

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DESIREE GUERRIERE TOWNSEND, an
individual,

Plaintiff,

v.

THERESA EGAN MORRISSEY, an
individual; RICH JUZWIAK, an individual;
and SOMETHING ELSE MEDIA LLC, a
New York Limited Liability Company,

Defendants.

Case No.: 1:24-CV-07151-OEM-MMH

District Judge Orelia E. Merchant

Magistrate Judge Marcia M. Henry

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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PRELIMINARY STATEMENT

“I honestly feel like if she did sue us it would be... I think it would be good for the show.”

- Theresa Egan Morrissey & Rich Juzwiak, October 20, 2023

Plaintiff respectfully submits this memorandum of law in opposition to Defendants’ Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (the “MTD”). This action arises from clear and direct copyright infringement. After all attempts to resolve this matter out of court failed, the Plaintiff was forced to bring this lawsuit. Maintaining a low public profile since her viral media exposure in 2009, the Plaintiff was unexpectedly thrust back into the spotlight following the death of prominent anti-vaccine figure Dr. Rashid Buttar in May 2023. The renewed media interest prompted her former employer, Outpace Bio Inc., to discover the Defendants’ Podcast, which falsely portrayed numerous unsubstantiated allegations as established facts in its legal analysis concerning the Plaintiff.

Displeased with the inaccurate and defamatory reporting that resulted in her loss of employment, the Plaintiff initially reached out to the Defendants via social media in an attempt to resolve the matter quietly, even offering to appear on their Podcast to address all questions. Instead of engaging in good-faith settlement discussions, the Defendants proceeded to appropriate her intellectual property. Despite multiple warnings to cease their unauthorized use, the Defendants persisted in exploiting the Plaintiff’s copyright-protected works without her permission, authorization, or consent, all to generate attention and notoriety for their Podcast.

The Defendants’ use of the Plaintiff’s Video and Photos was not for purposes of commentary or criticism, as alleged, rather, it was a lazy reproduction with no critical bearing on the substance or style of the original compositions. Instead, the Defendants have used these works to further their federally illegal commercial activities and explicit drug use. Moreover,

rather than ceasing use and removing the Plaintiff's copyrighted works from their social media page and Podcast, the Defendants have invested substantial resources in mounting legal defenses to continue their infringing conduct, underscoring the clear value of the Plaintiff's works.

The Defendants' misuse is inextricably linked to their federally prohibited activities, including facilitating interstate transactions of drug paraphernalia, promoting the use of a Schedule I drug, and broadcasting illicit drug use to a national audience. Importantly, the Defendants' MTD fails to identify any deficiencies in the complaint. Instead, it circumvents the pleading stage by directly addressing the fair use defense, thereby sidestepping the essential discovery process.

In doing so, the Defendants seek to prematurely adjudicate complex issues, such as the complete record of the Plaintiff's copyrighted content located behind the Defendants' Patreon paywall, that can only be properly resolved through a fully developed factual record established during discovery. Controlling case law indicates that such an analysis would be premature, as discovery is necessary to fully develop the record. However, if the Court opts to engage in a fair use analysis at this early stage, a mere review of the Defendants' non-transformative, commercial use is insufficient to establish a fair use defense, particularly given that their actions further federally illegal activity.

STATEMENT OF RELEVANT FACTS

Townsend is an intellectual property paralegal and creates educational and information content, specifically videos, as well as photographs, for use on social media. (*See* Compl. at ¶3). She licenses use of her photographs to online and print media for a fee through editorial photography provider Shutterstock. Plaintiff was extensively covered in the media in 2009 for a movement and speech disorder known as stiff person syndrome. Townsend was approached by

former anti-vaccine organization, Generation Rescue and their president at the time Stan Kurtz as well as Dr. Rashid Buttar, for complimentary medical treatment in exchange for filming of a documentary about the alleged harm caused by vaccines. Townsend’s story gave birth to today’s anti-vaccine movement. (*Id.* at ¶10).

