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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 CITY OF INGLEWOOD, a public  
13 entity  
14 Plaintiff,  
15 vs.  
16 JOSEPH TEIXEIRA and Does 1-10,  
17 Defendants.

Case No. 2:15-CV-01815-MWF-MRW  
**CONSOLIDATED 1) OPPOSITION  
TO DEFENDANT’S MOTION TO  
DISMISS PLAINTIFF’S  
COMPLAINT; 2) OPPOSITION TO  
DEFENDANT’S MOTION TO  
STRIKE; AND, 3) OPPOSITION TO  
DEFENDANT’S REQUEST TO  
TAKE JUDICIAL NOTICE**

Hearing Date: June 22, 2015  
Time: 10:00 a.m.  
Courtroom: 1600

Hon. Michael W. Fitzgerald, Judge

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24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. FACTS ALLEGED.....</b>	<b>4</b>
<b>III. AUTHORITY .....</b>	<b>4</b>
A. LEGAL STANDARD FOR A MOTION TO DISMISS .....	4
B. LEGAL STANDARD FOR A MOTION TO STRIKE .....	5
C. LEGAL STANDARD FOR JUDICIAL NOTICE .....	6
<b>IV. ARGUMENT .....</b>	<b>7</b>
A. THERE IS NO FIRST AMENDMENT RIGHT TO PLAGARIZE BY REPUBLISHING SUBSTANTIALLY ALL OF A COPYRIGHTED WORK .....	8
B. THE FAIR USE DEFENSE DOES NOT APPLY HERE AS EVERY FAIR USE FACTOR FAVORS THE PLAINTIFF .....	9
1. The Defendant’s Copying is Commercial and Not Transformative.....	10
2. The Copyrighted Works Are Creative And Original Expression.....	12
3. The Defendant Steals the Copyrighted Works .....	13
4. The Defendant Diverts Traffic From the Copyrighted Works .....	14
C. THE COPYRIGHTED WORKS ARE REGISTERABLE.....	15
D. RULE 12(f) DOES NOT AUTHORIZE THE STRIKING OF PLAINTIFF’S REQUEST FOR ATTORNEYS’ FEES.....	19
E. JUDICIAL NOTICE OF THE DEFENDANT’S WEBSITE AND CONTENTS IS IMPROPER .....	21
<b>V. CONCLUSION .....</b>	<b>24</b>

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

Page

**Cases**

*36 Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc.*,  
146 F.3d 66, 70 (2d Cir. 1998). ..... 7

*Alvary v. United States*,  
302 F.2d 790, 794 (2d Cir. 1962))..... 7

*Am. Prairie Constr. Co. v. Hoich*,  
560 F.3d 780, 798 (8th Cir. 2009)..... 7

*American Geophysical Union v. Texaco Inc.*,  
60 F.3d 913, 918 (2d Cir. 1995) ..... 10, 11, 13

*Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)..... 5

*Basic Books, Inc. v. Kinko’s Graphics Corp.*,  
758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) ..... 11

*Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544 (2007) ..... 4, 5

*Burrow-Giles Lithographic Co. v. Sarony*,  
111 U.S. 53, (1884) ..... 13

*Campbell v. Acuff-Rose Music, Inc.*,  
510 U.S. 569, 579 (1995) ..... 10, 11

*Campbell v. Acuff-Rose Music, Inc.*,  
510 U.S. 569, 589 (1994) ..... 13, 14

*Car-Freshner Corp. v. Getty Images, Inc.*,  
822 F. Supp. 2d 167, 175 (N.D.N.Y. 2011) ..... 23

*City of Inglewood vs. City of Chicago*,  
U.S. District Court for the Central District of California,  
Civ. 02-4594(AJWx))..... 17

*Columbia Pictures v. Miramax Films Corp.*,  
11 F.Supp.2d 1179, 1187 (C.D. Cal. 1998)..... 10

*Conley v. Gibson*,  
355 U.S. 41, 45-45 (1957) ..... 5

*County of Santa Clara v. Superior Court*,  
170 Cal. App. 4<sup>th</sup> 1301, 1333 (2009)..... 17, 18

*D.C. Comics Inc. v. Reel Fantasy, Inc.*,  
698 F.2d 24, 28 (2d Cir. 1982) ..... 15

1 *Desaigoudar v. Meyercord*,  
 223 F.3d 1020, 1021 (9<sup>th</sup> Cir. 2001) ..... 5

2 *Fantasy, Inc. v. Fogerty*,  
 3 984 F. 2d 1524, 1527 (9<sup>th</sup> Cir. 1993) ..... 5, 6, 20

4 *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*,  
 499 U.S. 340, 345 (1991). ..... 12

5 *Fogerty v. Fantasy, Inc.*,  
 6 510 U.S. 517 (1994). ..... 6

7 *Folsom v. Marsh*,  
 9 F.Cas. 342, 348 (D. Mass. 1841)..... 10

8 *Gilligan v. Jamco Develop. Corp.*,  
 9 197 F.3d 246, 249 (9<sup>th</sup> Cir. 1997) ..... 5

10 *Hancock v. Hartford Life & Accident Ins. Co.*,  
 No. CIV 2:06-CV-00208-FCD-DAD,  
 11 2006 U.S. Dist. LEXIS 39774, at \*12 (E.D. Cal. June 14, 2006)..... 23

12 *Harper & Row v. Nation Enterprises*,  
 471 U.S. 539, 554-55 (1985)..... 8, 9

13 *Hustler Magazine, Inc. v. Moral Majority, Inc.*,  
 14 796 F.2d 1148, 1155 (9<sup>th</sup> Cir. 1986) ..... 13

15 *In re Easysaver Rewards Litig.*,  
 737 F. Supp. 2d 1159, 1167–68 (S.D. Cal. 2010) ..... 23

16 *In re Pointer*,  
 17 346 B.R. 585, 586 (D. Mass. 2006)..... 23

18 *Infinity Broadcast Corp. v. Kirkwood*,  
 150 F.3d 104, 108 (2d Cir. 1998) ..... 11, 14

19 *Korematsu v. United States*,  
 20 584 F.Supp. 1406, 1415 (N.D. Cal. 1984)..... 6

21 *LaSalle Nat’l Bank v. First Conn. Holding Group, L.L.C. XXIII*,  
 287 F.3d 279, 290 (3d Cir. 2002). ..... 22

22 *Los Angeles News Service v. Tullo*,  
 23 973 F.2d 791 (9<sup>th</sup> Cir. 1992) ..... 16

24 *Los Angeles Times v. Free Republic*,  
 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. March 31, 2000) ..... 7, 8

25 *Meeker v. Belridge Water Storage Dist.*,  
 No. 1:05-CV-00603 OWW SMS, 2006 U.S. Dist. LEXIS 91775,  
 26 at \*33 (E.D. Cal. Oct. 18, 2006)..... 22

27

28

1 *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*,  
166 F.3d 65, 72 (2d Cir. 1999) ..... 11, 13

2

3 *Point Ruston, L.L.C. v. Pac. Nw. Reg'l*  
*Council of United Bhd. of Carpenters & Joiners of Am.*,  
658 F. Supp. 2d 1266, 1279 (W.D. Wash. 2009) ..... 7

4

5 *Sperry v. Florida*, 373 U.S. 379 (1963)..... 18, 19

6 *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*,  
786 F.2d 1440, 1449 (9th Cir. 1986) ..... 14

7 *United States v. S. Cal. Edison Co.*, 300 F.Supp. 2d 964, 975 (E.D.  
Cal. 2004). ..... 6

8

9 *Whittlestone, Inc. v. Handi-Craft Company*, 618 F.3d 970, 973 (9<sup>th</sup> Cir.  
2010)..... 5, 6, 19, 20, 21

10 **STATUTES**

11 17 U.S.C.

