise Issues of Fact

The Court should deny the defendants' motion for summary judgment because it raises genuine issues of material fact that the jury, not the Court, must decide.

As the defendants concede in their motion, the four factors at issue under 17 U.S.C. § 107 must be analyzed on a case-by-case basis and involve mixed questions of law and fact. *Harper & Row Pubs, Inc. v. Nation Enters*, 471 U.S. 539, 549, 560 (1985). For this reason, countless courts have noted that summary judgment is disfavored for copyright claims, particularly where the defendant asserts a "fair use" defense. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2nd Cir. 1991); *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142, 147 (2nd Cir. 1994); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (2d Cir. 1986) ("[b]ecause the fair use question is so highly dependent on the particular facts of each case, courts ... have usually found it appropriate to allow the issue to proceed to trial").

Analyzing each of the four factors demonstrates why summary judgment is not appropriate, particularly where (1) all facts and inferences must be viewed in a light most favorable to Plaintiff, and (2) defendants have deprived Plaintiff of the ability to offer all essential facts that justify his opposition because they have stalled in producing discovery and the discovery cut-off date is nearly six months away.

First, a reasonable jury could conclude that the purpose and character of the use does not weigh in favor of fair use because (1) a genuine issue of fact exists as to whether the defendants lawfully acquired Plaintiff's intellectual property, or at least did so in good faith, and (2) the defendants did not "transform" the material at issue.

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The Supreme Court has stated the propriety of the defendants' conduct should be considered when deciding whether the purpose and character of the use is entitled to fair use immunity. *Harper & Row Pubs, Inc.*, 471 U.S. at 562. This includes whether the defendants acquired the material through good faith and fair dealing. Given that Plaintiff asserts the defendants acquired the material illegally, and failed to make a good faith effort to ensure their purported "license" was legitimate (e.g., acquiring a license from the person who was being videotaped, but not the person doing the recording), a jury could conclude this factor does not weigh in favor of defendants.

Moreover, a reasonable jury could also find the defendants' use of Plaintiff's intellectual property was not transformative because all they did was use his property as a "catalyst" for their discussion of the health care system. They did not add anything "new" to his work, other than adding it to their blockbuster movie about health care. While the defendants again try to cloak themselves in "documentary immunity," all of the cases they cite discuss works that were the subject of the documentary. *Sicko* did not in any way "transform" Plaintiff's work, and the defendants did not create *Sicko* to criticize, comment on, report on, or research Plaintiff's intellectual property. Instead, the defendants selected Plaintiff's work from thousands of other entries and decided to use it to make their blockbuster movie. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (commercial use weighs in favor of finding against fair use).

At the very least, a reasonable jury could disagree that the defendants sufficiently "transformed" Plaintiff's work in a way that entitled them to fair use protection, particularly where the use was commercial in nature.

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Second, a reasonable jury could conclude the nature of Plaintiff's work weighs against a finding of fair use. As the defendants concede, the jury must consider whether Plaintiff's work was previously unpublished and whether it was highly creative.

As the Supreme Court has recognized, this factor weighs heavily against a "fair use" defense because Plaintiff's work was unpublished until the defendants stole it and decided to include it in their documentary. *Harper & Row Pubs, Inc.*, 471 U.S. at 551. As Plaintiff himself acknowledged, he did not plan on publishing the work until he learned that the defendants included it in *Sicko*. While not necessarily determinative, this unpublished nature of Plaintiff's work weighs heavily against a fair use defense. *Id.* at 540.

In addition to the unpublished nature of Plaintiff's work, the defendants' effort to compare Plaintiff's film to the Zapruder tapes demonstrates why a jury could easily reject their arguments. *Sicko* was not exploring the "history" of Plaintiff's trip to Europe, but was exploring the difference between healthcare in the United States and Europe. The fact that it provided a "catalyst" to make that comparison does not make Plaintiff's work necessary for that comparison, unlike the Zapruder tapes, which provide the best (and essentially only) historical record of the Kennedy assassination. Simply put, the defendants did not need Plaintiff's work until they decided they needed it.