Morrissey and Juzwiak are seasoned journalists, both having worked for major media outlets for over 20 years. (*Id.* at ¶¶4, 5). Morrissey and Juzwiak are co-owners of the online retail store Pipe Dreams <https://pipedreams.fun> and co-hosts of the podcast Pot Psychology (“Podcast”) and its associated subscription-based programs housed on the Patreon platform. (*Id.* at ¶6). Upon information and belief, Something Else Media LLC is a limited liability company duly organized by Theresa Morrissey and owner of the online retail store, Pipe Dreams, as evidenced by the website footer explicitly stating: “**Something Else Media** Powered by Shopify.” (*Id.* ¶¶ 6, 7, 9 & Ex. E). Something Else Media LLC is a direct and substantial beneficiary of the Podcast and its advertising efforts, which promote the sale of bongs, “Pot Psych” merchandise, and smoking accessories available through the Pipe Dreams online store (<https://pipedreams.fun>). (*Id.* ¶¶ 9, 19 & Ex. E).

Despite Defendants’ assertion that Something Else Media LLC has no involvement in the production or distribution of the Podcast, the entity is a direct and substantial beneficiary of the Podcast’s advertising revenue, including the very episode at the center of this claim, which opens by promoting the sale of a “Goblin bong” and other “Pot Psych” merchandise and smoking accessories available through the Pipe Dreams online store (<https://pipedreams.fun>). (*Id.* ¶¶ 9, 19 & Ex. E). Plaintiff’s copyright protected works were exploited within the Podcast to drive traffic and facilitate sales of these products, including federally regulated drug paraphernalia, through

interstate commerce. (*Id.*) The Podcast and the Pipe Dreams storefront are inextricably intertwined, with the Podcast functioning as a promotional funnel to the online shop. (*Id.*)

On or about October 10, 2023, the Defendants located Townsend’s Instagram page and captured six of her copyright-protected photos (“Photos”) to promote their Podcast and online retail store on their Pot Psychology Instagram page. (*Id.* at Ex. A). Upon discovering the unauthorized use, Townsend released a video (“Video”) on Instagram on or about October 11, 2023, warning the Defendants against using her material to promote their Podcast, which she alleged was defamatory, and to generate revenue through paid subscriptions and the sale of marijuana paraphernalia and merchandise (*Id.* at Ex. D).

On October 20, 2023, the Defendants aired a Podcast episode titled “Freedom of Speech” (“Episode”) that continued their defamatory statements purported as legal fact against Townsend, including claims that she is “unhinged” and “not smart enough to keep up with her lies.”¹ In the episode, the Defendants further compounded their misconduct by using Townsend’s copyright-protected video without authorization, despite her prior warnings, to actively promoting their online retail store marketing drug paraphernalia and merchandise such as a “Goblin bong,” as well as encouraging listeners to subscribe to their Podcast on Patreon (*Id.* at ¶ 19 & Ex. E). Additionally, the Defendants trivialized Townsend’s legal threats by joking that a lawsuit would be “**...good for the show**” (at minute 30:57 of the Episode)¹. These facts clearly demonstrate a consistent pattern of unauthorized use and commercial exploitation of Townsend’s work, designed to drive subscriptions to their podcast and boost sales from their online storefront.

¹ The Podcast episode titled “The Ballad of Desiree Jennings” is available at <https://podcasts.apple.com/lv/podcast/the-ballad-of-desiree-jennings/id1496859784?i=1000580420623> (Comp. ¶ 21).

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must allege “enough facts to state a claim to relief that is plausible on its face.” (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, but it does require more than an unadorned accusation that the defendant unlawfully harmed the plaintiff. (*See* Fed. R. Civ. P. 8(a)(2)).

Rather, the plaintiff must provide a short and plain statement of the claim that gives the defendant fair notice of the basis for the claim and the grounds upon which it rests. In evaluating a motion to dismiss under this standard, the court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. (*Ashcroft v. Iqbal*, 556 U.S. at 678; *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007); *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007)). The court must also construe the allegations in the light most favorable to the plaintiff and may not dismiss a complaint merely because it appears unlikely that the plaintiff can prove the alleged facts. (*Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 325 (1st Cir. 2009)).

The purpose of Rule 12(b)(6) is not to compel plaintiffs to prove their entire case at the outset, but rather to test the legal sufficiency of the claims as set forth in the complaint. Discovery is the proper mechanism for developing evidentiary support. Furthermore, courts within this jurisdiction recognize that a defendant asserting a fair use defense bears the burden of proving that its use was fair. (*See Swatch Grp. Mngm’t Servs. Ltd. v. Bloomberg L.P.*, 861 F.

