

1 DAVIS WRIGHT TREMAINE LLP  
THOMAS R. BURKE (State Bar No. 141930)  
2 [thomasburke@dwt.com](mailto:thomasburke@dwt.com)  
505 Montgomery Street, Suite 800  
3 San Francisco, CA 94111-6533  
Telephone: (415) 276-6500  
4 Fax: (415) 276-6599

5 DAVIS WRIGHT TREMAINE LLP  
DAN LAIDMAN (State Bar No. 274482)  
6 [danlaidman@dwt.com](mailto:danlaidman@dwt.com)  
DIANA PALACIOS (State Bar No. 290923)  
7 [dianapalacios@dwt.com](mailto:dianapalacios@dwt.com)  
865 South Figueroa Street, 24th Floor  
8 Los Angeles, California 90017-2566  
Telephone: (213) 633-6800  
9 Fax: (213) 633-6899

10 Attorneys for Defendant  
11 Joseph Teixeira

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14

15 CITY OF INGLEWOOD, a public entity, )  
16 Plaintiff, )  
17 vs. )  
18 JOSEPH TEIXEIRA and Does 1-10, )  
19 Defendants. )

Case No. **2:15-cv-01815-MWF-MRW**  
Assigned to the Hon. Michael Fitzgerald  
**CONSOLIDATED REPLY IN  
SUPPORT OF DEFENDANT’S  
MOTION TO DISMISS  
PLAINTIFF’S COMPLAINT AND  
MOTION TO STRIKE REQUEST  
FOR ATTORNEYS’ FEES**  
[Fed. R. Civ. P. 12(b)(6); 12(f)]  
Hearing Date: June 22, 2015  
Time: 10:00 a.m.  
Courtroom: 1600  
Action Filed: March 12, 2015

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26 Defendant Joseph Teixeira respectfully submits this Consolidated Reply in  
27 Support of his Motion to Dismiss (“MTD”) the Complaint of plaintiff City of  
28 Inglewood and his Motion to Strike (“MTS”) the City’s request for attorneys’ fees.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SUMMARY OF ARGUMENT**

Last month the Ninth Circuit emphatically held that “a weak copyright claim cannot justify censorship in the guise of authorship.” Garcia v. Google, Inc., --- F.3d ----, 2015 WL 2343586 (9th Cir. May 18, 2015) (en banc). In this case, the City of Inglewood is misusing copyright law to punish a citizen for criticizing his government, and its claim is not just weak, it is non-existent.

In its Opposition, the City ignores virtually all of the controlling authorities cited by Mr. Teixeira that show why its claim fails as a matter of law. It also overlooks the actual contents of Mr. Teixeira’s videos, despite having specifically identified and linked to these works in its own Complaint. Because these videos are incorporated by reference into the City’s pleading they are properly before the Court, and their contents supersede any contrary descriptions in the Complaint. Avoiding discussion of all of the dispositive issues, the City cannot salvage this meritless action for several reasons.

First, the City concedes that it has no specific authority to copyright public records documenting its City Council meetings, and thus its claim is barred by California law. See County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301, 1335 (2009). The City makes no effort to distinguish County of Santa Clara or to question its holding. The City’s failure to counter this decision is fatal to its claim: where, as here, there is “relevant precedent from the state’s intermediate appellate court,” and no “convincing evidence” that the state supreme court would decide differently, “the federal court must follow the state intermediate appellate court decision.” Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007).

The City’s only argument on this point is misguided, as the Supremacy Clause is not implicated by a state’s decision not to assert copyright in its own works. See Section II.A. This is why every authority to consider the issue has recognized that

1 states can choose to favor broad public access to public records over copyright absent  
2 special circumstances, as California has explicitly done. See id.; MTD at 9-14.

3 Second, the City fails to counter Mr. Teixeira’s showing that its attempt to use  
4 copyright to limit his use of City Council meeting videos as a vehicle to comment on  
5 political affairs is contrary to public policy and inconsistent with California law,  
6 which maximizes public access to such government records. See Section II.A; MTD  
7 at 12-14.

8 Third, to avoid a finding of fair use, the City ignores the actual content of the  
9 videos and merely repeats its conclusory allegations that they are “unaltered”  
10 “verbatim” copies of the original City Council meeting videos. E.g., Opp. at 11-14.  
11 But the City contradicts itself elsewhere in its Opposition, where it necessarily admits  
12 that Mr. Teixeira “adulterates” the meeting videos “by manipulating and adding  
13 derogatory comments” in order “to criticize the City.” Opp. at 1, 8.<sup>1</sup> Either way, the  
14 City’s characterizations of Mr. Teixeira’s videos are irrelevant, because even in the  
15 context of a motion to dismiss, “the works themselves supersede and control contrary  
16 descriptions of them, including any contrary allegations . . . in the pleadings.” Peter  
17 F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64 (2d Cir. 2010).  
18 Consequently, this Court is “not required to accept as true” the City’s “conclusory  
19 allegations which are contradicted by documents referred to in the complaint.”  
20 Steckman v. Hart Brewing, 143 F.3d 1293, 1295-96 (9th Cir. 1998) (affirming  
21 dismissal of action pursuant to Fed. R. Civ. P. 12(b)(6)).

22 ///

23  
24  
25 <sup>1</sup> These comments reveal the City’s true purpose – Inglewood officials find  
26 Mr. Teixeira’s criticism offensive, and want him silenced. But “[p]ublic office is no  
27 place for the thin-skinned. Those who function in the public arena must be prepared  
28 to withstand . . . the protest and controversy which their . . . actions and statements  
have generated.” Pittsburg Unified School Dist. v. Calif. School Employees Ass’n,  
166 Cal. App. 3d 875, 899 (1985). Under the First Amendment, speech cannot be  
proscribed because it is offensive, Cohen v. California, 403 U.S. 15, 25 (1971), or  
critical of public officials, Duran v. Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990).

1 The City necessarily refers to Mr. Teixeira’s videos in its Complaint because  
 2 they form the basis for its copyright claim, and it has even gone a step further and  
 3 provided links to the six allegedly infringing videos at issue. See Cmpl. ¶ 19. The  
 4 contents of these videos are therefore part of the Complaint, and the City cannot  
 5 simply ignore them. See Section II.B.1. While the City may now regret its decision  
 6 to link to them, Mr. Teixeira’s videos are quintessential examples of fair use and the  
 7 law is clear that “a plaintiff can . . . plead himself out of a claim by including  
 8 unnecessary details contrary to his claims.” Sprewell v. Golden State Warriors, 266  
 9 F.3d 979, 988 (9th Cir. 2001). The City has done just that.

10 Fourth, the City’s Orwellian claim that it is championing free speech by trying  
 11 to quash it does not withstand scrutiny. E.g., Opp. at 1-2. Copyright promotes  
 12 creativity by protecting the “commercial interest of the author,” but claims such as  
 13 the City’s, designed to “suppress a derogatory” work are “untethered from—and  
 14 incompatible with—copyright and copyright’s function as the engine of expression.”  
 15 Garcia, 2015 WL 2343586, at \*8-9 (quotations omitted). These principles guide the  
 16 fair use inquiry here, as state law bars the City from making any money from the sale  
 17 of its City Council meeting videos. See Section II.B.2. Nor could Mr. Teixeira’s  
 18 highly transformative, biting critical videos possibly supplant the market for the  
 19 City’s unadorned meeting videos, if one could even exist. Id.