Moreover, the defendants obviously believed that Plaintiff's work was highly creative because they selected it for their movie and told Turnbow the comic relief it provided "really made the movie." Because the defendants have not produced full discovery on how and why they selected Plaintiff's work over others, Plaintiff cannot fully explain how and why else the defendants selected his original work rather than other works. *Harper & Row Pubs, Inc.*, 471

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U.S. at 547 ("creation of a nonfiction work, even a compilation of pure fact, entails originality").

A reasonable jury could easily conclude that nature of Plaintiff's work does not lend itself to a fair use defense.

Third, while the defendants are fond of focusing on a quantitative analysis of Plaintiff's work and its use in *Sicko*, a jury must consider both the quantitative use and the qualitative use. For that reason, the Supreme Court has recognized that fact-finding as to the amount and substantiality of the portion used is a question for the jury. *Harper & Row Pubs, Inc.*, 471 U.S. at 565; *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F.Supp. 137, 1145 (11th Cir. 1980) (taking of 55 seconds out of 1 hour and 29-minute film deemed qualitatively substantial).

Given the defendants repeatedly told Turnbow that Plaintiff's footage was "awesome" and "really made the movie," and given the defendants' own motion acknowledges the footage provided a "catalyst" for the entire point of their documentary (e.g., a comparison of the health care systems in the United States and Europe), a jury could conclude the qualitative nature of the footage weighs against a fair use defense. And again, without being able to conduct discovery to ask the defendants what qualitative value they placed on the footage, Plaintiff cannot provide the facts essential to justify his opposition.

Finally, a reasonable jury could conclude the fourth factor weighs against a finding of fair use because the defendants have likely erased any value that the footage might have had. Plaintiff intends to offer expert testimony on this issue, the disclosure of which is not due for nearly four months, but suffice to say a jury could conclude that *Sicko* eliminated any

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potential value for his footage, in the documentary arena or otherwise (who would want to use or license video that has already appeared in a major blockbuster movie). The fact that Turnbow was obviously thrilled to be in a Michael Moore movie, and gave up the footage for free, has no bearing on the market value for the same. Plaintiff also intends to seek discovery from the defendants regarding the amount that they have paid for materials that have provided the same or similar value as Plaintiff's intellectual property.

As noted at the beginning of Plaintiff's analysis, summary judgment is disfavored in copyright cases, particularly those that involve a fair use defense, because they are so factually intensive. Viewing the existing evidence in a light most favorable to Plaintiff, a jury could find the defendants are not entitled to a fair use defense, which makes summary judgment inappropriate.

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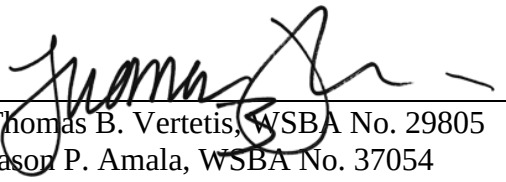
V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court deny the defendants' motion for summary judgment. At the very least, the Court should continue the motion until after the discovery cut-off date so that Plaintiff actually has a chance to pursue discovery regarding the issues of fact raised by their motion.

RESPECTFULLY submitted this 14th day of February 2011.

By: 

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UNITED STATES DISTRICT COURT
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CERTFICATE OF SERVICE

I, Angela Holm, hereby certify that on today's date, I caused to be filed electronically (1) Plaintiff's Opposition to Defendants' Motion for Summary Judgment, and (2) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, with the court, using the CM/ECF system, which will send email notification of such filing to the below addresses, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

__X__ CM/ECF Notification via email service to: Bruce E. H. Johnson, at brucejohnson@dwt.com and Noelle Kvasnosky, at noellekvasnosky@dwt.com.

I declare under penalty of perjury under the laws of the United States of America, 28 U.S.C. ¶ 1746, that the foregoing is true and correct.

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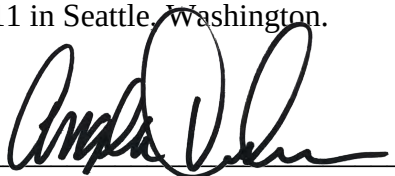
Dated this 14th day of February 2011 in Seattle, Washington.

By 
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