Supp. 2d 336, 339 (S.D.N.Y. 2012) (Hellerstein, J.) (aff'd, No. 12-2412, 2014 WL 2219162 (2d Cir. May 30, 2014)). As detailed below, the Defendants cannot meet this burden or demonstrate that any fair use factor weighs in their favor. Finally, should the Court find the allegations insufficient, Plaintiff respectfully requests leave to amend the Complaint to cure any perceived deficiencies. (*See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)).

ARGUMENT

Defendants do not dispute that the Complaint contains specific, detailed, and numerous factual allegations. Unlike complaints dismissed under Federal Rules of Civil Procedure 8 and 12(b)(6) for relying on vague or conclusory assertions, Plaintiff's Complaint clearly articulates 17 U.S.C. §§ 106 and 501 claims directed at named parties—Defendants Morrissey, Juzwiak, and Something Else Media LLC. It does not involve generalized accusations against unknown entities, but instead specifically identifies the individuals and LLC responsible. The Defendants do not dispute violations under 17 U.S.C. §§ 106 and 501. Instead, they prematurely put forth affirmative defenses of fair use, justifying their infringing use as protected under fair use. As detailed below, the Defendants cannot meet this burden or establish that any fair use factor weighs in their favor.

I. IF THE COURT WERE TO CONSIDER THE FAIR USE DOCTRINE AT THIS STAGE, DEFENDANTS CANNOT MEET ITS BURDEN OF ESTABLISHING ITS FAIR USE.

Fair use requires a "case-by-case analysis," *In Campbell*, 510 U.S. at 577, and "is an open-ended and context-sensitive inquiry," *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006), most courts approach the issue by applying the four nonexclusive factors set out in the Copyright Act itself: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted

work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." (17 U.S.C. § 107). These four factors are not to be "treated in isolation, one from another." (*Campbell*, 510 U.S. at 578). Instead, "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright." (*Id.*)

The fair use factors set forth by Congress are intended as "guidelines for balancing the equities," not as definitive or determinative tests. (See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997)). Congress observed that "since the doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is possible." The four fair use factors "are to be . . . weighed together, in light of the objectives of copyright 'to promote the progress of science and the useful arts.'" (*Id.*)

A. Factor One: Defendants' Use Is Commercial, Not Transformative, & Contrary to Public Interest Given the Use Extends to Federally Illegal Activity

When applying Section 107 of the Copyright Act, the Defendants argue that their use of the Plaintiff's Photos and Video is protected by the fair use doctrine. They contend that the first factor, whether and to what extent the use has a purpose or character different from the original, is satisfied. (See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 510 (2023)). The Supreme Court has repeatedly emphasized that the purpose and character of the use, particularly its transformative nature, can outweigh the other fair use factors. (See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). The Court made clear that a highly transformative use is more likely to be considered fair, thereby placing significant emphasis on this first factor. Moreover, a lack of transformation in the use of a copyrighted work can critically undermine a fair use defense, regardless of the other factors. (See *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014)).

In Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith the Court found that a photograph taken by Goldsmith and used by the Andy Warhol Foundation for licensing to Condé Nast, for a magazine story, shared “substantially the same purpose, and the use is of a commercial nature.” (598 U.S. 508, 526 (2023)). The Court found that the first factor favored the copyright holder. Similarly, the use of Plaintiff’s Video and Photos by the Defendants was not transformative, shares the same purpose, and the use was of a commercial nature tied to federally illegal activity. The Court has found that when a photo portrays an individual “somewhat differently” from another photograph’s use, yet has no critical bearing on the original photograph, that the “degree of difference is not enough for the first factor” to favor fair use. (*Id.* at 547). To allow fair use would “potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals.” (*Id.*)

The use of the Plaintiff’s Photos was not fair use. Despite the Defendants categorization that these Photos were used for criticism and commentary, a cursory review demonstrates otherwise. The Plaintiff’s Photos were simply republished with a brief descriptive statement: “the screen name, the check mark, the fact that she’s following Tracie (and not rich)”, which does not transform or reinterpret the original creative expression but merely states factual information. “No one may claim originality as to facts.” (*Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, § 2.11[A], p. 2-157 (1991)). No meaningful expressive originality, substance, commentary, or criticism was added. The Defendants simply republished the photos with a factual description that does not qualify for fair use protection.

