

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
EMI RECORDS LIMITED and CAPITAL :
RECORDS, LLC, :

Plaintiffs, :

-against- :

PREMISE MEDIA CORPORATION, L.P., :
C&S PRODUCTION L.P. d/b/a :
RAMPANT FILMS, PREMISE MEDIA :
DISTRIBUTION L.P. and ROCKY :
MOUNTAIN PICTURES, INC., :

Defendants. :

----- X

Index No. 601209/08

Commercial Division

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Julie Ahrens
Anthony Falzone (*pro hac vice* pending)
Center for Internet and Society
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 736-9050 Telephone

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4 Nimmer on Copyright § 13.03(2)7

*Mark A. Lemley and Eugene Volokh, Freedom of Speech and Injunctions in
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Pierre N. Leval, Toward a Fair Use Standard,
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PRELIMINARY STATEMENT

Defendants Premise Media Corporation, C&S Production LP, Premise Media Distribution LP, and Rocky Mountain Pictures, Inc. ("Defendants") are the producers and distributors of *EXPELLED: No Intelligence Allowed* ("*Expelled*" or the "Film"). *Expelled* is a controversial film about a highly contentious issue – whether proponents of intelligent design are being unfairly silenced in academia and beyond. The Film was released on April 18, 2008 on more than 1,000 screens nationwide.

Plaintiffs EMI Records Ltd. and Capitol Records LLC ("Plaintiffs") ask this Court to issue an injunction that would result in the withdrawal of the Film in hundreds of theaters across the country. The basis for this extraordinary request is the fact *Expelled* uses a fifteen second portion of the song *Imagine*, written and performed by the late John Lennon. Plaintiffs demand the deletion of this fifteen second clip on the ground it infringes their copyrights.

Plaintiffs fall well short of meeting the burden they must meet here. They fail to present anything but the most conclusory evidence of copyright ownership, and provide literally no authority holding that a fragmentary copy of a sound recording constitutes actionable "reproduction" under New York law. In any event, the quotation of a small portion of a copyrighted work for the purpose of criticism and commentary has long been protected by the fair use doctrine, both in New York common law and federal copyright law. *Expelled* criticizes the overtly anti-religious message that *Imagine* embodies, both explicitly and by implication, and uses precisely the ten words of the song the Film needs to make its point. Plaintiffs also fail to show irreparable harm. Lost licensing revenue is obviously compensable by money damages, and their asserted right to control the use of *Imagine* is nothing more than the right to control criticism of the song and the ideas it represents. Defendants' free speech rights are at stake here. The injunction Plaintiffs demand would literally censor debate over an important public issue, to

say nothing of the significant economic harm that would result were Defendants forced to re-cut the film in theaters, or on DVD.

Plaintiffs simply do not meet the very high burden they must discharge in order to obtain a mandatory injunction that would silence expressive speech on an issue of national public importance. Plaintiffs' preliminary injunction motion should be denied.

ARGUMENT

I. Plaintiffs Must Meet An Exceedingly High Burden To Justify An Injunction Suppressing Expressive Speech On An Important Public Issue

A party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; and (3) a balance of equities in the movant's favor. *See W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981). That burden becomes higher still when an injunction would restrain expressive speech. *See Pocket Books, Inc. v. Dell Publ'g Co.*, 267 N.Y.S.2d 269, 273-274 (N.Y. Spec. Term 1966); *Quinn v. Johnson*, 381 N.Y.S.2d 875, 877-888 (N.Y. App. Div. 1976).

The injunction that Plaintiffs seek here is particularly extraordinary. It does not seek to maintain the status quo. It would upset it radically by forcing Defendants to pull *Expelled* out of hundreds of theaters nationwide, and delete part of the Film. In doing so, it would silence expressive speech on a controversial issue of great national importance, and restrict the manner in which the creators of the Film are allowed to express themselves. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980) ("burden of supporting an injunction against a future exhibition [of a motion picture] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication"); *Pocket Books, Inc.*, 267 N.Y.S.2d at 273-274 (in considering an application for preliminary injunction regarding speech, the

“public interest in an unhampered flow of ideas and information, a tenet basic to our society, must be weighed and considered, and ultimately prevail absent proof of unusual circumstances.”)