12 §§ 101 et seq ..... 2, 15

13 § 102(a)..... 12

14 § 107 ..... 2, 9, 10, 15

15 § 107(4)..... 14

16 § 412 ..... 6, 20, 21

17 Cal. Gov't Code §§ 6250 - 6276.48 ..... 17

18 **RULES**

19 Federal Rules of Civil Procedure

20 Rule 8(a) ..... 3

21 Rule 12(b)(6) ..... 2, 4, 5, 20, 21, 22

22 Rule 12(f)..... 3, 5, 19, 20, 21

23 Rule 56..... 3, 20, 22

24 Federal Rules of Evidence

25 Rule 201 ..... 6, 7, 22, 23

26 Rule 201(b)..... 6, 7

27

28

1 **TREATISES**

2 Nimmer on Copyright, Vol. 3, § 13.05[D][1] ..... 12, 14

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
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16  
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Plaintiff, the City of Inglewood (the “City” or “Plaintiff”) respectfully replies to Defendant Joseph Teixeira’s Motion to Dismiss Plaintiff’s Complaint and says:

**I. INTRODUCTION**

This is a case about the illegal copying and distributing of videos that are copyrighted by the City – in other words, about copyright infringement. A copyright infringement plaintiff must prove: (1) ownership of the copyright; and (2) copying by the defendant. The Complaint details how the Defendant has taken the copyrighted videos of the City’s Council meetings (the “Copyrighted Works”), which the City has posted on the Internet and/or otherwise made available for its constituents to view. The Defendant adulterates the Copyrighted Works by manipulating and adding derogatory comments, and publishes the derivative works on his own websites for distribution. Defendant claims that his wholesale and continuous infringement of the Copyrighted Works is protected by the affirmative defense of fair use. Nothing could be further from the truth.

Despite Defendant’s attempt to create the appearance of a serious First Amendment issue, this case has nothing to do with the First Amendment. Rather, this case is simply about Defendant’s desire to steal the Copyrighted Works that the City has created at its own expense, instead of linking to them. The City does not seek to impinge on the Defendant’s First Amendment right to comment on the Copyrighted Works. Defendant can comment. All the City asks is that the Defendant stop posting adulterated unauthorized copies of the Copyrighted Works.

While the Defendant trumpets his support for the First Amendment, his arguments, if accepted by this Court, would actually totally undermine the First Amendment. Defendant seeks to deprive copyright holders of their copyrights, which would eliminate the economic incentives that copyrights protect. If Defendant succeeds, the result would be less speech, not more, because individuals

1 will lose the economic incentive to create new works. It is the Defendant who  
2 seeks to undermine the First Amendment, not the Plaintiff.

3           The Defendant has moved to dismiss the Complaint under Fed. Rule Civ. P.  
4 12(b)(6) for failure to state a federal claim. The Defendant erroneously claims that  
5 the Copyrighted Works are not registerable. He is wrong. The U.S. Constitution  
6 and the Copyright Act provide for registration of the Copyrighted Works. At the  
7 U.S. Copyright Office there are registrations in the name of other municipalities in  
8 California (*e.g.*, City of Los Angeles, City of Pasadena). The U.S. Constitution  
9 grants to Congress the power to administer over copyrights and patents. The  
10 Copyright Law provides that original works are copyrighted on creation, and the  
11 U.S. Copyright Office has the authority to register them. The Supremacy Clause of  
12 the U.S. Constitution prohibits states from impinging on federal authority reserved  
13 for the U.S. Government, where, as here, there is no compelling and overriding  
14 state interest to do so. California has not prohibited the U.S. Copyright Office from  
15 registering the Copyrighted Works.

16           The Defendant claims that even if the Copyrighted Works were registerable,  
17 his defense to unsanctioned use of the Copyrighted Works is the fair use defense.  
18 The Copyright Act (Title 17 of the United States Code) controls fair use. The fair  
19 use doctrine has never allowed such systematic infringement of copyrighted works  
20 for years at a time. If it did, hundreds of websites could republish any copyright  
21 holder's videos around the world. Copyrights would become meaningless if such  
22 wholesale theft were tolerated.

23           Section 107 establishes a balancing test of four factors, usually referred to as  
24 purpose of use, nature of copyrighted (source) work, substantiality, and market  
25 effect. Because this *is* a balancing test, no one factor – however strongly that one  
26 factor favors one side or the other in the dispute – ever controls the result.  
27 Evaluating these factors typically raises questions of fact that are decided by the  
28



1 trier of fact, and are not appropriate for disposition by a motion to dismiss. The  
2 Defendant attempts to circumvent the evaluation of the fair use defense by trying to  
3 raising it as a *fait accompli*, without giving the Plaintiff the opportunity to rebut.  
4 Such foreclosure is not appropriate. Submission of evidence by the City to support  
5 its position would demonstrate that this defense is not available to the Defendant.  
6 Proper evidentiary development and Court evaluation of the balancing of the four  
7 factors will show that the Defendant is not entitled to use the fair use defense.

8 In determining whether a motion to dismiss should be granted the Court  
9 must consider those facts alleged in the Complaint, accepting the allegations as  
10 true and drawing all logical inferences in favor of the Plaintiff. Here, the factual  
11 allegations of the Complaint more than satisfy the liberal pleading standards of Fed.  
12 R. Civ. P. 8(a). Defendant largely ignores the facts alleged in the Complaint, and  
13 instead misrepresents and mischaracterizes or omits, and contradicts the factual  
14 allegations of the Complaint; Defendant asks the Court to *sua sponte* consider  
15 information pulled from the Internet which is unauthenticated, under an  
16 inappropriate request for judicial notice, or a misrepresentation that the  
17 Defendant's videos are incorporated by reference. (It is the Copyrighted Works  
18 that are incorporated by reference by the Plaintiff.) Defendant improperly submits  
19 his infringing videos as evidence for the Court to consider, and asks the Court to  
20 evaluate evidence that is beyond the four corners of the Complaint in deciding the  
21 motion to dismiss. Certainly, if the Court were to consider the information  
22 proffered by the Defendant as exhibits, such information would turn the motion  
23 into one for summary judgment under Fed. Rule of Civ. Pro. 56, and the Plaintiff  
24 would request that the Court permit a period for discovery so that the City has the  
25 opportunity to provide a full and complete rebuttal to the Defendant's factual  
26 allegations.