20 Because the City has no copyright interest in its City Council meeting videos,  
 21 and even if it did this would be a classic case of fair use, the Complaint should be  
 22 dismissed with prejudice. See Section III. If the case proceeds, the Court should  
 23 strike the City’s defective request for attorneys’ fees. See Section IV.

## 24 **II. THE CITY’S COMPLAINT IS BARRED AS A MATTER OF LAW.**

### 25 **A. The City Cannot Copyright Its Public Meeting Videos Under State Law.**

26 The City concedes that the California Court of Appeal’s decision in County of  
 27 Santa Clara is on point, and thus that state law precludes it from copyrighting video  
 28

1 recordings of its City Council meetings. Opp. at 17-19. The City's only argument is  
2 that it is not bound by state law, which is incorrect. Id.<sup>2</sup>

3 First, every authority to address this issue has recognized that works of state  
4 and local government can only be copyrighted "depending on state law and policy,  
5 and subject to exceptions dictated by public policy." Building Officials & Code  
6 Adm. v. Code Technology, Inc., 628 F.2d 730, 735-36 (1st Cir. 1980). The reason is  
7 clear: "[s]tates may ... refuse to permit assertion of copyright in state-created works"  
8 because "copyright is never imposed." 4 William F. Patry, Patry on Copyright § 4:81  
9 (2015). See generally In re Aimster Copyright Litigation, 334 F.3d 643, 652 (7th  
10 Cir. 2003) (recognizing that artists may choose not to copyright their works in order  
11 to broaden their audience). In other words, a state can forgo securing copyright  
12 protection in its own works, the same as any private individual or entity.

13 Because the key issue here is how California has chosen to proceed with  
14 respect to its own public records, the City's invocation of the Supremacy Clause is a  
15 non-sequitur. The only authority that the City cites involves states attempting to  
16 regulate the conduct of others in a manner that conflicts with federal prerogatives.  
17 For example, in Sperry v. State of Fla. ex rel. Florida Bar, 373 U.S. 379 (1963), the  
18 Court held that Florida could not prohibit a private attorney from practicing before  
19 the United States Patent Office because he lacked a Florida law license. Id. at 384.  
20 Consequently, the Sperry decision might be relevant if this were a case in which  
21 California law purported to limit some other private individual or entity's ability to  
22 obtain and hold copyrights contrary to federal law, but that is not the situation.

23 Instead, this is a case in which California has adopted a constitutional and  
24 statutory scheme that maximizes public access to its own public records, and that is  
25

26 \_\_\_\_\_  
27 <sup>2</sup> The City alleges that it "is a municipality incorporated under the laws of the  
28 State of California ... in statutory compliance with California law." Cmplt. ¶¶ 9, 16.  
"A municipal corporation is simply a political subdivision of the State." Trenton v.  
New Jersey, 262 U.S. 182, 189 (1923).

1 plainly incompatible with one of its political subdivisions trying to use copyright to  
 2 limit such access. MTD at 9-14. To the extent that federalism concerns are relevant  
 3 at all here, they cut against the City’s position. California cannot be compelled  
 4 through the Copyright Act to allow its political subdivisions to copyright any and all  
 5 public records in violation of state law and policy. See New York v. United States,  
 6 505 U.S. 144, 166 (1992) (“even where Congress has the authority under the  
 7 Constitution to pass laws requiring or prohibiting certain acts, it lacks the power  
 8 directly to compel the States to require or prohibit those acts”).

9 Second, the City erroneously asserts that the County of Santa Clara opinion is  
 10 “non-precedential.” Opp. at 17. To the contrary, “[i]n deciding an issue of state law,  
 11 when ‘there is relevant precedent from the state’s intermediate appellate court, the  
 12 federal court must follow the state intermediate appellate court decision unless the  
 13 federal court finds convincing evidence that the state’s supreme court likely would  
 14 not follow it.” Hayes v. County of San Diego, 658 F.3d 867, 870 (9th Cir. 2011)  
 15 (emphasis added). “[W]here there is no convincing evidence that the state supreme  
 16 court would decide differently, a federal court is obligated to follow the decisions of  
 17 the state’s intermediate appellate courts.” Vestar Dev. II, LLC v. Gen. Dynamics  
 18 Corp., 249 F.3d 958, 960 (9th Cir. 2001) (quotation omitted; emphasis added).

19 The City has presented no evidence that the California Supreme Court would  
 20 disagree with the County of Santa Clara decision.<sup>3</sup> It does not distinguish the case, or  
 21 explain how the opinion is wrongly decided. Opp. at 15-19. As set forth in Mr.  
 22 Teixeira’s Motion, the Court of Appeal’s well-reasoned decision is fully supported  
 23 by state and federal law, and is consistent with authority from other jurisdictions as  
 24 well. MTD at 10-12. Moreover, the City does not dispute any of the key features of  
 25

26  
 27 <sup>3</sup> The California Supreme Court denied requests to de-publish the County of  
 28 Santa Clara decision, leaving it intact as a binding precedent, Santa Clara, County of  
v. Superior Court, 2009 Cal. LEXIS 4728, at \* 1 (May 13, 2009), and it has cited the  
 opinion favorably, Sierra Club v. Superior Court, 57 Cal. 4th 157, 176 (2013).

1 California’s governing public records and open meetings laws that are fundamentally  
2 incompatible with a municipality asserting copyright to limit access to its video  
3 recordings of City Council meetings:

4 ● The state Constitution, Brown Act, and CPRA maximize public access to  
5 government information, and require that any limits on access be narrowly construed.  
6 Cal. Const. Art. 1, § 3(b); Gov’t Code §§ 6250 et seq., 54950 et seq., MTD at 13-14.

7 ● Unlike some other states, California’s public records law contains no  
8 exception authorizing restrictions on public access based on copyright. MTD at 11.

9 ● California limits agencies to charging no more than the “direct costs of  
10 duplication” for copies of public records. Gov’t Code § 6253(b); MTD at 11, 13.

11 ● California prohibits agencies from limiting access to public records based on  
12 the purpose of the request. Gov’t Code § 6257.5; MTD at 11.

13 ● California law specifically authorizes certain public agencies to copyright  
14 certain enumerated items, in statutes that would all be superfluous if any agency  
15 could copyright any public record, as the City claims. MTD at 11-12.

16 ● The Brown Act specifies that video recordings of public meetings are public  
17 records that must be available for public viewing free of charge, and that are subject  
18 to disclosure under the CPRA. Cal. Gov’t Code § 54953.5(b); MTD at 13.

19 The City does not address any of these provisions. Compare MTD at 9-14,  
20 with Opp. 15-19. Nor does it offer an explanation for how this constitutional and  
21 statutory regime could be reconciled with its attempt to use copyright to restrict  
22 public access to City Council meeting videos. Id. Because the City has not come  
23 close to presenting “convincing evidence” that the California Supreme Court would  
24 disagree with the Court of Appeal’s well-reasoned, controlling decision in County of  
25 Santa Clara, the “federal court is obligated to follow” that decision, which is fatal to  
26 this lawsuit, as the City essentially concedes. Vestar, 249 F.3d at 960; Opp. at 17-19.