The Defendants’ own social media description of the Podcast as “a podcast, that’s difficult to describe” (Compl. ¶¶ 8, 9) is telling when contrasted with their admission in the MTD and its categorization on Apple Podcasts as “Society and Culture.” This categorization runs

completely counter to their assertion that the Podcast is protected under fair use as a work of satirical commentary or criticism—a category that typically falls under Apple Podcasts’ “News Commentary” or “Comedy” classifications. Instead, Apple’s “Society & Culture” category generally encompasses niche subject matter, where audiences would reasonably expect to find content focused on legal analysis. Indeed, a careful review of the Defendants’ Podcast episodes, and in particular the Episode at the heart of this lawsuit, reveals that the Episode is presented as a legal analysis piece, covering in depth, various aspects of applicable law, including every element of California Civil Code regarding defamation, a subject addressed in the Plaintiff’s competing legal analysis work. Even the Episode’s title, “Freedom of Speech,” signals to the audience that it is intended as a legal analysis.

This analysis mirrors the Plaintiff’s own content and Video, developed through her paralegal expertise, in both substance and style, offering no transformative reinterpretation of the original work even discussing identical legal topics, as the Defendants pose as subject matter experts. Defendants’ use of Plaintiff’s Video and its content was so strikingly similar in character and purpose that the Defendants even stated within the Episode that she was welcome to “join the show” and that **“She can be our legal analyst”**. (See minute mark 20:12 of the Episode). By this concession, the Defendants effectively acknowledge that their use of the Plaintiff’s work replicates her own. When determining fair use in the context of a recurring show or podcast, the Court must consider the series’ underlying purpose and essence, as reflected in its stylistic choices, delivery, and a reasonable audience’s expectations.

Contrary to the Defendants’ assertion that the recent decision in *Santos v. Kimmel* is “instructive,” that case compares apples to oranges with respect to the present matter. In *Santos v. Kimmel*, Defendant Kimmel, hired Santos under a Cameo account created by Kimmel to

request a personalized video message from the former Congressmen and Plaintiff, Santos, requesting at least fourteen videos. One request made by Defendant Kimmel:

“Hey George. My friend Heath just came out as a Furry and I’d love for you to tell him that his friends and family all accept him. His ‘fursona’ is a platypus mixed with a beaver. He calls it a beav-a-pus. Can you say we all love you Beav-a-pus? He also just got the go ahead from Arby’s corporate to go to work in the outfit so we’re all so happy for him to be himself at work and at home. Could you also do a loud ‘Yiff yiff yiff!’? That’s the sound a Beav-a-pus makes as a Beav-a-pus. Thank you so much.”

This case is fundamentally different from the present matter because, in *Santos*, the Defendants actively commissioned the work from the Plaintiff. Moreover, the work was produced as a parody, delivered to an audience that knowingly participated in a comedic experience. No reasonable individual watching *Jimmy Kimmel Live!* would assume the veracity of an individual identifying as a “platypus mixed with a beaver.” However, upon engaging in the Defendants’ Podcast “that’s difficult to describe,” one can clearly and early on determine from many of the segments, especially involving the Plaintiff, that they are legal analysis pieces as the Defendants’, portraying themselves as subject matter experts, discuss topics of a legal nature, which is not transformative. Under Section 107, the fair use doctrine is designed to serve the public interest by promoting activities such as criticism, comment, news reporting, teaching, scholarship, and research that foster an informed and enlightened society. In the Defendants’ cited *Kane v. Comedy Partners*, the Plaintiff’s incorporated video clips which were used for a *Daily Show* segment, a well-known comedy news program, it’s use clearly falling under “news reporting” and therefore, fair use.

The Defendants do not market their podcast as news reporting or comedy, complete with

criticism and commentary, as evident of by their admission in the MTD of a “culture and society” categorization one would find on Apple Podcasts. Their experience as industry journalists combined with the heavy legal analysis and focus featured in each episode concerning the Plaintiff, clearly signals to audiences that these segments are legal analyses pieces for the niche “Society & Culture” category on Apple Podcasts.