27 Regarding Defendant's motion to strike, Rule 12(f) of the Federal Rules of  
28

1 Civil Procedure does not authorize the Court to strike a claim for attorneys’ fees on  
2 the ground that they are precluded as a matter of law because courts may not  
3 resolve factual or legal issues that would be the basis for granting of attorneys’ fees  
4 in deciding a motion to strike.

5 **II. FACTS ALLEGED**

6 Plaintiff, the City of Inglewood, is located in the greater Los Angeles area.  
7 The City has videotapes of its Council meetings made. The Plaintiff is the  
8 copyright owner of exclusive rights under United States copyright law with respect  
9 to certain its video recordings – the Copyrighted Works. (Complaint, ¶ 14) The  
10 Defendant, without the permission or consent of Plaintiff, has made derivative  
11 works of the Copyrighted Works by reproducing the Copyrighted Works in  
12 substantial part and posting them on the Internet. The Defendant lives in the City of  
13 Inglewood and is trading as Inglewoodwatchdog.wix.com and is also known as  
14 Dehol Trouth. (Complaint, ¶ 11) The derivative works (“Infringing Copies”) have  
15 no critical bearing on the substance or style of the original composition merely use  
16 the Copyrighted Works to get attention, generate income, and avoid having to  
17 create Defendant’s own legitimate videos. (Complaint, ¶ 17) The Defendant has  
18 used and continues to use, online media distribution to distribute the Infringing  
19 Copies to the public, and/or to make the Infringing Copies available for distribution  
20 to others. (Complaint, ¶ 18) The infringing acts of the Defendant are willful and  
21 intentional, in disregard of and with indifference to the rights of the City.  
22 (Complaint, ¶ 20)

23 **III. AUTHORITY**

24 **A. LEGAL STANDARD FOR A MOTION TO DISMISS**

25 Under Rule 12(b)(6), the Court may dismiss a complaint if it fails to “state a  
26 claim upon which relief can be granted.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
27 544 (2007); see Fed. R. Civ. P. 12(b)(6). Motions to dismiss under Rule 12(b)(6)  
28

1 should be granted only when there are insufficient facts to state a claim for relief  
2 “that is plausible on its face.” *Twombly*, 550 U.S. at 570. In *Ashcroft v. Iqbal*, 129  
3 S.Ct. 1937 (2009), the Supreme Court clarified that the *Twombly* plausibility  
4 pleadings standard applies to “all civil actions.” *Iqbal*, 129 S. Ct. at 1953. Plaintiff’s  
5 Complaint fully meets this pleading standard. A plaintiff is not required to prove  
6 factual allegations are true at the pleading stage. “A claim has facial plausibility  
7 when the plaintiff pleads factual content that allows the court to draw the reasonable  
8 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing  
9 *Twombly*, 550 U.S. at 556).

10 A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the  
11 Federal Rules of Civil Procedure (“FRCP”) is viewed with disfavor by the courts  
12 and is rarely granted. *Gilligan v. Jamco Develop. Corp.*, 197 F.3d 246, 249 (9<sup>th</sup> Cir.  
13 1997) A complaint should not be dismissed for failure to state a claim “unless it  
14 appears beyond doubt that the plaintiff can prove no set of facts in support of his  
15 claim which would entitle him to relief.” *Id.* at 248 citing *Conley v. Gibson*, 355  
16 U.S. 41, 45-45 (1957) In considering a motion to dismiss, courts must accept as true  
17 all allegations in the complaint and construe them in the light most favorable to the  
18 plaintiff. *Twombly*, 550 U.S. at 545; *Desaigoudar v. Meyercord*, 223 F.3d 1020,  
19 1021 (9<sup>th</sup> Cir. 2001)

20 **B. LEGAL STANDARD FOR A MOTION TO STRIKE**

21 FRCP Rule 12(f) does not authorize courts to strike such matters as requests  
22 for damages or requests for counsel fees. Rule 12(f) states that a court “may strike  
23 from a pleading an insufficient defense or any redundant, immaterial, impertinent,  
24 or scandalous matter.” “The function of a 12(f) motion to strike is to avoid the  
25 expenditure of time and money that must arise from litigating spurious issues by  
26 dispensing with those issues prior to trial...” *Whittlestone, Inc. v. Handi-Craft*  
27 *Company*, 618 F.3d 970, 973 (9<sup>th</sup> Cir. 2010) quoting *Fantasy, Inc. v. Fogerty*, 984  
28

1 F. 2d 1524, 1527 (9<sup>th</sup> Cir. 1993) (quotation marks, citation, and first alteration  
2 omitted), *rev'd on other grounds* by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).  
3 Where, as here, the issue of whether and to what extent the Plaintiff will be entitled  
4 to claim attorneys' fees will depend on the development of the facts of the case and  
5 understanding the full extent of the Defendant's infringing activity. Such a claim is  
6 not redundant, immaterial, impertinent or scandalous. Whether, as the Defendant  
7 claims, 17 U.S.C. § 412 will act as a bar to the Plaintiff's claim for attorney's fees  
8 can only be ascertained after the full extent of the Defendant's acts of infringement  
9 are known and the statute is applied. This Court cannot rely on a supporting  
10 declaration of a Defendant who alleges that all of his acts of infringement fall  
11 outside the scope of what the statute permits as a basis for granting a motion to  
12 strike. Courts may not resolve "disputed and substantial factual or legal issue[s] in  
13 deciding ... a motion to strike." *Whittlestone, Inc.*, 618 F. 3d at 973.

14 **C. LEGAL STANDARD FOR JUDICIAL NOTICE**

15 Courts may judicially notice a fact that is not subject to reasonable dispute  
16 because it: "(1) is generally known within the trial court's territorial jurisdiction; or  
17 (2) can be accurately and readily determined from sources whose accuracy cannot  
18 reasonably be questioned." Fed. R. Evid. 201(b). "While the court may take judicial  
19 notice of the general meaning of words, phrases, and legal expressions, documents  
20 are judicially noticeable only for the purpose of determining what statements are  
21 contained therein, not to prove the truth of the contents or any party's assertion of  
22 what the contents mean." *United States v. S. Cal. Edison Co.*, 300 F.Supp. 2d 964,  
23 975 (E.D. Cal. 2004). "Care must be taken that Rule 201 not be used as a substitute  
24 for more rigorous evidentiary requirements and careful factfinding." *Korematsu v.*  
25 *United States*, 584 F.Supp. 1406, 1415 (N.D. Cal. 1984) "Because the effect of  
26 judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-  
27 examination, and argument to attack contrary evidence, caution must be used in  
28

1 determining that a fact is beyond controversy under Rule 201(b).” *36 Int’l Star*  
2 *Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir.  
3 1998).