27 Third, with no authorities to support its novel copyright claim, the City relies  
28 instead on anecdotal examples of items that agencies have registered with the



1 Copyright Office. Opp. at 16-17. But registrations are not binding authorities. See  
 2 Techniques, Inc. v. Rohn, 592 F. Supp. 1195, 1197 (S.D.N.Y. 1984) (“Registration’s  
 3 validity is subject to judicial review and may be attacked by a defendant in an  
 4 infringement action”); U.S. ex rel. Twentieth Century-Fox Film Corporation v.  
 5 Bouve, 33 F. Supp. 462, 463 (D.D.C. 1940) (“any finding of fact or conclusion of  
 6 law on the part of the Register of Copyrights are not binding upon the court”).

7 And in any event, the City’s examples are also consistent with Mr. Teixeira’s  
 8 position. As discussed in the Motion, the California Legislature “knows how to  
 9 explicitly authorize public bodies to secure copyrights when it means to do so.”  
 10 MTD at 11 (quoting County of Santa Clara, 170 Cal. App. 4th at 1333). Numerous  
 11 statutes authorize public agencies to copyright particular items, which is compelling  
 12 evidence that such specific authorization is required for a California agency to secure  
 13 copyright protection in a public record. See statutes cited at MTD at 10-11. The fact  
 14 that the City was only able to identify six instances in which California public  
 15 agencies have registered copyrights is consistent with this regime in which copyright  
 16 in public records is the exception, not the rule. Opp. at 16-17.

17 Similarly, the City’s discussion of its meter reading software and lawsuit  
 18 against the City of Chicago does not support its insistence that its videos of its City  
 19 Council proceedings are protected by copyright. Opp. at 17. There, the City brought  
 20 a copyright infringement lawsuit based on a parking ticket software system that it had  
 21 developed. City of Inglewood v. City of Chicago, C.D. Cal. No. 2:02-cv-04594-DT-  
 22 AJWX, Dkt. # 30 (Order on Motion to Dismiss, Dec. 9, 2002). But unlike videos of  
 23 City Council proceedings, the CPRA makes clear that “[c]omputer software  
 24 developed by a state or local agency is not itself a public record under this chapter,”  
 25 and an “agency may sell, lease, or license the software for commercial or  
 26 noncommercial use.” Cal. Gov’t Code § 6254.9.

27 In County of Santa Clara, the court examined this provision and held that “the  
 28 referenced copyright protection is limited to computer software,” and that the statute



1 “recognizes the availability of copyright protection for software in a proper case,  
 2 [but] provides no statutory authority for asserting any other copyright interest.” 170  
 3 Cal. App. 4th at 1333-34 (emphasis added). The City cannot rely on its copyright for  
 4 a software program that is not even a public record as authority for its unprecedented  
 5 attempt to use copyright to control public records of City Council meetings.

6 Where it makes sense for public agencies to copyright works like computer  
 7 software or other comparable items, the Legislature has enacted statutes that  
 8 expressly recognize such protection. See MTD at 11-12. This shows that specific  
 9 authorization is required for a California public agency to copyright a public record.  
 10 Id. The City offers no response to this decisive point. See Opp. at 15-19.

11 Finally, the City avoids acknowledging the nature of the public records at issue  
 12 here. This is not a case about parking meter software, “Cash Wiz Cash Management  
 13 Software,” historical crime scene photographs, or a book about green building. Opp.  
 14 at 16-17. The City is trying to use copyright to punish a citizen for using public  
 15 records that document official proceedings where public policy is discussed and laws  
 16 are made. The City does not – and cannot – cite to any authority permitting such  
 17 behavior. To the contrary, it has been well-established for over a century that  
 18 copyright cannot block access to such records that directly implicate democratic self-  
 19 governance. See MTD at 14 n.9.

20 For all of these reasons, California law does not permit the City to obtain or  
 21 hold a copyright in its recordings of City Council meetings, and therefore its claim  
 22 against Mr. Teixeira fails as a matter of law and should be dismissed with prejudice.

23 **B. Mr. Teixeira’s Use Of Clips From City Council Meetings In His Political**  
 24 **Commentaries Is Independently Protected By The Fair Use Doctrine.**

25 The videos giving rise to this litigation are paradigmatic examples of fair use.  
 26 Mr. Teixeira has taken brief clips from the City’s lengthy original public meeting  
 27 videos, overlaid them with his original text and narration, interspersed them with his  
 28 original footage, and presented them in an entirely new context where the clear

1 purpose is to criticize the public statements and behavior of City officials at  
 2 Inglewood Council meetings. See Ex. A; MTD at 5-8. The City does not identify  
 3 any case in which works of this kind have been deemed infringing, and courts have  
 4 consistently held that such transformative works are “deserving of fair-use protection  
 5 as a matter of law.” Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986).

6 **1. Fair Use Applies To Mr. Teixeira’s Videos As A Matter Of Law.**

7 The City makes no effort to distinguish any of the numerous authorities cited  
 8 by Mr. Teixeira that support this Court’s ability to dismiss this lawsuit on the basis of  
 9 fair use at the pleading stage. See MTD at 8-9, 16-17; RJN at 2-3.<sup>4</sup> Instead, it is  
 10 seeking to prolong the litigation (and hence the chilling effect on Mr. Teixeira’s  
 11 speech, see Section III) by ignoring the transformative content of the videos. But the  
 12 City cannot escape the consequences of its own pleading.

13 **a. The Allegedly Infringing Videos Are Incorporated By**  
 14 **Reference Into The City’s Complaint.**

15 The Court can consider Mr. Teixeira’s videos (and the YouTube pages that  
 16 display them) because they are incorporated by reference into the City’s Complaint.  
 17 See MTD at 8-9, 16-17.<sup>5</sup> Citing no authority, the City claims that “the only

18  
 19  
 20 <sup>4</sup> E.g., Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 530 (9th Cir.  
 21 2008); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690-92 (7th Cir.  
 22 2012); Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013); Burnett v. Twentieth  
 23 Century Fox Film Corp., 491 F. Supp. 2d 962, 966 (C.D. Cal. 2007); Savage v.  
Council on American-Islamic Relations, 2008 U.S. Dist. LEXIS 60545, at \*2-3; 87  
 U.S.P.Q.2D 1730 (N.D. Cal. 2008); Sedgwick Claims Management Servs. v.  
Delsman, 2009 U.S. Dist. LEXIS 61825, at \*20-21 (N.D. Cal. July 17, 2009);  
Righthaven v. Realty One Group, 2010 WL 4115413, \*3 (D. Nev. Oct. 19, 2010).

24 <sup>5</sup> Mr. Teixeira also brought a Request for Judicial Notice out of an abundance  
 25 of caution because some courts have combined the incorporation by reference and  
 26 judicial notice inquiries. See, e.g., RJN at 2-3. But these are separate bases for  
 27 considering the videos. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S.  
 28 308, 322 (2007) (“when ruling on Rule 12(b)(6) motions to dismiss ... documents  
 incorporated into the complaint by reference, and matters of which a court may take  
 judicial notice” may be considered); Burnett, 491 F. Supp. 2d at 967 (same).  
 Therefore, while judicial notice of these materials is proper, the Court can  
 independently consider them under the incorporation by reference doctrine. Id.