In *Hughes v. Benjamin*, the court examined a use that was framed as part of a broader social commentary, specifically addressing “SJW Levels of Awareness”, and found that the work was transformative within its sociopolitical context. In contrast, the present case involves a use that is non-transformative and commercial in nature, lacking any substantive reimagining of the original work. Whereas Hughes focused on content that engaged in meaningful social critique and was clearly directed at an audience expecting commentary on socio-political issues, here the Defendants’ use merely replicates the Plaintiff’s legal analysis without adding new insights or creative expression. Moreover, the Defendant’s use actively competes with the Plaintiff’s work by integrating it into a commercial framework that promotes illegal activities. These critical distinctions demonstrate that *Hughes v. Benjamin* is not analogous to the current matter and should not be applied to support a fair use defense in this case.

In the Defendants’ cited *Boesen v. United Sports Publications, Ltd.* the plaintiff’s photo, of professional tennis player Caroline Wozniacki, was used for the defendants’ Instagram post as part of a news reporting article. The court finding the post to be transformative, as the post “was the very thing the [a]rticle was reporting on.” (*Id.*) Similarly in *Walsh v. Townsquare Media, Inc.*, the court held that an article reporting on rapper Cardi B’s lipstick collaboration with designer Tom Ford that “incidentally contained” Cardi B’s own Instagram posts about the collaboration was transformative.

In the present matter, the Defendants are neither a news reporting organization, nor a comedy show, and do not market their Podcast as such. No reasonable audience member engages with the content under the assumption that it constitutes news, commentary, or satire. Instead, and upon their own admission in the MTD, the Podcast is categorized on Apple Podcasts as “Society and Culture,” which Apple further subdivides into five subcategories—Documentary, Personal Journals, Philosophy, Places & Travel, and Relationships. This classification includes programs such as *Reclaiming with Monica Lewinsky*, *Stuff You Should Know*, or *The War on Drugs*². The podcasts within this category are not presented as pieces of commentary or criticism. Rather, they are factual and geared toward a specific niche informational subject matter. Similarly, the Defendants’ Podcast is clearly positioned as an informational legal analysis, leading audiences to assume that the content is intended to provide legal insight, rather than news or comedic material. This argument demonstrates that the Defendants’ use lacks the transformative context required for a fair use defense.

Under Section 107, the fair use doctrine is designed to serve the public interest by promoting activities such as criticism, comment, news reporting, teaching, scholarship, and research that foster an informed and enlightened society. When comparing the Defendants’ cited cases in the MTD of fair use by news reporting organizations, the Plaintiff’s Photos were not employed for news reporting, commentary, or criticism. Instead, they were merely repurposed with a descriptive statement, an approach that weighs heavily against a finding of fair use.

When the use serves the same purpose as the original work, with "commentary" that merely regurgitates the Plaintiff’s work, substance, and style to attract attention and sell the Defendants’

² Each of these referenced Podcasts fall under the Society & Culture category under Apple Podcasts and are available here: <https://podcasts.apple.com/us/podcast/reclaiming-with-monica-lewinsky/id1791132317>; <https://podcasts.apple.com/us/podcast/stuff-you-should-know/id278981407>; <https://podcasts.apple.com/us/podcast/the-war-on-drugs/id1666289553>.

products and services, “the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.” (*Campbell*, 580 U.S. at 580). In the MTD the Defendants state that the “Plaintiff appears to take issue with the fact that people can subscribe to the Podcast, appearing to suggest that anything that makes money lacks copyright protection.”

The Plaintiff does not claim that commercial use automatically negates copyright protection or fair use. Rather, while the Defendants imply that the mere fact the Podcast has subscribers that is, generates revenue, invalidates a fair use claim, the Plaintiff contends that the Defendants' commercial exploitation of her work, without any transformative purpose, undermines their fair use defense. The Plaintiff's argument is not that any revenue-generating work is unprotected, rather, in this instance, when the non-transformative nature of the use is combined with the Defendants' conduct, specifically their promotion of drug paraphernalia and drug use, and weighed alongside the other fair use factors, a finding of fair use is clearly precluded.