4 While a court has considerable discretion in determining whether and when  
5 to judicially notice facts relevant to the resolution of a case, it cannot bypass or  
6 ignore the basic requirements of the rules of evidence by opting to use a judicial  
7 notice shortcut. For example, in holding that a defamation claim survived a  
8 defendant’s motion for judgment on the pleadings, one district court declined to take  
9 judicial notice of a YouTube video on the Internet, pointing to questions of  
10 authenticity regarding the proposed evidence. *Point Ruston, L.L.C. v. Pac. Nw.*  
11 *Reg’l Council of United Bhd. of Carpenters & Joiners of Am.*, 658 F. Supp. 2d 1266,  
12 1279 (W.D. Wash. 2009).

13 Rule 201 also states that a court “must take judicial notice if a party requests  
14 it and the court is supplied with the necessary information.” Although the rule does  
15 not identify just what sort of information, courts must be provided with fairly  
16 specific details. Without such details, the information can be called into question.  
17 “While courts are often required to conduct independent research regarding  
18 questions of law, ‘[o]n fact questions, the court should not use the doctrine of  
19 judicial notice to go outside the record unless the facts are matters of common  
20 knowledge or are capable of certain verification.’” *Am. Prairie Constr. Co. v.*  
21 *Hoich*, 560 F.3d 780, 798 (8th Cir. 2009) (quoting *Alvary v. United States*, 302 F.2d  
22 790, 794 (2d Cir. 1962)).

#### 23 **IV. ARGUMENT**

24 Guidance for the resolution of the free speech and fair use issues in this case  
25 is found in cases such as *Los Angeles Times v. Free Republic*, 2000 U.S. Dist.  
26 LEXIS 5669 (C.D. Cal. March 31, 2000), a case involving a strikingly similar  
27 factual scenario. (See Exhibit 1, Order Granting Plaintiffs’ Motion for Partial  
28

1 Summary Judgment and Denying Defendants’ Motion for Summary Judgment, ECF  
2 73) In the *Los Angeles Times* case, the plaintiffs, Los Angeles Times and The  
3 Washington Post Company published newspapers in print and online versions.  
4 Defendant Free Republic posted the newspaper articles verbatim from the Plaintiffs’  
5 online versions of its newspapers and permitted visitors to its website to post  
6 comments on the newspaper articles, similar to what the Defendant in the present  
7 case now does with the Copyrighted Works of the Plaintiff. In a scholarly opinion,  
8 Judge Morrow rejected the defendants’ free speech argument and analyzed the fair  
9 argument to find in favor of the plaintiffs. She followed *Harper & Row v. Nation*  
10 *Enterprises*, 471 U.S. 539, 554-55 (1985) and reflect that in *Harper & Row*:

11  
12 . . . defendant’s First Amendment argument that material could be  
13 copied because it was “newsworthy,” [was rejected] and “[the] inquiry  
14 [was limited] to ‘the traditional equities of fair use,’ unexpanded by  
any free speech concerns.” [Citations omitted.]

15 Exhibit 1 at page 39.

16  
17 **A. THERE IS NO FIRST AMENDMENT RIGHT TO**  
18 **PLAGARIZE BY REPUBLISHING SUBSTANTIALLY**  
**ALL OF A COPYRIGHTED WORK**

19 In spite of the Defendant’s assertions to the contrary, the Plaintiff has never  
20 sought any relief that would shut down the Defendant’s websites. The City does not  
21 seek to dictate what the Defendant can and cannot say, nor claim any monopoly on  
22 the facts contained in the Copyrighted Works. The City is not trying to impinge on  
23 the Defendant right to freedom of speech. All the Plaintiff want is for the Defendant  
24 to stop posting substantially all of the full Copyright Works with Defendant’s  
25 comments posted on top of them.

26 What is really going on here is that the Defendant wants to criticize the City  
27 without doing his own work. What he likes about infringing Plaintiff’s copyright  
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1 rights is simply that – particularly with the Internet – it is extremely easy, and  
2 essentially cost free. The Defendant takes the position that anyone who wants to  
3 criticize or comment on anyone else’s work would be entitled to make a copy of it  
4 (and for free). A person could go into a bookstore, for example, and make a copy of  
5 an entire book (instead of buying it) because they do not just want to read it, they  
6 want to “comment” on it. If Defendant’s argument is adopted, anyone could copy  
7 hundreds of books and articles so they could “comment” on them. Then they could  
8 scan this library of books and articles, and post them on the Internet with his  
9 “comments.” To make his websites more appealing, he might also decide to  
10 “comment” on photographs, paintings, music, documentaries, and movies.  
11 Copyright law would be eviscerated if Defendant’s argument is adopted.

12 The Defendant does not want copyright laws to be enforced. This would  
13 have as pernicious an effect on the First Amendment as anything imaginable. It  
14 would destroy long existing incentives to create and publish works of authorship in  
15 various media, including the Internet. *Harper & Row*, 471 U.S. at 554-55 (“The  
16 obvious benefit to author and public alike of assuring authors the leisure to develop  
17 their ideas free from fear of expropriation outweighs any short-term ‘news value’ to  
18 be gained from premature publication of the author's expression.”). If authors  
19 cannot expect compensation for their creative works, they will stop creating them.  
20 *Id.* Not only does the First Amendment not compel this, to allow this would  
21 undermine the very First Amendment values that the Defendant so ardently claims  
22 he believes in. This would deprive authors of any economic incentive to speak. The  
23 result: less free speech, not more.

24  
25 **B. THE FAIR USE DEFENSE DOES NOT APPLY HERE**  
26 **AS EVERY FAIR USE FACTOR FAVORS THE PLAINTIFF**

27 The fair use doctrine, codified at 17 U.S.C. § 107, permits the reproduction  
28



1 of copyrighted works for certain purposes. Section 107 sets forth four nonexclusive  
2 factors to be considered in determining whether a defendant’s copying is a fair use.  
3 Consideration of the four factors requires examination and determination of factual  
4 issues. The factors are “(1) the purpose and character of the use, including whether  
5 such use is of a commercial nature or is for nonprofit educational purposes; (2) the  
6 nature of the copyrighted work; (3) the amount and substantiality of the portion used  
7 in relation to the copyrighted work as a whole; and (4) the effect of the use upon the  
8 potential market for or value of the copyrighted work . . .” 17 U.S.C. § 107.