1 documents incorporated by reference are the copyright applications of the City.”  
 2 Opp. at 23. But courts have consistently held that the allegedly infringing works that  
 3 are the basis of a copyright claim are “integral to the complaint,” and thus  
 4 incorporated by reference therein. Canal+ Image UK Ltd. v. Lutvak, 773 F. Supp. 2d  
 5 419, 427 (S.D.N.Y. 2011) (granting 12(b)(6) motion and dismissing copyright claim  
 6 by considering content of allegedly infringing work not attached to the complaint).

7 As this Court explained in DuckHole Inc. v. NBC Universal Media LLC, 2013  
 8 U.S. Dist. LEXIS 157305 (C.D. Cal. Sept. 6, 2013), the allegedly infringing works  
 9 “form the basis of Plaintiff’s claim of copyright infringement, therefore the Court  
 10 may properly consider the content of the show as documentary facts whose contents  
 11 are alleged in [the] Complaint” even though the plaintiff did not attach the show to  
 12 the complaint. Id. at \*9 (quotation omitted). The same is true here: because the  
 13 City’s claim relies on the contents of the six allegedly infringing videos that it  
 14 specifically references and links to in its pleading (see Cmpl. ¶ 19), the contents of  
 15 those videos are incorporated into the Complaint.<sup>6</sup>

16 Because the contents of Mr. Teixeira’s videos are part of the City’s pleading,  
 17 the City’s allegations that these works are “unaltered copies” of “entire” “verbatim”  
 18 City Council meeting videos (Opp. at 14), must be disregarded. “In copyright  
 19 infringement actions, the works themselves supersede and control contrary  
 20 descriptions of them, including any contrary allegations, conclusions or descriptions  
 21 of the works contained in the pleadings.” Peter F. Gaito Architecture, 602 F.3d at 64  
 22 (quotations omitted). This is not unique to copyright: when ruling on any motion to  
 23 dismiss under Rule 12(b)(6), the Court is “not required to accept as true conclusory  
 24

25 <sup>6</sup> See also Burnett, 491 F. Supp. 2d at 966 (allegedly infringing work  
 26 incorporated by reference); Campbell v. Walt Disney Co., 718 F. Supp. 2d 1108,  
 27 1111 n.3 (N.D. Cal. 2010) (same); Felix the Cat Prods. v. New Line Cinema, 2000  
 28 U.S. Dist. LEXIS 21763, at \*4 (C.D. Cal. May 1, 2000) (same); Savage, 2008 U.S.  
 Dist. LEXIS 60545, at \*6 (same); Arrow Productions, LTD. v. Weinstein Co. LLC,  
 44 F. Supp. 3d 359, 363 (S.D.N.Y. 2014) (same); Allen v. Scholastic, 739 F. Supp.  
 2d 642, 645 n.1 (S.D.N.Y. 2011) (same).

1 allegations which are contradicted by documents referred to in the complaint.”  
 2 Steckman, 143 F.3d at 1295-96. See also Gonzalez v. Planned Parenthood of L.A.,  
 3 759 F.3d 1112, 1115 (9th Cir. 2014) (if “documents incorporated by reference into  
 4 the complaint conflict with allegations in the complaint, we need not accept those  
 5 allegations as true”). Thus the allegations in the City’s Complaint are only “deemed  
 6 true to the extent that they are consistent with the works themselves.” Allen, 739 F.  
 7 Supp. 2d at 645 n.1 (emphasis added). See also Adjmi v. DLT Entertainment Ltd., --  
 8 - F. Supp. 3d ----, 2015 WL 1499575, at \*13 (S.D.N.Y. 2015) (“the Court’s decision  
 9 is predicated on its review of the raw materials, not the parties’ proverbial labels”;  
 10 finding fair use at pleading stage in copyright infringement action).

11 The City’s own authority on this point supports Mr. Teixeira’s position. In  
 12 Meeker v. Belridge Water Storage Dist., 2006 U.S. Dist. LEXIS 91775 (E.D. Cal.  
 13 Oct. 23, 2006), the court took judicial notice of a contract that was referenced in the  
 14 complaint, explaining that “a court may take judicial notice of a document relied  
 15 upon in the complaint and/or matters of public record outside the pleadings, without  
 16 converting a motion to dismiss into a motion for summary judgment.” Id. at \*26.  
 17 The City erroneously relies on other cases in which incorporation by reference was  
 18 not even at issue. E.g., LaSalle Nat. Bank v. First Connecticut Holding Group,  
 19 L.L.C. XXIII, 287 F.3d 279, 282 (3d Cir. 2002) (court imposed sanctions by  
 20 improperly judicially noticing the contents of a telephone conversation).<sup>7</sup>

21 The City cannot rely on inapposite cases in which there were specific reasons  
 22 to doubt that items submitted were the same ones referenced in the complaint; none  
 23 involve a situation like this where the plaintiff links to the works in its own pleading.

24  
 25 <sup>7</sup> Am. Prairie Const. Co. v. Hoich, 560 F.3d 780, 796-98 (8th Cir. 2009), Point  
 26 Ruston, LLC v. Pac. Northwest Regional Council of the United Broth. of Carpenters  
 27 and Joiners of America, 658 F. Supp. 2d 1266, 1279 (W.D. Wash. 2009), United  
 28 States v. S. Cal. Edison Co., 300 F. Supp. 2d 964, 974-76 (E.D. Cal. 2004), and  
Korematsu v. United States, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984), all cited by  
 the City (Opp. at 6-7), are similarly irrelevant as none of these cases address  
 incorporation by reference.

1 Opp. at 23.<sup>8</sup> For this same reason, the City cannot question the accuracy of these  
 2 videos: it provided the URL addresses for the YouTube pages that display them, and  
 3 it alleges that Mr. Teixeira made them available on those pages and that those videos  
 4 constitute the purported infringement at issue. Cmplt. ¶ 19. These are “judicial  
 5 admissions” which are binding on the City. American Title Ins. Co. v. Lacelaw  
 6 Corp., 861 F.2d 224, 226 (9th Cir. 1988) (“[f]actual assertions in pleadings ... are  
 7 considered judicial admissions conclusively binding on the party who made them”);  
 8 see also Faust v. Travelers, 55 F.3d 471, 474 (9th Cir. 1995) (party bound by judicial  
 9 admission in complaint). Bound by its own admissions, the City cannot now deny  
 10 that these are the videos at issue in this case.<sup>9</sup>

11 Nor can the City claim that its Complaint is “incomplete” and speculate that  
 12 other unidentified infringing works might hypothetically exist. Opp. at 23. The  
 13 court rejected this same argument in Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124  
 14 (C.D. Cal. 2007). As the City does here, the plaintiffs in that case tried to oppose  
 15 dismissal under Rule 12(b)(6) with “speculation” that some episodes of the  
 16 defendant’s television show that were “not before the Court may contain infringing  
 17 content.” Id. at 1132. The court explained that “as masters of their Complaint,  
 18 Plaintiffs must allege the best facts for their case,” and “[p]resumably, Plaintiffs have  
 19