This First Amendment concern does not disappear simply because a copyright has been asserted. In the copyright context, First Amendment and free speech interests are protected by the fair use doctrine – a critical “First Amendment safeguard[]” designed to prevent copyright law from unduly burdening free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-65 (11th Cir. 2001). In light of the free speech, First Amendment and expressive interests fair use protects, courts must be exceedingly cautious in granting provisional relief over a colorable fair use defense. *See Campbell*, 510 U.S. at 578, n.10 (urging caution against injunctive relief over “reasonable contentions of fair use”) (internal citations omitted); *Suntrust*, 268 F.3d at 1265 (reversing preliminary injunction; courts must be cautious in granting injunctions over a “colorable fair-use defense”); Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Copyright Cases*, 48 Duke L. J. 147 (1998) (preliminary injunctions in copyright and trademark cases should be subject to traditional First Amendment analysis as prior restraints on speech).

II. Plaintiffs Cannot Show Likelihood Of Success On Their Claim For Infringement Of Common Law Copyright

A. Plaintiffs Have Not Established A Prima Facie Case Of Infringement

New York protects sound recordings fixed before February 15, 1972 via common-law copyright. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 559-60 (2005).¹ The elements of a common-law claim of copyright infringement are “(1) the existence of a valid

¹ Sound recordings fixed on or after February 15, 1972 are subject to protection under the federal Copyright Act. *See* 17 U.S.C. § 301(c); *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 477-78 (2d Cir. 2004); *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 559-60 (2005).

copyright; and (2) unauthorized reproduction of the work protected by the copyright.” *Naxos*, 4 N.Y.3d at 563, 797 N.Y.S.2d at 368. Plaintiffs have not established either element here.

1. Plaintiffs Submit No Evidence Of Ownership

To proceed on their infringement claim, Plaintiffs must show that they own a valid copyright. *See Naxos*, 4 N.Y.3d at 563. Here, Plaintiffs assert they own the common law copyrights in the *Imagine* Recording, but the only evidence Plaintiffs offer on that issue is a conclusory assertion from EMI Senior Vice President Alasdair J. McMullan, who states that “EMI owns the *Imagine* Recording by virtue of a contract entered into by EMI’s predecessor-in-interest with the members of the Beatles.” Declaration of Alasdair J. McMullan in Support of Plaintiffs’ Motion for a Preliminary Injunction ¶ 8. He does not state EMI owns any copyrights in the Recording, and Plaintiffs provide no document(s) that would establish ownership of any copyrights in the Recording. *See id.* Accordingly, Plaintiffs fail to submit any evidence that would establish the threshold issue of ownership. *See Naxos*, 4 N.Y.3d at 544 (explaining that artists’ contracts specified that Gramophone would have “absolute, worldwide rights to the performances, including the right to reproduce and sell copies of the performances to the public”).

2. Plaintiffs Fail To Establish Actionable Reproduction Of The *Imagine* Recording

Plaintiffs conclude without analysis that Defendants have “reproduced” the *Imagine* recording without authorization. Pl. Memo at 6. But the length of the *Imagine* clip used in the film is fifteen seconds long. *See* Declaration of John Sullivan in Opposition to Motion for Preliminary Injunction (“Sullivan Dec.”) ¶ 17. Defendants offer literally no authority that an excerpt of this length – or anything less than the reproduction of an entire sound recording – constitutes actionable “reproduction” under New York law.