9 Because the fair use doctrine is an affirmative defense to a claim of copyright  
10 infringement, the Defendant carries the burden of proof on the issue. *American*  
11 *Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1995); *see also*,  
12 *Columbia Pictures v. Miramax Films Corp.*, 11 F.Supp.2d 1179, 1187 (C.D. Cal.  
13 1998) Here, there is no evidence that the Court could presently rely on to find as a  
14 matter of law that the fair use defense applies. Such an inquiry must be reserved for  
15 the trier of fact. Even if the Court were to consider the fair use defense at the  
16 pleading stage, the Defendant has not met his burden of proving fair use.

17 1. The Defendant’s Copying is Commercial and Not Transformative

18 The first fair use factor is “the purpose and character of the use, including  
19 whether such use is of a commercial nature or is for nonprofit educational  
20 purposes.” 17 U.S.C. § 107. This factor considers whether “the new work ‘merely  
21 supersedes the objects’ of the original creation, or instead adds something new, with  
22 a further purpose or different character, altering the first with new expression,  
23 meaning, or message; it asks, in other words, whether and to what extent the new  
24 work is ‘transformative.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579  
25 (1995) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (D. Mass. 1841)). “. . . [T]he  
26 more transformative the new work, the less will be the significance of other factors,  
27 like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510  
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1 U.S. at 579. The critical inquiry under this factor is to determine whether the new  
2 work “adds something new, with a further purpose or different character, altering the  
3 first with new expression, meaning, or message.” *Infinity Broadcast Corp. v.*  
4 *Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); *Campbell* 510 U.S. at 578 (“central  
5 inquiry”). The Plaintiff alleges (Complaint ¶ 14) that the Defendant merely  
6 republished substantially all of Plaintiff’s unaltered videotapes of its Council  
7 meetings, with Defendant’s derogatory comments overlaid on top. This is not  
8 transformative in the least. *Infinity Broadcast*, 150 F.3d at 108 (“simply tak[ing]  
9 [plaintiff’s unaltered broadcasts] and market[ing] them to a specific clientele” is not  
10 transformative under the first factor; fair use not found); *Basic Books, Inc. v.*  
11 *Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (copying “that  
12 merely repackages or republishes the original is unlikely to pass the test” under the  
13 first factor).

14 The Defendant may claim that he “transform” Plaintiff’s Copyrighted Works  
15 by offering copies for a very different purpose than the intended purpose of the  
16 originals, *i.e.*, to post his comments to the Copyrighted Works for a public audience.  
17 Such an argument would fail as a matter of law. Transformativeness is not about a  
18 defendant’s subjective intent; it is about “add[ing] something new.” *Infinity*  
19 *Broadcast*, 150 F.3d at 108 (defendants’ marketing of plaintiffs’ articles to a  
20 different audience does not “transform” them). *See also American Geophysical*  
21 *Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (photocopying scientific  
22 articles for purpose of “research in the sciences [which] might well serve a broader  
23 public purpose” is not a fair use); *Nihon Keizai Shimbun, Inc. v. Comline Business*  
24 *Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (defendant’s “abstracts” of plaintiffs’  
25 news articles “add[ed] almost nothing new” because they were “for the most part  
26 direct translations”; no fair use).

27 There is nothing unique about the Defendant’s website or comments. The  
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1 Defendant is alleged to trade as Inglewoodwatchdog.wix.com and is also known as  
2 Dehol Trouth. The purpose of Defendant’s website and posting is to attract readers  
3 by distributing commentary to the Copyrighted Works. Indeed, as alleged, the  
4 Defendant offers as a substitute for the Copyrighted Works the Defendant offers  
5 exact copies with his comments overlaid on top. 3 Nimmer on Copyright, §  
6 13.05[D][1] (“whatever the intent of the copier, a verbatim reproduction will of  
7 necessity serve the function of the plaintiff’s work”).

8 The Defendant is simply republishing untransformed, copies of the  
9 Copyrighted Works, and free-riding on the City’s expenses. Therefore, the “critical”  
10 inquiry – transformation – under the first factor strongly favors the Plaintiff. The  
11 facts alleged a complete lack of transformativeness.

12 2. The Copyrighted Works Are Creative And Original Expression.

13 The Copyright Act of 1976 protects “original works of authorship fixed in  
14 any tangible medium of expression.” 17 U.S.C. § 102(a). The essential element to  
15 qualify for copyright protection is that the work must be original to the author. *Feist*  
16 *Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). As the term is used  
17 in copyright law, original “means only that the work was independently created by  
18 the author (as opposed to copied from other works), and that it possesses at least  
19 some minimal degree of creativity.” *Id.* The creativity required is “extremely low”  
20 and the work need not be novel; the vast majority of works will satisfy this  
21 requirement quite easily because they possess some slight creativity. *Id.* Even such  
22 works as phone directories or residential housing lists are copyrighted. Videos of  
23 current events are not like phone directories or residential housing listings, which  
24 receive very limited copyright protection.

25 Any argument that the Copyrighted Works involved no creativity or  
26 intellectual input, and so are not original works deserving copyright protection must  
27 fail. The Supreme Court rejected a similar argument more than 100 years ago. In  
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1 *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, (1884), the plaintiff argued a  
2 photograph of the author Oscar Wilde was not original and therefore not  
3 copyrightable because a “photograph is the mere mechanical reproduction of the  
4 physical features or outlines of some object animate or inanimate, and involves no  
5 originality of thought or any novelty in the intellectual operation connected with its  
6 visible reproduction in shape of a picture.” *Id.* at 59. This argument was flatly  
7 rejected by the Supreme Court.

8 Even if this Court were to find Plaintiff’s Copyrighted Works to be  
9 “predominantly factual,” the second factor does not favor a finding of fair use. See,  
10 *e.g., Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 72 (2d  
11 Cir. 1999) (refusing to overlook the “expressive elements” of the news article  
12 contained in certain Japanese-language business journals, and concluding that the  
13 second fair use factor was “at most neutral” and not finding fair use). Thus, the  
14 second fair use factor favors the Plaintiff.