Unlike incidental commercial uses, the Defendants' appropriation of the Plaintiff's content is integral to their business model, it drives subscriptions, merchandise sales, and promotes activities that directly compete with and undermine the Plaintiff's market. Moreover, their use is not merely for profit, but is deployed without any transformative alteration to the original work. Rather than adding meaningful commentary or critical insight, the Defendants simply repurpose the Plaintiff's content and commentary in a manner that duplicates its substance and style.

While it is true that many uses under § 107 are conducted for profit, the commercial nature of a use remains a significant factor in the fair use analysis. The Supreme Court emphasized that while commercial use is not fatal to a fair use claim, its presence weighs against fair use if the use is not sufficiently transformative. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

When commercial exploitation is combined with a non-transformative use, the commercial use of copyrighted material, especially when it substitutes for the original work, critically undermines a fair use defense. (*Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014)).

Under Section 107, the fair use doctrine is designed to serve the public interest by promoting activities that foster an informed and enlightened society. However, the use of the Plaintiff's Video and Photos to promote the sale of drug paraphernalia and drug use does not advance this public interest. Instead of contributing to a constructive public dialogue, this exploitative use actively harms society by endorsing and normalizing illegal behavior. It undermines national public health and safety efforts, misappropriates creative works for profit of a federally illegal activity, and diverts the transformative potential of creative expression into a sector of commercial exploitation that becomes inherently detrimental to society.

Copyright law is meant to “encourage others to build freely upon the ideas and information conveyed by a work.” *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (quoting U.S. Const. art. I, § 8, cl. 8 and citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985)). In the present case, the Defendants' use neither builds upon the underlying ideas nor adds any new creative expression. The first factor weighs against fair use.

B. Factor Two: The Registered Works are Creative and Expressive

Under the **second factor**, courts consider “the nature of the copyrighted work,” and “whether the work is expressive or creative, such as a work of fiction, or more factual,” and if the work is published or unpublished. (*Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 557 (S.D.N.Y. 2013)). The works at the heart of this claim were published, therefore, the key characteristic in regard to the second factor is the works creative and expressive nature. The

Plaintiff's Video involved a number of creative decisions and research including academic research about the legal elements discussed, scripting of discussion points, and refinement of the delivery mechanism or expressive tone to be used for the production.

Plaintiff's published Video production included the unique combination of legal discussion with authentic and heartfelt expressions of indignation. The Plaintiff's content is the product of strategic and stylistic choices. Plaintiff's delivery or "performance," is a uniquely creative form of expression that even the Defendants recognized when they described it as "an aggressive ChatGPT." (See minute mark 19:51 of the Episode). A similar creative vision is evident in the Plaintiff's photographs, which reflect the camera operator's deliberate decisions regarding lens selection, lighting, and background scenery. Because these various components of the Plaintiff's registered works combine to form a unique and creative compilation, and given the Defendants' non-transformative use, this factor weighs decisively in the Plaintiff's favor.

C. Factor Three: Defendants Copied the Registered Works Substantially

The third statutory factor also disfavors fair use. When evaluating the third factor of fair use courts look at "the substantiality of the portion used in relation to the copyrighted work as a whole" (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, (1985)). This factor has both quantitative and qualitative dimensions, which consider the portion of the copyrighted work taken in relation to the whole and the importance of that portion to the work. (*Meltwater*, 931 F. Supp. 2d at 557.)

The Defendants took substantial portions at the heart of the creative Video work, while taking a screenshot reproducing the Plaintiff's copyright protected Photos, including the main profile picture which is licensed for use by Shutterstock. (Compl. at Ex. C). In the MTD the Defendants' acknowledged that they "presented clips from her social media posts in order to

comment on them.” The infringing Episode was clearly edited to deliberately excise segments that might have cast the Defendants in a negative light, or conversely, the Plaintiff in a positive one. Yet, even after these modifications, approximately 72% of the 3-minute-55-second Video, which embodies Townsend’s distinctive creative expression, remained integral to the Episode.

The Court has found that when substantial portions of a copyright protected work are used that such liberal use of verbatim work “posed substantial potential for damage” (*Harper*, 471 U.S. at 539, 541). The Defendants cannot benefit from the third factor when their non-transformative use was “wholesale” copying. (*Davis*, 246 F.3d at 175). The Defendants’ non-transformative use of the Plaintiff’s Video with word-for-word copying, even with “slight additions” weighs against a finding of fair use. (*Weissmann*, 868 F.2d at 1325).