In *Naxos*, unlawful reproduction was found where the defendants remastered and reproduced entire sound recordings. *See Naxos*, 4 N.Y.3d at 545. Thus, while Plaintiffs report that “New York case law protect[s] sound recordings against unauthorized reproduction,” Pl. Memo at 5, the fact is *Naxos* and all of the cases Plaintiffs cite on this point concern the reproduction of entire sound recordings, not mere excerpts, much less very short ones. *See Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 879, 252 N.Y.S.2d 553, 554 (N.Y. Sup. Ct. 1964) (Defendant produced identical reproductions of full records); *Metropolitan Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 790, 101 N.Y.S. 2d 483, 487 (N.Y. Sup. Ct. 1950) (Defendant produced bootleg records made from Plaintiff’s radio broadcasts of operas); *Apple Corps Ltd. v. Adirondack Group*, 124 Misc. 2d 351, 353, 476 N.Y.S.2d 716, 718 (N.Y. Sup. Ct. 1983) (Defendant engaged in record piracy); *Radio Corp. of Am. v. Premier Albums, Inc.*, 19A.D.2d 62, 63, 240 N.Y.S. 2d 995, 996 (N.Y. App. Div., 1st Dep’t 1963) (Plaintiff had licensed exclusive right to produce and market recordings of the orchestra; Defendant found and produced copies of old recordings before license was made); *Greater Recording Co. v. Stambler*, 144 U.S.P.Q. 547 (N.Y. Sup. Ct. 1965) (Defendant engaged in “record piracy”); *Firma Melodiya v. ZYX Music GmbH*, 882 F. Supp. 1306, 1309 (S.D.N.Y. 1995) (Defendant “forged” album released by Plaintiff); *Rostropovich v. Koch Int’l Corp.*, 34 U.S.P.Q.2d 1609, 1611 (S.D.N.Y. 1995) (full reproductions of Plaintiff’s concerts); *Arista Records, Inc. v. MP3 Bd., Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918, at *1 (S.D.N.Y. 2002) (Defendant pirated copies of records via file-sharing).

Similarly, the authorities *Naxos* itself discusses deal over and over again with appropriations of an entire work. *See, e.g., Naxos*, 4 N.Y.3d at 554 (citing *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 659 (2d Cir. 1955) (reproduction and sale of entire

phonorecords)), 556 (citing *Goldstein v. California*, 412 U.S. 546, 548 (1973) (conviction on 140 counts of criminal piracy)), and 559 (citing *Rosette v. Rainbo Record Mfg. Corp.*, 546 F.2d 461, 462 (2d Cir. 1976) (manufacture and sale of records)).

This long line of authority Plaintiffs rely on suggests the common law protection for sound recordings is limited to piracy – the reproduction of entire recordings that displace sales of the original recordings – not copying mere excerpts in non-competing works. None of these cases holds or suggests that copying fifteen seconds of a sound recording is an unlawful reproduction.

On the contrary, New York courts have recognized that copying a small amount of a copyrighted work – even unpublished text – is not actionable as a reproduction under common law copyright protection. See *Estate of Ernest Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 466 (N.Y. Sup. Ct. 1967). The *Hemingway* court declared that “[b]efore an action [for common law copyright infringement] may be maintained, there must be a showing of a significant appropriation of plaintiffs’ property – significant both in volume and impact.” *Id.*

Recognizing that New York does not recognize fragmentary copying as actionable “reproduction,” Plaintiffs resort to federal law and report that *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-801 (6th Cir. 2005), held any unauthorized use of sounds from a sound recording “no matter how short” constitutes infringement of the copyrights in the sound recording. Pl. Memo at 8. Yet Bridgeport’s holding turned entirely on the specific language of the federal Copyright Act. See *Bridgeport Music*, 410 F.3d at 800-01. *Bridgeport*

therefore provides no insight on whether a fifteen second excerpt constitutes “reproduction” under New York law.²

Naxos itself suggests New York law adopts a test for actionable infringement much different than the test that applies under federal law. That decision noted the elements for an infringement claim under federal law are “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original,” *Naxos*, 4 N.Y.3d at 564 n.10 (citing *Feist Pubs. v. Rural Tel. Serv. Co.*, 499 US 340, 361 (1991)), but set forth a different test for infringement under New York state law: “(1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright.” *Naxos*, 4 N.Y.3d at 563. The Court’s adoption of a different test for common law infringement suggests New York law does not go so far as the federal Copyright Act does in regard to copying parts, or elements, of a sound recording. Rather, the purpose of the New York common law protection is, again, to protect against wholesale duplication of the entire sound recording.