### 15 3. The Defendant Steals the Copyrighted Works

16 Defendant argues that he does not steal entire copyrighted works because he  
17 only takes, verbatim, fifteen minute “clips” (“Subject Clips”) related to topic areas  
18 from the Council meetings. This is wrong. Under long settled principles of  
19 copyright law, each of Plaintiff’s topic areas represents an independent and entire  
20 work. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 925-26 (2d Cir.  
21 1994) (copying an entire article from a journal whose copyright was only registered  
22 as a whole still constituted copying of the entire work); *Hustler Magazine, Inc. v.*  
23 *Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (“A creative work does  
24 not deserve less protection just because it is [considered] part of a composite  
25 work.”). Therefore, Defendant must satisfy his burden of proving that republishing  
26 the entire Infringing Copy is somehow “essential” so that he can “comment” on  
27 them. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (requiring that  
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1 “no more [be] taken than necessary”); *Supermarket of Homes, Inc. v. San Fernando*  
2 *Valley Bd. of Realtors*, 786 F.2d 1440, 1449 (9th Cir. 1986) (“Generally, no more of  
3 a work may be taken than is necessary to making the accompanying comment  
4 understandable.”). Defendant can never meet his burden of proving that it is  
5 somehow “essential” to copy the entire Subject Clip. *Campbell*, 510 U.S. at 589  
6 (explaining that “attention [under the third factor] turns to the persuasiveness of a  
7 [copier’s] justification for the particular copying done”). The Defendant is attracting  
8 visitors by republishing unaltered copies of Plaintiff’s entire Subject Clips with his  
9 criticism and comments on them. There is nothing “essential” about republishing  
10 and archiving verbatim copies of Plaintiff’s entire works on the Internet. See, e.g.,  
11 *Infinity Broadcast*, 150 F.3d at 109 (“Though not an absolute rule, ‘generally, it may  
12 not constitute a fair use if the entire work is reproduced’” because it is almost never  
13 “essential” to copy the entire work) (quoting 3 Nimmer on Copyright, §  
14 13.05[A][3]). Indeed, Defendant’s removal of the offending Subject Clips  
15 effectively admits that the criticism and comment that purportedly occurs on  
16 Defendant’s Infringing Copies does not require the Defendant to steal entire  
17 copyrighted works. In short, the Defendant is republishing the Copyrighted Works  
18 in their entirety, without any conceivable justification when Plaintiff’s Copyrighted  
19 Works are already published by the Plaintiff, and made available to its constituents  
20 to view and/or purchase. Therefore, the third fair use factor strongly favors Plaintiff.

#### 21 4. The Defendant Diverts Traffic From the Copyrighted Works

22 The fourth fair use factor concerns “the effect of the use upon the potential  
23 market for or value of the copyrighted work.” 17 U.S.C. § 107(4). The Defendant  
24 acknowledges that the City sells its Copyrighted Works and recoups the expenses  
25 incurred in making them available to the public. (Defendant’s Motion to Dismiss  
26 Plaintiff’s Complaint, ECF 9, page 23). While Defendant contends that the City  
27 cannot make money on the sale of the Copyrighted Works, the Defendant ignores  
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1 that the City has spent funds to have its Council meetings videotaped, and it can  
2 recoup its expenses. Thus, there is harm to the City via its inability to recoup its  
3 expenses. And, the Defendant's attempt to trivialize the harms caused by his  
4 systematic infringement of the Copyrighted Works rings hollow.

5 Defendant uses and republishes the Copyrighted Works to the world without  
6 a license, which violates the fundamental right of copyright owners. It deprives  
7 Plaintiff of potential revenue. Taking into account all of this, Defendant has no  
8 basis for arguing that the City cannot benefit or profit as a result of the Defendant's  
9 theft of its Copyrighted Works that copyright law has always recognized as the  
10 copyright owner's property. It is not a defense to copyright infringement to say that  
11 the copyright owner somehow cannot benefit from having his works stolen. *D.C.*  
12 *Comics Inc. v. Reel Fantasy, Inc.*, 698 F.2d 24, 28 (2d Cir. 1982) (rejecting  
13 defendants' arguments that the fourth fair use factor favored them because the  
14 infringing activities increased plaintiffs' sales). The Defendant has not rebutted the  
15 detrimental effect of Defendant's infringing activities on Plaintiff. Thus, the fourth  
16 factor – as all the others – strongly favors the Plaintiff.

17 **C. THE COPYRIGHTED WORKS ARE REGISTERABLE**

18 The Copyright Law, 17 U.S.C. § 101 *et seq.* (1976) governs original works  
19 created after 1976. It grants copyright protection to “original works of authorship  
20 fixed in a tangible medium of expression.” *Id.* A work does not have to be new or  
21 highly creative to qualify as an original work of authorship. It simply must owe its  
22 origin to a particular author. Although facts are not original works of authorship, the  
23 way facts are recorded is copyrightable.

24 To be copyrighted, original works must be produced in a format that can be  
25 perceived, reproduced and communicated over time. Most forms of media,  
26 including the Internet, easily satisfy these criteria. Copyright protection is automatic  
27 upon creation of an original work. Registration is not necessary. Radio and  
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1 television news programs are recorded on paper, tape or in digital form, and thus are  
2 fixed in a tangible medium of expression. News services raw videotapes are  
3 copyrighted because they satisfy the Copyright Law. *Los Angeles News Service v.*  
4 *Tullo*, 973 F.2d 791 (9th Cir. 1992) Thus, the videotapes of the City’s Council  
5 meetings are copyrighted upon creation. However, to enforce a copyright right  
6 against an infringing third party, a copyright owner must register his copyright.

7 That cities in California not only own copyrights in public records, but have  
8 registered their original works can be confirmed by a search of the public records at  
9 the U.S. Copyright Office. By way of example, the following copyright  
10 registrations for original works containing public records are listed for the City of  
11 Los Angeles:

12  
13 Scene of the Crime: Photographs from the LAPD Archives  
14 Book  
15 Registration Number/Date: TX0007343583 / 2007-01-19

16  
17 Cash Wiz Cash Management Software  
18 Computer Software  
19 Registration Number/Date: TXu001654158 / 2009-10-06

20 For the City of Sacramento:

21 Diversity Resource Book  
22 Book  
23 Registration Number/Date: TXu001243091 / 2005-02-15

24 For the City of San Diego:

25 Ridgheaven “green building” demonstration project  
26 Book  
27 Registration Number/Date: TXu000741427 / 1996-06-03

28 For the City of Pasadena:

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City of Pasadena, Cost Control System  
Books  
Registration Number/Date: TX0003466676 / 1993-01-11

For the City of Inglewood

Universal Meter Reading System  
Computer Program  
Registration Number/Date: TX0003119182 / 1991-07-05

This Court can take judicial notice on its own that these municipalities have copyrighted original works of authorship and have registered their works with the U.S. Copyright Office. In fact, not only did the City of Inglewood register its copyrighted Universal Meter Reading System (which contains public records of other California cities as well), it sued the City of Chicago for copyright infringement, which lawsuit ended with a settlement favorable to the City of Inglewood. (*City of Inglewood vs. City of Chicago*, U.S. District Court for the Central District of California, Civ. 02-4594(AJWx)).