20  
 21 <sup>8</sup> See In re Easysaver Rewards Litig., 737 F. Supp. 2d 1159, 1168-69, n.5 (S.D.  
 22 Cal. 2010) (case concerned “the dynamic nature of internet shopping” and the web  
 23 pages at issue were “programmed to rotate” different relevant images at different  
 24 times); Hancock v. Hartford Life & Accident Ins. Co., 2006 U.S. Dist. LEXIS 39774,  
 25 at \*11-12 (E.D. Cal. June 14, 2006) (refusing to consider insurance plan defendants  
 26 submitted for first time on reply because of reasons to question its accuracy); Car-  
 27 Freshner Corp. v. Getty Images, Inc., 822 F. Supp. 2d 167, 175 (N.D.N.Y. 2011)  
 28 (unclear if web pages submitted in trademark and unfair competition action were the  
 same pages viewed by consumers in the relevant time period in the complaint).

<sup>9</sup> The City has not submitted any evidentiary objections and thus it effectively  
 concedes the authenticity of the videos in Exhibit A and screenshots in Exhibit B, as  
 it must. But Mr. Teixeira has properly authenticated these exhibits in any event. See  
 Teixeira Decl. ¶¶ 2-4; United States v. Kaipat Pelisamen, 641 F.3d 399, 411 (9th Cir.  
 2011) (“evidence may be authenticated by the testimony of a witness with knowledge  
 of the matter in question”) (citing Fed. R. Evid. 901(b)(1)).



1 done so by alleging the content of the episodes they believe most substantially  
 2 resemble” their work. Id. The same is true here, as the City chose to identify the six  
 3 allegedly infringing works at issue. It cannot evade dismissal by running away from  
 4 the facts that it chose to allege.

5 **b. Dismissal At The Pleading Stage Is Proper In This Case.**

6 The City cites no authority to support its request to convert Mr. Teixeira’s  
 7 Motion to Dismiss into one for summary judgment under Rule 56. Opp. at 3. It  
 8 overlooks cases holding that it is proper to dismiss a copyright infringement action at  
 9 the pleading stage where, as here, it is a clear case of fair use and no factual issues  
 10 need to be decided. E.g., Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 530  
 11 (9th Cir. 2008) (“assertion of fair use may be considered on a motion to dismiss”).

12 In this respect, this case is directly analogous to Burnett, in which the court  
 13 granted the defendants’ Rule 12(b)(6) motion and dismissed the plaintiff’s copyright  
 14 claim with prejudice. 491 F. Supp. 2d at 971-72. The allegedly infringing video was  
 15 incorporated by reference into the complaint, providing the court with all that it  
 16 needed to determine that it was a fair use as a matter of law. Id.; See also cases cited  
 17 at MTD at 16-17.<sup>10</sup> The Southern District of New York’s recent decision in Adjmi is  
 18 also instructive. There, a playwright sought a declaratory judgment that his parodic  
 19 play made fair use of elements of the television show “Three’s Company.” Id. 2015  
 20 WL 1499575 at \*1. The court resolved the case on the pleadings based on its review  
 21 of DVDs of episodes of “Three’s Company” and the script for the play, which were  
 22 incorporated by reference into the pleadings. Id. at \*13. The court held that the play  
 23 was a protected fair use as a matter of law, and that the playwright’s motion for  
 24 judgment on the pleadings “need not be converted to a motion for summary  
 25 judgment, and further discovery is unnecessary.” Id. at \*14.

26 \_\_\_\_\_  
 27 <sup>10</sup> The case for finding fair use as a matter of law is even stronger here than in  
 28 Burnett, as even apart from the content of the videos, California law makes clear that  
 there can be no commercial market at all for the City’s videos of its City Council  
 meetings. See Section II.B.2.d.

1 Likewise, in Arrow Productions, LTD. v. Weinstein Co. LLC, 44 F. Supp. 3d  
 2 359 (S.D.N.Y. 2014), the court held at the pleading stage that the defendant’s film  
 3 “Lovelace” made fair use of parts of the plaintiff’s film “Deep Throat.” Id. at 363.  
 4 The court rejected the plaintiff’s argument that the court “should not make a fair use  
 5 determination at this stage in the litigation, because there are factual questions that  
 6 must be addressed through discovery.” Id. at 367. In terms that apply equally to this  
 7 case, the court explained that “there is a complete factual record before the court and  
 8 discovery would not provide any additional relevant information in this inquiry. All  
 9 that is necessary for the court to make a determination as to fair use are the two films  
 10 at issue.” Id. at 368. See also Brownmark, 682 F.3d at 691-92 (copyright claim  
 11 properly dismissed at the pleading stage on basis of fair use without any discovery).<sup>11</sup>

12 Indeed, the City does not identify any factual issue that needs to be developed  
 13 through discovery before Mr. Teixeira’s fair use defense can be resolved. Opp. at 23.  
 14 As in the cases discussed above, this is an “obvious case of fair use” (Brownmark,  
 15 682 F.3d at 692), in which it is clear from reviewing the City’s original City Council  
 16 meeting videos and Mr. Teixeira’s works that his videos are highly transformative  
 17 political commentaries, and that all four factors overwhelmingly favor a finding of  
 18 fair use. See MTD at 17-25; Section II.B.2, infra. Moreover, under the unique  
 19 circumstances of this case, this Court could even hold that Mr. Teixeira’s videos are  
 20 protected by fair use without reviewing them. As California law expressly bars the

21 \_\_\_\_\_  
 22 <sup>11</sup> In Brownmark, the Seventh Circuit affirmed the dismissal of the Complaint  
 23 under Rule 12(b)(6), but found that it should have been treated as a Rule 56 motion.  
 24 Id. at 692. This was based on the panel’s conclusion that the Seventh Circuit had not  
 25 yet endorsed incorporation by reference of videos, while it specifically noted that  
 26 courts in the Ninth Circuit have held that dismissal under Rule 12(b)(6) is proper on  
 27 that basis. Id. at 691 (citing Burnett, 491 F. Supp. 2d at 966; Zella, 529 F. Supp. 2d  
 28 at 1131-32; Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1121-22 (N.D. Cal. 2002)).  
 The Seventh Circuit subsequently held that videos can be incorporated by reference  
 and considered on a Rule 12(b)(6) motion. See Bogie v. Rosenberg, 705 F.3d 603,  
 609 (7th Cir. 2013). And in any event, the court in Brownmark held that even under  
 a Rule 56 standard, the plaintiff was still not entitled to any discovery because it was  
 clear from the videos themselves that it was “an obvious case of fair use” that could  
 be decided “without discovery or a trial.” Brownmark, 682 F.3d at 692.

1 City from profiting from recordings of its public meetings, there is no commercial  
 2 market for them as a matter of law. See MTD at 13, 23-24; Section II.B.2.d, infra.  
 3 The City also concedes that Mr. Teixeira “adulterates” its meeting videos “by  
 4 manipulating [them] and adding derogatory comments” to “criticize the City,”  
 5 effectively admitting that they are transformative works. Opp. at 1, 8.