It does not appear that any New York court has held or suggested that copying fifteen seconds from a sound recording is an actionable “reproduction” under New York common law. This should not be the first. The copying at issue here simply does not trigger the interest in preventing wholesale duplication – and the obvious commercial harm that results from it – that lies at the center of the common law copyright protection.

² The *Bridgeport* decision has also been criticized for misinterpreting the text of the federal Copyright Act. See 4 Nimmer on Copyright § 13.03(2)(b) (discussing and criticizing the “error” in *Bridgeport*’s reasoning).

B. Defendants' Use Of Fifteen Seconds Of *Imagine* For The Purpose Of Criticism And Comment Is Protected By Fair Use

1. New York Law Recognizes The Fair Use Defense, As It Must In Order To Comply With First Amendment Safeguards

Plaintiffs contend without support that New York law does not recognize a fair use defense on the ground “fair use is strictly a creature of federal statutory copyright law.” Pl. Memo at 9 (original emphasis). Plaintiffs are wrong twice over. Fair use is not strictly a creature of federal law. New York law recognizes the fair use defense as well, and acknowledges that federal law supplies its contours. *See Estate of Ernest Hemingway*, 53 Misc. 2d at 466 (finding that use of a collection of fragments and quotations was fair use). Nor is fair use an invention of “statutory law.” Pl. Memo at 9. The fair use doctrine is a common law doctrine that dates back literally to the “infancy of copyright protection.” *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). It is essential to achieving the central goals of copyright protection itself because it balances the need to both protect copyrighted material and “to allow others to build upon it.” *Id.* (fair use is “necessary to fulfill copyright’s very purpose”); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107, 1110 (1990).

New York law recognizes fair use by good judgment and necessity. Fair use is a critical “First Amendment safeguard[]” designed to prevent copyright law from unduly burdening free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-65 (11th Cir. 2001). Without this safeguard, New York’s common law copyright regime would trigger First Amendment scrutiny as a regulation of speech. *See Eldred*, 537 U.S. at 221; *Golan v. Gonzales*, 501 F.3d 1179, 1196-97 (10th Cir. 2007) (copyright regulation departing from traditional contours may trigger strict First Amendment scrutiny). Plaintiffs impliedly acknowledge the First Amendment necessity of the fair use defense by

asserting fair use “subsumes and supplants any independent First Amendment analysis.” Pl. Memo at 9 n. 3. This is simply another way of saying that fair use protection is essential to keep common law copyright protection from triggering First Amendment concerns. That is presumably the reason Plaintiffs address the federal law of fair use at great length. See Pl. Memo at 9-21.

2. Fair Use Protects Defendants Here

New York law looks to federal law in defining the contours of fair use. See *Estate of Ernest Hemingway*, 53 Misc. 2d at 466; see Pl. Memo at 9-21 (applying federal law). Here, federal law leaves no doubt defendants are protected by fair use.

a. Purpose And Character Of The Use

The “heart of the fair use inquiry” lies in the first factor – the purpose and character of the use. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006); see also 17 U.S.C. § 107(1). The focus of this analysis is the “transformative” nature of the accused work. See *Campbell*, 510 U.S. at 579; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). Although this factor also considers whether the use is commercial in nature, commercial use is not a dispositive consideration, and the “more transformative the new work, the less will be the significance of other factors, like commercialism.” *Blanch*, 467 F.3d at 254 (quoting *Campbell*, 510 U.S. at 579).

A work is transformative when it does not “merely supersede[] the objects of the original creation,” but rather “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. A work is presumed to be transformative where it criticizes or comments on the copyrighted work. See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) (presumption of transformative purpose arises where defendants use copyrighted work for purpose of criticism or

commentary). Transformative purpose is not, however, limited to commentary or criticism. A work is also transformative where it combines copyrighted expression with original expression to produce a new creative work. *See, e.g., Blanch*, 467 F.3d at 251-52 (finding fair use where painter used portion of fashion photograph as “fodder” for his artistic commentary); *Bill Graham Archives*, 448 F.3d at 608 (finding fair use where Grateful Dead concert posters were reproduced in order to illustrate history of the popular musical group); *Hofheinz v. A & E Television Networks*, 146 F.Supp.2d 442, 446-47 (S.D.N.Y. 2001) (television biography made fair use of film clips to illustrate actor’s career).