Defendant incorrectly argues that municipalities are precluded from registering their copyrighted works in public records because the California statute California Public Records Act (“CPRA”) (Statutes of 1968, Chapter 1473; currently codified as California Government Code §§ 6250 through 6276.48) does not specifically allow it. The CPRA was a law passed by the California State Legislature and signed by the Governor in 1968 requiring inspection and/or disclosure of governmental records to the public upon request, unless exempted by law. The Defendant cites a non-precedential northern California state appellate case argued by defense counsel’s firm (*County of Santa Clara v. Superior Court*, 170 Cal. App. 4<sup>th</sup> 1301, 1333 (2009)) that follow a Florida state case in support. Neither that case, nor the arguments put forward by the Defendant, are persuasive. To the



1 contrary, because the CPRA does not preclude municipalities from registering  
2 copyrighted original works containing public records, municipalities are not  
3 precluded from doing so under the Supremacy Clause of the U.S. Constitution.

4 This issue was settled years ago in a seminal case involving a patent agent's  
5 right to live in Florida and practice before the U.S. Patent Office – namely, *Sperry v.*  
6 *Florida*, 373 U.S. 379 (1963). In *Sperry*, the lower court enjoined Mr. Sperry, who  
7 was licensed before the U.S. Patent Office, from practicing before the U.S. Patent  
8 Office because he lived in Florida and was not licensed in Florida. Chief Justice  
9 Warren, writing for the majority, noted that “‘the law of the State, though enacted in  
10 the exercise of powers not controverted, must yield’ when incompatible with federal  
11 legislation. *Gibbons v. Ogden*, 9 Wheat. 1, 22 U. S. 211.” *Id.* at 384. He went on to  
12 explain that, where, as here, the federal statute expressly permits the federal agency  
13 to grant authority, and the “the authorization is unqualified, then, by virtue of the  
14 Supremacy Clause, [a State] may not deny to those failing to meet its own  
15 qualifications the right to perform the functions within the scope of the federal  
16 authority. A State may not enforce [] requirements which, though valid in the  
17 absence of federal regulation, give ‘the State[] a virtual power of review over the  
18 federal determination’ . . .” *Id.* at 385. Interestingly, the Supreme Court overturned  
19 Florida’s attempted restraint on a federally granted authority. Certainly, looking to a  
20 Florida case for guidance in the *County of Santa Clara* case, which is a restraint on  
21 the same federal authority, rather than *Sperry*, is not appropriate.

22 Here, the Copyright Law provides that original works are copyrighted on  
23 creation, and the U.S. Copyright Office has the authority to register them.  
24 California’s state law, the CPRA, regarding copyright registration of public records  
25 is silent. This law only requires that municipalities make public records available to  
26 its constituents, which the City of Inglewood has done by making copies of its  
27 Copyrighted Works available for viewing and for sale at cost. The City of  
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1 Inglewood is in full compliance with the California statute. Beyond that, the CPRA  
2 is silent, and the California judiciary does not have the right to obstruct the U.S.  
3 Copyright Office’s federally granted authority to register the City of Inglewood’s  
4 Copyrighted Works. “‘No State law can hinder or obstruct the free use of a [right]  
5 granted under an act of Congress.’ *Pennsylvania v. Wheeling & Belmont Bridge*  
6 *Co.*, 13 How. 518, 54 U. S. 566.” *Sperry* at 385.

7 In the present action, the CPRA only requires that public records be available  
8 to the public. It does not specifically preclude copyright registration. In contrast, in  
9 *Sperry* the State of Florida had specifically conditioned Mr. Sperry’s right to  
10 practice before the U.S. Patent Office. While noting that the State of Florida had an  
11 interest in protecting its citizens, Chief Justice Warren explained that the power over  
12 patents and copyrights are bestowed upon Congress, which passes federal statutes  
13 and regulations to do so, and the states are not empowered to restrict this federal  
14 authority without a compelling reason to do so. *Id.* at 402 – 403. No such  
15 compelling reason exists in the present case. To the contrary, the CPRA has no such  
16 restriction. And, the Defendant impermissibly seeks to impose a judicially-made  
17 restriction that is not binding on this Court. Accordingly, Defendant’s argument  
18 regarding the City of Inglewood’s ability to register its Copyrighted Works must  
19 fail.

20 **D. RULE 12(f) DOES NOT AUTHORIZE THE STRIKING OF**  
21 **PLAINTIFF’S REQUEST FOR ATTORNEYS’ FEES**

22 Interpretation of Rule 12(f) is according to its plain meaning. *Whittlestone,*  
23 *Inc.*, 618 F. 3d at 973 citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,  
24 1111 (9th Cir. 2002). Analysis of the rule requires consideration of whether the  
25 request for attorneys’ fees in the Complaint is: (1) an insufficient defense; (2)  
26 redundant; (3) immaterial; (4) impertinent; or (5) scandalous. None of these five  
27 categories covers the allegations in the pleading sought to be stricken by the  
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1 Defendant. First, the claim for attorneys’ fees is clearly not an insufficient defense,  
2 and the Defendant has not suggested otherwise. Second, the claim for damages is  
3 not alleged to be redundant, and appears only in the prayers for relief.

4 Third, the claim for attorneys’ fees is not immaterial. Whether attorneys’  
5 fees are recoverable relates directly to the Plaintiff’s underlying claim for relief. *See*  
6 *Fogerty*, 984 F.2d at 1527 (“Immaterial matter is that which has no essential or  
7 important relationship to the claim for relief or the defenses being pled.”) (quoting  
8 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at  
9 706-07 (1990) (quotation marks omitted)). Fourth, the claim for attorneys’ fees is  
10 not impertinent, because whether attorneys’ fees will ultimately be recoverable  
11 pertains directly to the acts of infringement that are ultimately proven.

12 The Defendant alleges that the purported acts of copyright infringement  
13 commenced after the first publication of each of the Copyright Works and before the  
14 effective date of its registration, and on that basis attorneys’ fees are not recoverable  
15 under 17 U.S.C. § 412. Such is not the basis for dismissal under Rule 12(f). As the  
16 appellate court stated (when reversing the dismissal of a claim for damages, even  
17 though the Defendant claimed that damages were unavailable as a matter of law):

18 [the Defendant’s] 12(f) motion was really an attempt to have certain  
19 portions of [the Plaintiff’s] complaint dismissed or to obtain summary  
20 judgment against [Plaintiff] as to those portions of the suit— actions  
21 better suited for a Rule 12(b)(6) motion or a Rule 56 motion, not a  
22 Rule 12(f) motion. *Compare Yamamoto v. Omiya*, 564 F. 2d 1319,  
23 1327 (9<sup>th</sup> Cir. 1997) (“Rule 12(f) is ‘neither an authorized nor a proper  
24 way to procure the dismissal of all or a part of a complaint.’”) (citing  
25 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and*  
26 *Procedure* § 1380, at 782 (1969)), *with Rutman Wine Co. v. E. & J.*  
27 *Gallo Winery*, 829 F. 2d 729, 738 (9<sup>th</sup> Cir. 1987) (“The purpose of  
28 [Rule] 12(b)(6) is to enable defendants to challenge the legal  
sufficiency of complaints....”).

