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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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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTS ALLEGED.....	4
III. AUTHORITY	4
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
IV. ARGUMENT	7
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
V. CONCLUSION	24

1
2
3
4
5
6
7
8
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10
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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. 4th 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 (9th Cir. 2001) 5

2 *Fantasy, Inc. v. Fogerty*,
 3 984 F. 2d 1524, 1527 (9th 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 (9th 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 (9th 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 (9th 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 (9th 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

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1 **TREATISES**

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

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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
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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)
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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 (9th 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 (9th 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 (9th Cir. 2010) quoting *Fantasy, Inc. v. Fogerty*, 984
28

1 F. 2d 1524, 1527 (9th 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 **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
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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
28

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. 4th 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.

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

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

23 Interpretation of Rule 12(f) is according to its plain meaning. *Whittlestone,*
24 *Inc.*, 618 F. 3d at 973 citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,
25 1111 (9th Cir. 2002). Analysis of the rule requires consideration of whether the
26 request for attorneys’ fees in the Complaint is: (1) an insufficient defense; (2)
27 redundant; (3) immaterial; (4) impertinent; or (5) scandalous. None of these five
28 categories covers the allegations in the pleading sought to be stricken by the

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):

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

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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