Here, there can be no doubt that Defendants used *Imagine* for a transformative purpose, because the Film criticizes *Imagine* and the viewpoint it represents. While *Imagine* may have many layers of meaning, its lyrics suggest an overtly anti-religious message. The first three stanzas urge the listener to imagine a secular world without Heaven or hell or any religion, and implies this is a world where all people can live life in peace and that without religion “the world will be as one.” *See Sullivan Dec.* ¶ 14 and Ex. A. The Film critiques that viewpoint expressly. It uses 10 words from the lyrics of *Imagine* and the music that accompanies them, all lasting fifteen seconds:

Nothing to kill or die for
And no religion too

Sullivan Dec. ¶ 17 and Ex. B.

As the music plays and these lyrics appear on the screen with the words as they’re sung, the film shows a series of four video clips that illustrate what the producers believe to be the fallacy in the worldview *Imagine* would seem to represent. As the Film’s producer John Sullivan explains:

The images provide a layered criticism and commentary of the song building upon each other as the music and lyrics play

underneath. The images demonstrate the social and political process we the filmmakers believe would be required to actualize the ideas promoted by *Imagine*. The first image is a large circle of children in a school-sponsored activity in a classroom followed by an individual little girl spinning in playful bliss. This is followed by a clip of a Soviet national parade at the height of the Cold War echoing how these ideas cannot be maintained without realization in a politicized form. The final stock image clip running over the song is what we the filmmakers believe to be the last step in this process, which is a power grab or a move of "might is right," by a dictator answering to no one. In this case we selected the image of General Secretary of the Communist Party of the Soviet Union, Joseph Stalin.

Sullivan Dec. ¶ 18.

The Film also critiques *Imagine* implicitly. For several minutes before the *Imagine* clip, the Film features interviews with academics, intellectuals and entertainers, all of whom suggest in one way or another that the world be better off without religion, or at least with less of it. See Sullivan Dec. ¶¶ 19, 20 and Ex. C. Following the *Imagine* clip, the Film suggests religion's commitment to transcendental values place limits on human behavior, and that societies that permit "Darwinism to trump all other authorities, including religion" pose a greater threat to human values. *Id.* While one might properly quarrel with the suggestion there is a link between a secular society and fascism, the Film suggests this connection and therefore presents a counterpoint to the secular utopia described in *Imagine*. The Film also uses *Imagine* to trace a chronology. It uses the song to show the secular ideal represented immediately before the *Imagine* clip is not a new idea, and further suggests its been tried before with disastrous results.

In short, the Film not only criticizes *Imagine* and the worldview it represents, it uses *Imagine* as a tool for exploring the consequences of the secular world it envisions. Accordingly, the Film does not use *Imagine* merely to "supersede[] the objects of the original creation" or avoid the drudgery of creating something original. *Campbell*, 510 U.S. at 579. The film uses *Imagine* for the purpose of social critique and commentary. Once this purpose is considered,

there can be no doubt the Film “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579.

The Second Circuit has found transformative purpose based on far less than this. In *Blanch v. Koons*, the Court found a transformative purpose where an artist used a fashion photograph “as fodder for his commentary on the social and aesthetic consequences of mass media.” *Blanch*, 467 F.3d at 253. Koons’ use was transformative because he used Blanch’s photograph as “raw material” to create a new work with a profoundly different meaning and message by adding new expression to the original photograph. *Id.* Here, the transformative purpose is far more compelling. Jeff Koons provided little, if any, direct commentary or criticism of Blanch’s photograph; his main purpose in using it was to present a social critique. *Expelled* uses *Imagine* to not only present a social critique, it holds *Imagine* up for explicit and implicit criticism and discussion, and uses *Imagine* because it typifies the viewpoint the Film criticizes.