In summary, the Defendants’ verbatim copying and redistribution of the Plaintiff’s Photos and Video, including portions central to the works, is both quantitatively and qualitatively substantial, thereby weighing heavily against a finding of fair use.

D. Factor Four: Defendants’ Use Harms the Market for and the Value of the Registered Works.

The fourth factor in a fair use inquiry is “the effect of the use upon the potential market for or value of the copyrighted work,” including harm to the market for the original work and derivative works. (*Campbell*, 510 U.S. at 590; 17 U.S.C. § 107(4)). The fourth factor has been held by the courts to be “undoubtedly the single most important element of fair use.” (*Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985))). The fourth factor, again disfavors use by the Defendants.

The Defendants’ use of Plaintiff’s copyright protected Photos and Video for use in their Podcast, that they admittedly describe as a Podcast about “culture and society” falling within

Apple Podcasts’ categorization encompassing niche subject matter, where audiences would reasonably expect to find content focused on legal analysis, rather than commentary or criticism (which typically falls under comedy and news reporting), directly competes with the Plaintiff’s own content. The Plaintiff’s works share substantially similar trade channels with consumers, with the very important distinction that the products and services offered by the Plaintiff are federally lawful.

The Defendants’ use of Plaintiff’s copyright protected Photos and Video in conjunction with the Defendants’ Podcast greatly diminishes the value of her copyright protected and licensed works. This unauthorized use substantially reduces the licensing potential of the Plaintiff’s works for potential documentaries, particularly given the sustained public interest in Townsend amid the rise of prominent anti-vaccine figures under the new presidential administration. (Compl. ¶ 10). The value of the works are even further eroded by the Defendants’ use in conjunction with illegal activity under the Controlled Substances Act, including but not limited to 21 U.S.C. § 863 for the sale or offer of drug paraphernalia, or to use mails or any other facility of interstate commerce to transport drug paraphernalia; 21 U.S.C. § 844 to intentionally possess a controlled substance; and 21 U.S.C. § 856 to maintain any place (a podcast studio) for the purpose of using any controlled substance. The use of Townsend’s works in conjunction with the Defendants’ Podcast, which clearly engages in federally illegal activity of a Schedule I drug, greatly devalues and reduces the marketability for her works. Accordingly, the fourth factor also heavily weighs against fair use.

II. THE MOTION SHOULD BE DENIED

Defendants’ motion to dismiss under Rule 12(b)(6) does not actually challenge the sufficiency of Plaintiff’s factual allegations under the pleading standards set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Instead,

Defendants improperly attempt to litigate the merits of their affirmative defense of fair use at the pleading stage, well before any discovery has occurred or a factual record has been developed.

However, even in the evaluation of Defendants' fair use defense, it fails on each of the four factors set under the statutory framework of Section 107 of the Copyright Act. Furthermore, allowing fair use as a defense would provide judicial approval of illegal commercial activity. Fair use is an equitable doctrine and courts do not protect illegal conduct. The Supreme Court found that, "[n]o court will lend its aid to a party who founds his claim for redress upon an illegal act." (*The Florida*, 101 U.S. 37, 43 (1879)). The Controlled Substances Act prohibits the Defendants' actions in conjunction with their Podcast, including the sale or offer of drug paraphernalia, possessing a controlled substance, and to maintaining any place, for the purpose of using any controlled substance. The use of Plaintiff's copyright protected works in association with multiple illegal activities adversely affects the market value of the works. Being tied to illicit activities, greatly diminishes the ability to control its use and monetize it through legitimate trade channels.

In assessing the market impact of the Defendants' conduct, courts have consistently emphasized that unauthorized uses, which usurp the market for the original work, weigh heavily against a finding of fair use. (*See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–576 (1994)). Which underscores that an infringement substituting for the original work in the marketplace diminishes its value. Here, the Defendants' appropriation of the Plaintiff's Video and Photos, to promote the sale of drug paraphernalia and drug use, directly undermines the Plaintiff's ability to monetize and license her work. By incorporating the Plaintiff's content into a production that facilitates illegal commercial activity, the Defendants not only erode the potential market for the Plaintiff's original work but also diminish its intrinsic value. *Fox News Network, LLC v.*

TVEyes, Inc., 43 F. Supp. 3d 379, 389 (S.D.N.Y. 2014) further illustrates that market harm is a critical factor in the fair use analysis, and in this instance, the Defendants’ conduct decisively tips the scales against a finding of fair use and their motion should be DENIED.