6 Because this Court can hold that Mr. Teixeira’s videos are protected by fair  
 7 use based on the pleadings, the videos incorporated by reference therein, and  
 8 California law, without having to resolve any disputed factual issues, it is proper to  
 9 dismiss the Complaint under Rule 12(b)(6). And even assuming for the sake of  
 10 argument that the Court was inclined to treat Mr. Teixeira’s Motion as one under  
 11 Rule 56, this matter can still be resolved at this early stage based on the Complaint  
 12 and the parties’ current submissions. Because the City cannot identify any disputed  
 13 factual issue that is necessary to the fair use inquiry, its request for discovery must be  
 14 denied for lack of good cause. See New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090,  
 15 1101 (C.D. Cal. 2004) (party seeking discovery to oppose Rule 56 motion must show  
 16 that discovery is “essential to its opposition”); Brownmark, 682 F.3d at 691  
 17 (“discovery would only follow a Rule 56 motion if the district court granted a request  
 18 for discovery. District courts need not, and indeed ought not, allow discovery when  
 19 it is clear that the case turns on facts already in evidence”).

## 20 **2. Each Statutory Factor Favors A Finding Of Fair Use.**

21 It is apparent from reviewing Mr. Teixeira’s videos that they are highly  
 22 transformative political commentaries that use brief, heavily modified clips from the  
 23 City’s public meeting videos to criticize Inglewood officials for their statements and  
 24 conduct at these official proceedings. See Cmplt. ¶ 19; Ex. A; MTD at 5-8, 17-25.  
 25 Disregarding the City’s “conclusory allegations which are contradicted by documents  
 26 referred to in the complaint,” Steckman, 143 F.3d at 1295-96, and focusing on “the  
 27 works themselves,” Peter F. Gaito Architecture, 602 F.3d at 64, it is clear that all four  
 28 factors favor a finding of fair use.



1                   **a.     The Purpose And Character Of The Use**

2           The City overlooks virtually all of the cases cited in Mr. Teixeira’s Motion that  
3 found fair use in analogous situations involving transformative works of political  
4 criticism. Compare MTD at 18-21 with Opp. at 10-12.

5           The decisions that the City does rely on are readily distinguishable. For  
6 example, Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998),  
7 involved a service that simply retransmitted the plaintiff’s “unaltered radio  
8 broadcasts” over the telephone. Id. at 108. The defendant likened its own service “to  
9 a library photocopy machine,” id. at 112,<sup>12</sup> and the “retransmissions [left] the  
10 character of the original broadcasts unchanged. There [was] neither new expression,  
11 new meaning nor new message. In short, there [was] no transformation.” Id. at 108  
12 (quotation and citation omitted). Courts have repeatedly distinguished Infinity  
13 Broadcasting in cases such as this one, explaining that it merely involved a “change  
14 of format.” Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596,  
15 607 (9th Cir. 2000). See also Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146,  
16 1165 (9th Cir. 2007) (unlike the “simple retransmission” in Infinity Broadcasting,  
17 “Google uses Perfect 10’s images in a new context to serve a different purpose”).<sup>13</sup>

18           Likewise, in Los Angeles Times v. Free Republic, 2000 WL 565200 (C.D.  
19 Cal. Apr. 4, 2000), the defendant re-posted “the entire text of articles” including  
20 “verbatim copies of articles from the Los Angeles Times and Washington Post  
21 websites.” Id. at \*1. The defendant’s own evidence showed “that, generally, exact  
22 copies of whole or substantial portions of articles [were] posted.” Id. at \*6.  
23 Moreover, the defendant re-posted the articles to inform its readers of “the news of  
24

25                   <sup>12</sup> Two of the cases that the City relies on literally involved photocopying. See  
26 Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 924 (2d Cir. 1994); Basic  
Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991).

27                   <sup>13</sup> Similarly, Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166  
28 F.3d 65 (2d Cir. 1999), concerned abstracts that presented “direct translations of ...  
articles” that “added almost nothing new in their works.” Id. at 72.

1 the day,” not to criticize “the manner in which the media reports that news” – thus  
 2 the defendant’s work served the same purpose as the original. Id. at \*10.

3 By contrast, Mr. Teixeira’s videos plainly use short clips from lengthy City  
 4 Council meetings heavily modified and interspersed with original text and audio, for  
 5 the entirely different purpose of criticizing officials for their conduct at these  
 6 proceedings. See MTD at 4-7, 18-21; Exs. A-F. This Court has held that this exact  
 7 type of modification renders a video transformative and protected by fair use,  
 8 Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform, 868 F.  
 9 Supp. 2d 962, 978 (C.D. Cal. 2012), and the Ninth Circuit has held that even “entire  
 10 verbatim reproductions are justifiable where the purpose of the work differs from the  
 11 original,” Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 803 n.8 (9th Cir. 2003).

12 The City does not address these on-point authorities. Opp. at 10-12. It simply  
 13 repeats its allegations about Mr. Teixeira’s videos being “untransformed copies” that  
 14 “merely republished substantially all of Plaintiff’s unaltered videotapes of its Council  
 15 meetings.” Opp. at 11-12. These allegations must be disregarded because they are  
 16 contradicted by the videos themselves. Peter F. Gaito Architecture, 602 F.3d at 64;  
 17 Steckman, 143 F.3d at 1295-96. Indeed, the City admits that Mr. Teixeira  
 18 “adulterates” the meeting clips by “manipulating and adding derogatory comments  
 19 ... overlaid on top” of them in order “to criticize the City.” Opp. at 1, 8, 11. By  
 20 these arguments, the City effectively concedes the transformative nature of the  
 21 allegedly infringing videos, which makes this a clear case of fair use.<sup>14</sup>

22  
 23 <sup>14</sup> The City’s claim that simply “linking to” its public meeting videos would be  
 24 sufficient assumes that it posts the videos online, but it does not allege this in the  
 25 Complaint. Opp. at 1. Moreover, this argument was squarely rejected in Savage v.  
 26 Council on American-Islamic Relations, 2008 U.S. Dist. LEXIS 60545 (N.D. Cal.  
 27 2008), where the court explained that “it was not unreasonable for defendants to  
 28 provide the actual audio excerpts, since they reaffirmed the authenticity of the  
 criticized statements and provided the audience with the tone and manner in which  
 plaintiff made the statements.” Id. at \*15. The same is true here as Mr. Teixeira’s  
 videos comment on the Mayor’s “tone and manner” and criticize particular  
 statements made at the City Council meetings. See Ex. A. The City does not dispute  
 that its meeting videos last for several hours (see MTD at 4-5, Exs. C-F). Linking to  
 an entire video would not identify the particular statements and conduct at issue.

1                   **b.     The Nature Of The Allegedly Copyrighted Works**

2           The City misconstrues this aspect of the fair use inquiry. It cites Feist  
3 Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991), and  
4 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), but those cases  
5 merely held that the works at issue were subject to copyright as a threshold matter;  
6 they did not address fair use. Indeed, the Court noted in Feist that while the  
7 telephone directory at issue could be copyrighted, “the copyright in a factual  
8 compilation is thin.” 499 U.S. at 349. Thus subsequent courts have held that the  
9 “scope of fair use is greater” when these “‘informational’ ... works are involved.”  
10 Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153-54 (9th Cir.  
11 1986) (quotation omitted). The City overlooks this decisive point. Opp. at 12-13.