In *Bill Graham Archives v. Dorling Kindersley Ltd.*, a publisher reproduced seven concert posters as part of an illustrated history of the Grateful Dead. *See* 448 F.3d at 607. The book included many other concert posters, but the Bill Graham Archives refused to license the seven at issue. *See id.* When the publisher used these seven posters anyhow, the Bill Graham Archives sued for copyright infringement. *See id.* In concluding the publisher’s use of the seven concert posters was transformative, the Second Circuit held that no direct commentary or criticism of the posters was necessary to find a transformative purpose. *See id.* at 609. Rather, the court found a transformative purpose based on the fact the book used the admittedly expressive works as “historical artifacts” that enhanced and illustrated the history of the band.

Id. at 609-10. The Court also premised its finding of transformative purpose on the ground the book combined the seven concert posters with lots of other content, and the posters made up less than 0.20% of the book. *See id.* at 611 (“[W]e are aware of no case where such an insignificant taking was found to be an unfair use of original materials.”). Here, *Imagine* makes up a similarly small portion of the Film – 0.27%. Moreover, the Film uses *Imagine* in a similar context, to contextualize the secular ideal expressed immediately before the clip of *Imagine* by reminding the reader it has long been part of popular culture and imagination. And this is to say nothing of the direct commentary and criticism that creates a “presumption” of transformative purpose. *See, NXIVM*, 364 F.3d at 477.

Plaintiffs contend transformation turns on whether using “copyrighted material was necessary to the asserted purpose of criticism [or] comment” and go on to observe that it was not strictly necessary to use the clip of *Imagine* in the Film. *See* Pl. Memo at 12 (original emphasis). But necessity is not the test. It was not necessary for Jeff Koons to use the legs and feet from Andrea Blanch’s photograph. He could have simply drawn a pair of women’s legs and feet from scratch. It was not necessary for Dorling Kindersley to use the seven concert posters in the book it published about the Grateful Dead. The book contained scores of other concert posters, and it is doubtful anyone would have noticed, much less missed, the six posters the Bill Graham Archives refused to license.

Plaintiffs then report that simply including a “voice-over” does not make the use of *Imagine* transformative. *See* Pl. Memo at 13. But no one claims otherwise. The Film criticizes *Imagine* and the viewpoint it represents, both explicitly and implicitly. It is not simply the “spoken reference” in the film that creates the transformative purpose. *See* Pl. Memo at 13. It is

the critical examination of whether, in fact, the secular world the lyrics of *Imagine* would seem to advocate is, or is not, a better state of humanity.

Plaintiffs go on to suggest that *Byrne v. British Broadcasting Corp.*, 132 F.Supp.2d 229 (S.D.N.Y. 2001), somehow demonstrates that the Film's use of *Imagine* is not transformative. *See* Pl. Memo at 13-14. But *Byrne* has no application here. In that case, the BBC recorded fifty seconds of a song written by an Irish political activist and used it as part of a twenty-minute television news story concerning the arrest of four Irish nationals in Florida on gun-running charges. *See id.* at 234. The song at issue was used as "theme music" by a radio program that was also recorded as part of the news story. The BBC then used a portion of that song as one of three "clean fades," a technique whereby an audio track is used to "ease the viewer" into a new story segment. *See id.* at 232. The BBC articulated no particular purpose in using the song, other than the fact part of its story was about a radio program that uses the song as theme music. Accordingly, the court held there was insufficient evidence to find the BBC's use of the song transformative. *See id.* at 234. Here, there is abundant evidence of transformative purpose in the form of express criticism and social critique.

Finally, Plaintiffs suggest the Film's use of *Imagine* was not transformative because there were "equally informative non-infringing alternatives." Pl. Memo at 14. But the issue here is not whether the Film could have been made differently. Nor should it be. *See Blanch*, 467 F.3d at 255 ("It is not, of course, our job to judge the merits of 'Niagara,' or of Koons' approach to art."). The question is whether the Film used the clip of *Imagine* for a transformative purpose. *See id.* Here, the Film uses *Imagine* for the transformative purpose of criticizing the song and the views it represents, and as fodder for further commentary on the consequences of the secular world the song advocates.