CONCLUSION

Instead of engaging in genuine transformation, such as offering meaningful criticism or parody, the Defendants merely republish the Plaintiff’s Photos with factual information and reproduce the Plaintiff’s video without incorporating any stylistic or substantive modifications. This unaltered reproduction of the Plaintiff’s Video, injected into the Defendants’ legal analysis podcast to extend airtime, boost fame, and drive sales, fails to “build freely” upon the original work. Rather, it usurps the Plaintiff’s creative expression without contributing new insights or value to public discourse, a simple, unsophisticated retelling of the same topics in the same style and substance as the Plaintiff. This is not a case of transformative use that adds new expression or meaning, but rather a replication that competes directly with the Plaintiff’s market.

Courts have long emphasized that the fair use defense is not a blank check to justify any and all uses of copyrighted material. When a defendant’s use of protected works is inseparable from an illegal enterprise—in this case, facilitating the sale of drug paraphernalia and promoting Schedule I drug use—the fair use doctrine cannot be stretched to cover that conduct.

Specifically, one of the key factors in the fair use analysis is the purpose and character of the use. While courts recognize that even commercial uses can sometimes be deemed fair, that analysis shifts dramatically when the use is intertwined with federally illegal activity. The Defendants’ use of the Plaintiff’s works is not only nearly identical to the Plaintiff’s own legal analysis but is also employed as part of a scheme to license and promote content that furthers

unlawful conduct. This use directly undermines the market for the Plaintiff's work, which is central to her business model.

Moreover, the fact that the Defendants continue to invest substantial resources in legal defenses to sustain their infringing use, rather than simply removing the works, further underscores that their actions are not merely a benign exercise of "criticism" or "commentary," neither of which were used transformatively as part of the works. Rather, their conduct is an intentional, profit-driven exploitation of the Plaintiff's material to support an illegal enterprise. This combination of market harm and criminality strongly weighs against any fair use claim.

In sum, because the Defendants' use is inextricably linked to the facilitation of illegal activity, it falls outside the protective ambit of the fair use doctrine, which is designed to encourage creativity and free expression, not to shield unlawful behavior.


Rule 12(b)(6) is designed to test the legal sufficiency of the complaint, not to resolve factual disputes or to adjudicate affirmative defenses that are not apparent from the face of the complaint. Courts routinely hold that fair use is a highly fact-specific inquiry that generally should not be resolved on a motion to dismiss unless the facts necessary to establish the defense are beyond dispute and evident from the complaint itself. (*See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) ("[F]air use is a mixed question of law and fact," and courts should be "very cautious in granting Rule 12(b)(6) motions on fair use grounds."); *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013) (dismissal on the basis of fair use "is appropriate only if a court can conclude, after drawing all reasonable inferences in favor of the plaintiff, that the defense is established from the face of the complaint"))).

Plaintiff has plausibly alleged ownership of the copyrighted works, copying by the Defendants, and that the copying was unauthorized and caused harm to Plaintiff's business

interests—particularly due to the commercial and non-transformative nature of Defendants’ use. These allegations more than satisfy the pleading requirements under Rule 8 and are sufficient to survive a motion to dismiss. Should this Court be inclined to grant the Motion, the Plaintiff respectfully request leave to amend the Complaint so that the claims could proceed to discovery. “The court should freely give leave [to amend a complaint] when justice so requires.” Fed. R. Civ. P. 15(a)(2).

For the foregoing reasons, Plaintiff respectfully request that the Court deny Defendants’ Motion to Dismiss the Complaint.

Dated: April 14, 2025

By: 

DESIREE GUERRIERE TOWNSEND
Plaintiff

PROOF OF SERVICE

I hereby certify that on April 14, 2025, I served true copies of the **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** on the interested parties in this action as follows:

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- ☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address desiree@sparktrademarks.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

By: _____



DESIREE GUERRIERE TOWNSEND

Plaintiff