12                   **c.     The Amount And Substantiality Used**

13           The City’s treatment of the third factor is based on erroneous characterizations  
14 of Mr. Teixeira’s videos which are contradicted by the works themselves and must be  
15 disregarded. Opp. at 13-14; Peter F. Gaito Architecture, 602 F.3d at 64; Steckman,  
16 143 F.3d at 1295-96. It is plain from reviewing the videos, which use short, heavily  
17 modified clips of City Council meetings for harsh political criticism (Ex. A), that Mr.  
18 Teixeira is not “republishing unaltered copies” of the original videos or “archiving  
19 verbatim copies of Plaintiff’s entire works.” Opp. at 14. As discussed above, the  
20 City itself acknowledges that Mr. Teixeira “adulterates” and “manipulate[es]” the  
21 meeting clips “to criticize the City.” Opp. at 1, 8, 11.

22           The City also misconstrues Mr. Teixeira’s Motion, which does not argue that  
23 he takes “verbatim fifteen minute ‘clips’” from the meeting videos. Opp. at 13. His  
24 videos last between three and 15 minutes, most of which consists of original content  
25 and commentary; the longest any Council meeting clip runs without audio or visual  
26 modification by Mr. Teixeira is a little over a minute, while most of the unaltered  
27 clips are far less than a minute. See MTD at 22-23; Ex. A. Meanwhile, the City does  
28 not deny that its underlying City Council meeting videos last between two hours and

1 37 minutes and four hours and forty minutes. See MTD at 4-5; Exs. C-F. As Mr.  
 2 Teixeira has used very brief clips from very long City Council meeting videos, and  
 3 the amount used is “reasonable in relation to the purpose” of his political criticism,  
 4 this factor strongly favors a finding of fair use. See Campbell v. Acuff-Rose Music,  
 5 Inc., 510 U.S. 569, 586 (1994).

6 **d. The Effect On The Market**

7 In addressing the fourth factor, the City mischaracterizes both the videos at  
 8 issue and the governing law.

9 First, the City concedes, as it must, that its video recordings of City Council  
 10 meetings are public records, and California law prohibits it from making money from  
 11 the distribution of these videos. See Opp. at 14-15; Cmplt. ¶ 16; MTD at 23-24. It  
 12 claims that it “has spent funds to have its Council meetings videotaped, and it can  
 13 recoup its expenses. Thus, there is harm to the City via its inability to recoup its  
 14 expenses.” Opp. at 15. However, the CPRA limits public agencies to charging no  
 15 more than the “direct costs of duplication” for copies of public records. Cal. Gov’t  
 16 Code § 6253(b) (emphasis added). “The direct cost of duplication is the cost of  
 17 running the copy machine, and conceivably also the expense of the person operating  
 18 it. ‘Direct cost’ does not include the ancillary tasks necessarily associated with the  
 19 retrieval, inspection and handling of the file from which the copy is extracted.”  
 20 North County Parents Org. v. Dep’t of Education, 23 Cal. App. 4th 144, 148 (1994).

21 A public agency’s “expenditures in addition to the copying charges” are  
 22 “nonreimbursable indirect costs [that] are not significant in light of [its]  
 23 constitutionally mandated governmental function to disclose public records.” Los  
 24 Angeles Unified School Dist. v. Superior Court, 151 Cal. App. 4th 759, 770 (2007).

25 The City would therefore be violating the law if it used fees for copies of its  
 26 public meeting videos to recoup its expenses from videotaping those meetings. Id.<sup>15</sup>

27 \_\_\_\_\_  
 28 <sup>15</sup> That the City can only charge fees to recover the cost of copying the videos  
 and not for making them in the first place is underscored by Cal. Gov’t Code §

1 Because it is only permitted to charge the direct cost of duplication, the only effect  
 2 that a third-party's distribution of the City's public meeting videos could possibly  
 3 have would be to relieve the City of its copying costs. Consequently, there can be no  
 4 economic harm to the City here as a matter of law and this factor strongly favors fair  
 5 use even without any reference to the content of the videos at issue.<sup>16</sup>

6 Second, the City overlooks Mr. Teixeira's other dispositive argument, that his  
 7 acerbic videos criticizing City officials are obviously no substitute for the City's  
 8 unvarnished, gavel-to-gavel recordings of its City Council meetings. Compare MTD  
 9 at 24 with Opp. at 14-15. The City recognizes that Mr. Teixeira "adulterates" the  
 10 Council meeting clips "by manipulating and adding derogatory comments" in order  
 11 "to criticize the City." Opp. at 1, 8. Assuming that there could be a market for the  
 12 City's videos, it is objectively unreasonable to conclude that the same viewers  
 13 looking for a straightforward document of the week's City Council proceedings  
 14 would turn instead to Mr. Teixeira's strident critiques. See Campbell, 510 U.S. at  
 15 592 ("there is no protectible derivative market for criticism"). Because Mr.  
 16 Teixeira's videos are "not a substitute for the original and do[] not deprive the  
 17 [purported] copyright holder of a derivative use, the fourth factor weighs in favor of  
 18 fair use." Sofa Entm't, Inc. v. Dodger Prods., 709 F.3d 1273, 1280 (9th Cir. 2013).

### 19 **III. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE.**

20 The City is silent as to Mr. Teixeira's showing that its Complaint should be  
 21 dismissed with prejudice. MTD at 25 (citing, inter alia, Steckman, 143 F.3d at 1298;  
 22 Burnett, 491 F. Supp. 2d at 971-72; Savage, 2008 U.S. Dist. LEXIS 60545, at \*25-

23  
 24 54953.5(b), which requires that members of the public be permitted to view public  
 meeting videos "without charge on equipment made available by the local agency."

25 <sup>16</sup> The only case cited by the City, DC Comics Inc. v. Reel Fantasy, Inc., 696  
 26 F.2d 24 (2d Cir. 1982), is inapposite. There, a store's unlicensed use of DC Comics  
 27 characters in its advertisements deprived DC of the opportunity "to balance the  
 28 prospect of increased sales against revenue from a license." Id. at 28. As the City is  
 barred from selling its public records for more than the direct cost of copying them it  
 can neither profit from increased sales nor make money through licensing the works.

1 26). Nor does it request leave to amend in the event of dismissal, or identify any way  
 2 that it could amend to state a valid claim. Dismissal with prejudice is especially  
 3 appropriate here because this lawsuit squarely targets Mr. Teixeira’s political speech,  
 4 raising “the danger that the mere pendency of the action will chill the exercise of  
 5 First Amendment rights.” Franchise Realty Interstate Corp. v. S.F. Local Joint Exec.  
 6 Bd. of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976).