While transformation is the heart of the fair use inquiry, the Court must nonetheless consider the fact *Expelled* is a commercial film. See 17 U.S.C. 107(1); *Blanch*, 467 F.3d at 254. This does not disqualify it for fair use protection. On the contrary, *Campbell* recognized most fair uses are undertaken for profit. See *Campbell*, 510 U.S. at 584. Accordingly, the Court should “not give much weight to the fact that the secondary use was for commercial gain.” *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d, 132, 142 (2d Cir. 1998). Where, as here, the secondary work is highly transformative, its commercial nature should receive even less weight. See *Campbell*, 510 U.S. at 579 (“[t]he more transformative the new work, the less will be the significance of other factors, like commercialism”); *Blanch*, 467 F.3d at 254 (“discount[ing]” the commercial nature of the secondary work in light of its “substantially transformative” nature). While *Expelled* is a commercial film, that fact is significantly outweighed by its highly transformative purpose. Accordingly, the first factor weighs strongly in favor of Defendants here.

b. Nature Of The Copyrighted Work

The second fair use factor focuses on “the nature of the copyrighted work.” 17 U.S.C. § 107(2); *Bill Graham*, 448 F.3d at 612. Plaintiffs report that *Imagine* is a creative work and therefore at the “core” of copyright protection. Pl. Memo at 19 (citing *Campbell*). While this may be true, Plaintiffs ignore the fact the Second Circuit has explained that this factor is of “limited usefulness” where a creative work is being used for a transformative purpose. *Bill Graham*, 448 F.3d at 612; see *Blanch*, 467 F.3d at 257; see generally *Campbell*, 510 U.S. at 586 (stating that the second factor is not “likely to help much in separating the fair use sheep from the infringing goats” in cases involving transformative copying of “publicly known, expressive works”).

c. Amount And Substantiality Of The Portion Used

The third fair use factor requires the Court to assess “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3); *see Blanch*, 467 F.3d at 257. While the Court must consider both the quality and quantity of the portion of the copyrighted work that was used, the central question is whether the extent of copying is reasonable in light of its purpose. *See Campbell*, 510 U.S. at 586; *Blanch*, 467 F.3d at 257 (quoting *Campbell*).

Here the Film’s purpose in using *Imagine* is to hold it up for scrutiny and criticism insofar as it suggests the world would be better off without religion, and as fodder for further discussion about whether a world without religion is, in fact, a better place. The portion of *Imagine* the Film uses is narrowly tailored to that expressive purpose. Indeed, the Film uses exactly ten words from *Imagine*. They are:

Nothing to kill or die for
And no religion too

(P. 11, above.) Accordingly, the Film uses only the portion of *Imagine* that is pertinent to the film’s criticism of *Imagine* and the viewpoint it represents.

Plaintiffs suggest Defendants used more than what was reasonable in light of the purpose of the use because “no copying of the *Imagine* Recording was necessary.” *See* Pl. Memo at 16. That ignores the purpose of the use – to criticize the song and the viewpoint it represents. It also misses the point: criticism is never strictly necessary; one can always stand silent instead. Indeed, 2 Live Crew could have refrained from criticizing Roy Orbison’s song through parody, and simply made an album with lots of other music. *See Campbell*, 510 U.S. at 586-88. Here, the Film quotes from no more of *Imagine* than was necessary to make its critical point, and the

amount and substantiality of the use cannot be viewed as excessive in light its purpose. *See id.*

The third factor therefore favors Defendants.

d. Market Effect

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor “requires a balancing of the benefit the public will derive if the use is permitted” versus “the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 613 (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991).³

Substantial Public Interest. The public benefit implicated here is the right to receive information on an issue of public importance. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (First Amendment protects the right to receive information and ideas as well as provide them). An injunction here will stop Defendants from expressing themselves in their chosen manner on an issue of great public importance, and will prevent would-be viewers of this film from receiving Defendants’ views uncensored. *See New York Times Co v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).⁴

³ Plaintiffs suggest they are entitled to a presumption of market harm. Pl. Memo at 18-19 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 415 (1984)). Plaintiffs are simply wrong. In *Campbell*, the U.S. Supreme Court explained that *Sony*’s presumption of market harm is limited to situations where the secondary work “amounts to a mere duplication of the entirety of an original” and does not apply to situations where “the second use is transformative.” *Campbell*, 510 U.S. at 591.