1 Were we to read Rule 12(f) in a manner that allowed litigants to use it  
2 as a means to dismiss some or all of a pleading (as [the Defendant]  
3 would have us do here), we would be creating redundancies within the  
4 Federal Rules of Civil Procedure, because a Rule 12(b)(6) motion (or  
5 a motion for summary judgment at a later stage in the proceedings)  
already serves such a purpose.

6 *Whittlestone, Inc.*, 618 F. 3d at 974 (footnote omitted). Even though Defendant  
7 alleges that in applying Section 412 of the Copyright Act, courts repeatedly have  
8 held that plaintiffs may not recover statutory damages or attorneys’ fees, and that the  
9 facts are undisputed as to when the alleged copyright infringement occurred (which  
10 the Plaintiff disputes), the Defendant cannot request that this Court dismiss a claim  
11 for attorneys’ fee on that basis. Such dismissal is precluded as a matter of law  
12 because the Court is not authorized to do so. *Id.*

13  
14 **E. JUDICIAL NOTICE OF THE DEFENDANT’S WEBSITE**  
15 **AND CONTENTS IS IMPROPER**

16 The Defendant asks this Court to take judicial notice of the following:

17 “1. Exhibit A: The contents of the six YouTube videos referenced  
18 and linked at Paragraph 19 of the Complaint that form the basis for  
19 the City’s claim. See Teixeira Decl. ¶ 3; Notice of Lodging of DVDs,  
20 Ex. A.

21 2. Exhibit B: The contents of the screenshots of the six YouTube  
22 pages referenced and linked at Paragraph 19 of the Complaint that  
23 form the basis for the City’s claim. See Teixeira Decl. ¶ 4, Ex. B”

24 Defendant’s Request for Judicial Notice in Support of Motion to Dismiss (F.R.C.P.  
25 12(b)(6) and Motion to Strike (F.R.C.P. 12(f)) (ECF 10, Page 2) After making this  
26 request, the Defendant attempts to authenticate these exhibits through his  
27 declaration. This procedure is not a proper request for judicial notice – it is an  
28 attempt to introduce evidence into a motion to dismiss.

1           While the Internet furnishes a convenient mechanism for ready determination  
2 of a fact, not all the sources on the Internet are unquestionably accurate. Evidentiary  
3 requirements such as authenticity, relevance, hearsay, and accuracy are called into  
4 question. Rule 201 permits a court to judicially notice facts that are generally  
5 known or facts that can easily be located within sources where accuracy is not  
6 questioned, “[j]udicial notice is not a mechanism by which a party can offer into  
7 evidence documents that do not fall into one of the specific categories” that Rule  
8 201 identifies. *Meeker v. Belridge Water Storage Dist.*, No. 1:05-CV-00603 OWW  
9 SMS, 2006 U.S. Dist. LEXIS 91775, at \*33 (E.D. Cal. Oct. 18, 2006). Here, the  
10 Defendant request the Court judicially notice the content of his own website,  
11 without giving the Plaintiff the opportunity to conduct proper discovery. Such flatly  
12 contradicts the rules that require if evidence is brought in beyond the four corners of  
13 the Complaint in a motion to dismiss, the motion to dismiss is to be treated as a  
14 motion for summary judgment under Rule 56 of the FRCP. “For all practical  
15 purposes, judicially noticing a fact is tantamount to directing a verdict against a  
16 party as to the noticed fact.” *LaSalle Nat’l Bank v. First Conn. Holding Group,*  
17 *L.L.C. XXIII*, 287 F.3d 279, 290 (3d Cir. 2002).

18           Here, the Defendant attempts to introduce evidence of the content of his  
19 website. However, his proffered “facts” (*i.e.*, the contents of his website) which he  
20 wants the Court to infer from proffered videos and screen shots. These proffered  
21 screen shots are: (1) not something generally known within the Court’s jurisdiction;  
22 (2) subject to reasonable dispute; (3) cannot accurately or readily be determined  
23 from the cited source and instead the Court is asked to refer to Defendant’s  
24 submitted unauthenticated lodged evidence; and, (4) the accuracy of the source, *i.e.*,  
25 the Defendant, is reasonably questioned. Failure to meet the requirements for  
26 judicial notice is the basis for disallowing the Defendant’s improper submission of  
27 evidence. In a case involving a Rule 12(b)(6) motion to dismiss and screenshots of  
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1 the purported content of a website, the district court denied the request to take  
2 judicial notice. *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1167–68  
3 (S.D. Cal. 2010) (denying the request to take judicial notice of eleven screenshots  
4 submitted and citing *In re Pointer*, 346 B.R. 585, 586 (D. Mass. 2006) as taking  
5 notice of the fact that the party maintained the website, but not of changing content  
6 on the website). *See also Hancock v. Hartford Life & Accident Ins. Co.*, No. CIV  
7 2:06-CV-00208-FCD-DAD, 2006 U.S. Dist. LEXIS 39774, at \*12 (E.D. Cal. June  
8 14, 2006) (noting that one of the goals of the limitations placed on judicial notice via  
9 Rule 201 is to allow both parties to “examine each other’s evidence and to present  
10 all sides to the trier of fact,” and explaining how that goal would be frustrated if  
11 judicial notice could properly be taken of facts that are susceptible of reasonable  
12 dispute). Similarly, in denying the request to take judicial notice, a district court  
13 was not persuaded to consider the contents of a website in determining whether the  
14 complaint’s allegations might incorporate website materials by reference. *Car-*  
15 *Freshner Corp. v. Getty Images, Inc.*, 822 F. Supp. 2d 167, 175 (N.D.N.Y. 2011)

16 In the present Complaint, the only documents incorporated by reference are  
17 the copyright applications of the City. The documents submitted by the Defendant  
18 of his website content are not integral to the Complaint and are not authenticated.  
19 Although the City does reference to the Defendant’s website, those references are  
20 not particularized, and are noted as incomplete – only sufficient to put the Defendant  
21 on notice of the City’s claim. (Complaint, ¶ 19) The accuracy of Defendant’s  
22 submissions and the full extent of the Defendant’s copyright infringement must be  
23 discovered through the proper development of the record – through discovery. Even  
24 though the documents may have been provided through Defendant’s counsel and  
25 purport to be from the Defendant, the genuineness of the documents is based on the  
26 declaration of the Defendant before he can be cross-examined, and the fact that the  
27 documents were submitted by the Defendant means they are not accessible. On  
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these bases, the Defendant’s request for judicial notice of his own website content must be denied.

**V. CONCLUSION**

This Court should deny the motion to dismiss and motion to strike. The Court should exclude that evidence of the Defendant’s website content offered by the Defendant when considering these motions.

DATED: May 18, 2013

Respectfully submitted,

*Majesty Law Group PLC*

/s/ JoAnna M. Esty  
JoAnna M. Esty  
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City of Inglewood