7 As the D.C. Circuit recognized in similar circumstances, “[t]he threat of being  
 8 put to the defense of a lawsuit brought by a popular public official may be as chilling  
 9 to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit  
 10 itself, especially to advocates of unpopular causes ... Unless persons ... desiring to  
 11 exercise their First Amendment rights are assured freedom from the harassment of  
 12 lawsuits, they will tend to become self-censors. And to this extent debate on public  
 13 issues and the conduct of public officials will become less uninhibited, less robust,  
 14 and less wide-open, for self-censorship affecting the whole public is ‘hardly less  
 15 virulent for being privately administered.’” Washington Post Co. v. Keogh, 365 F.2d  
 16 965, 968 (D.C. Cir. 1966). This meritless, censorious lawsuit should end now.

#### 17 **IV. THE CITY’S REQUEST FOR FEES SHOULD BE STRICKEN.**

18 If this case does proceed, then the City’s request to recover its attorneys’ fees  
 19 should be stricken because it is foreclosed by 17 U.S.C. § 412. See MTS at 5-8. The  
 20 City does not address Mr. Teixeira’s argument, and thereby concedes, that it is not  
 21 entitled to recover its attorneys’ fees pursuant to Section 505 of the Copyright Act  
 22 because such fees are not available where, as here, the works at issue were not  
 23 registered when the infringement commenced or within three months of the works’  
 24 first publication. MTS at 5-8; see, e.g., Said v. Cnty. of San Diego, 2013 WL  
 25 2120866, at \*3 (S.D. Cal. May 15, 2013) (“[S]ince Plaintiff has not addressed the  
 26 merits of Defendants’ argument, the court assumes that plaintiff concedes this  
 27 point.”). Instead, the City contends that Rule 12(f) does not authorize the striking of  
 28 the City’s request for attorneys’ fees, relying on Whittlestone, Inc. v. Handi-Craft



1 Co., 618 F.3d 970, 974 (9th Cir. 2010). Opp. at 19-20. Whittlestone, however, does  
2 not apply in this case.

3 In Whittlestone, the Ninth Circuit reversed a district court’s decision to strike  
4 the plaintiff’s claim for lost profits and consequential damages, holding that the  
5 plaintiff’s claims for damages were not encompassed within the categories of matters  
6 that may be stricken pursuant to Rule 12(f), and could not be considered immaterial  
7 “because whether these damages are recoverable relates directly to the plaintiff’s  
8 underlying claim for relief.” 618 F.3d at 974. The court agreed that “courts may not  
9 resolve ‘disputed and substantial factual or legal issue[s] in deciding ... a motion to  
10 strike.’” Id. at 973 (citation omitted). The case did not involve a request to strike a  
11 request for attorneys’ fees under Rule 12(f), and the court did not address the issue.

12 Here, unlike the damages requested in Whittlestone, the City’s request for  
13 attorneys’ fees does not “relate[] directly to the plaintiff’s underlying claim for  
14 relief.” Id. at 974. To the contrary, the fee request is ancillary to the City’s copyright  
15 infringement claim. See United States v. Ford, 650 F.2d 1141, 1144 (9th Cir. 1981)  
16 (“the question of attorney’s fees is ancillary to the underlying action and survives  
17 independently under the Court’s equitable jurisdiction.”). Indeed, in his Motion to  
18 Strike, Mr. Teixeira included several cases, which the City ignores in its Opposition,  
19 demonstrating that courts have routinely struck requests for attorneys’ fees post-  
20 Whittlestone. See MTS at 4-5 (citing, *inter alia*, N. Cal. River Watch v. Fluor Corp.,  
21 2014 U.S. Dist. LEXIS 141198, at \*2 n.1, 10-11 (N.D. Cal. Oct. 2, 2014) (“[b]ecause  
22 the fees requests do not comprise any one cause of action, a motion to strike is the  
23 appropriate vehicle to address them.”); Dos Santos v. Telemundo Commc’ns Grp.,  
24 LLC, 2012 WL 9503003, at \*7 (C.D. Cal. Dec. 19, 2012) (striking request for  
25 attorneys’ fees for failure to satisfy Section 412 requirements)).

26 Further, Whittlestone also does not apply because the Court need not decide  
27 any disputed factual or legal issues. As mentioned above, the City does not dispute –  
28 nor can it – that Section 412 of the Copyright Act bars it from recovering its

1 attorneys' fees in this action because the Copyright Office received the City's  
2 copyright registrations on February 3, 2015, which is after the commencement of the  
3 purported infringement, and beyond three months after first publication of the works.  
4 See Supplemental Request for Judicial Notice ("SRJN"), Dkt. # 16, at 1; Ex. G.

5 The City concedes that these copyright registration applications are  
6 incorporated by reference into the Complaint, and it has not opposed the SRJN. Opp.  
7 at 23; Cmplt. ¶ 14. Consequently, not only has the City failed to allege that it timely  
8 registered the underlying works here, but it is apparent from the Complaint itself that  
9 it did not do so. See MTS at 7-8. Therefore, the Court should grant Mr. Teixeira's  
10 Motion and strike the City's request for attorneys' fees with prejudice.

11 Alternatively, if the Court finds that Mr. Teixeira's Motion "is in substance a  
12 Rule 12(b)(6) motion, but is incorrectly denominated as a Rule 12(f) motion, [the  
13 Court] may convert the improperly designated Rule 12(f) motion into a Rule 12(b)(6)  
14 motion." Consumer Solutions REO, LLC v. Hillery, 658 F. Supp. 2d 1002, 1021  
15 (N.D. Cal. 2009) (citations omitted). See also Yeager v. Corr. Corp. of Am., 2012  
16 U.S. Dist. LEXIS 43029, at \*6, 11-12 (E.D. Cal. Mar. 28, 2012) (converting Rule  
17 12(f) motion to Rule 12(b)(6) motion and striking request for punitive damages).

18 Even under the Rule 12(b)(6) standard, the City's request for attorneys' fees  
19 fails as a matter of law. As discussed above, the City has waived any argument to the  
20 contrary by ignoring the substance of Mr. Teixeira's Motion. See Said, 2013 WL  
21 2120866, at \*3. Moreover, the City has not alleged that it timely registered the  
22 underlying works as required under Section 412 and Section 505. MTS at 3. And  
23 the copyright registration applications incorporated by reference in the Complaint  
24 show conclusively that it failed to do so. Id. at 7-8; SRJN at 1, Ex. G. As a result, if  
25 the Court converts Mr. Teixeira's Motion to Strike into a Motion to Dismiss, the  
26 City's request for attorneys' fees should be dismissed without leave to amend.

27 ///

28



V. CONCLUSION

With this lawsuit, the City seeks “to impose speech restrictions under copyright laws meant to foster rather than repress free expression.” Garcia, 2015 WL 2343586, at \*1. The City has no cognizable copyright interest in videos of its City Council public hearings and is impermissibly using the Copyright Act to punish Mr. Teixeira for exercising his First Amendment right to criticize public officials. The very pendency of this litigation is chilling constitutionally protected speech. Mr. Teixeira respectfully requests that this Court bring a swift end to this action by dismissing the City’s Complaint in its entirety, with prejudice.

DATED: June 5, 2015

DAVIS WRIGHT TREMAINE LLP  
THOMAS R. BURKE  
DAN LAIDMAN  
DIANA PALACIOS

By: /s/ Dan Laidman  
Dan Laidman

Attorneys for Defendant  
Joseph Teixeira

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