⁴ The free speech interest in uninhibited debate applies to both the opinion expressed, and the manner one chooses to express it. *See Cohen v. California*, 403 U.S. 15 (1971) (First Amendment protected the right to express opposition to Vietnam War by wearing jacket bearing the words “fuck the draft”).

No Cognizable Harm. In considering potential market harm, the Court must consider harm to the markets for both the song itself and potential licensing markets, while recognizing that “[t]he more transformative the secondary use, the less likelihood that the secondary work substitutes for the original.” *Castle Rock*, 150 F.3d at 145 (citing *Campbell*, 510 U.S. at 591); see *Bill Graham*, 448 F.3d at 614-15. Not all harms to these markets, however, are cognizable. Market harm that arises from criticism, for instance, is not cognizable because copyright owners would not be expected to license criticism of their work. See *Campbell*, 510 U.S. at 592. Similarly, licensing revenues “lost” from transformative uses are likewise not cognizable because copyright owners have no right to these revenues in the first place. *Bill Graham*, 448 F.3d at 615 (“[C]opyright owners may not preempt exploitation of transformative markets” by charging licenses for what would otherwise be fair use) (quoting *Castle Rock*, 150 F.3d at 146 n.11).

Here, Plaintiffs assert the same market harm the Bill Graham Archives asserted when it claimed that there was “an established market for licensing its images” and that it would suffer “the loss of royalty revenue directly from [the publisher who used the posters] and the opportunity to obtain royalties from others.” Compare *Bill Graham*, 448 F.3d at 614, with Pl. Memo at 22. That argument was rejected there and should be rejected here as well. See *Bill Graham*, 448 F.3d at 614-15 (finding no cognizable market harm where the use of copyrighted material “falls within a transformative market”).

Castle Rock does not suggest otherwise. While it reserved the market for non-transformative markets to the copyright holder, the market for transformative uses of copyrighted materials cannot be reserved or foreclosed by a copyright owner. *Bill Graham*, 448 F.3d at 615 (“Copyright owners may not preempt exploitation of transformative markets” by charging

licenses for what would otherwise be fair use) (quoting *Castle Rock*, 150 F.3d at 146 n.11). *Clean Flicks of Colorado LLC v. Soderbergh*, 433 F.Supp.2d 1236 (D. Colo. 2006), does not change this result. It reserved to the copyright owner the market for “sanitized” versions of Hollywood films from which sex, nudity and violence had been expunged. *See id.* at 1239-41. It says nothing about whether cognizable market harm arises from criticism, commentary or otherwise transformative uses of a small fragment of a copyrighted work.

Plaintiffs simply have no right to control the use of *Imagine* for the purpose of criticizing it, *Campbell*, 510 U.S. at 592, or other transformative purposes, *see Bill Graham*, 448 F.3d at 614-15, and the potential licensing revenue “lost” here was not theirs to demand in the first place. *See id.* There is no cognizable market harm to Plaintiffs here, and the fourth factor therefore weighs in favor of Defendants.

III. Plaintiffs Cannot Show Irreparable Harm And The Balance Of Hardships Tips Strongly In Favor Of Defendants

A. Plaintiffs Fail To Show Irreparable Harm

Plaintiffs suggest an injunction should be automatic once they show likelihood of success on the merits. *See* Pl. Memo at 19 (injunctive relief should be “routinely and uniformly granted to successful plaintiff owners of sound recording rights”). But Plaintiffs have shown no such likelihood of success (part II, above) and even if they had, injunctive relief should not be routinely granted without careful consideration of the facts and equities at issue and the balancing of hardships.

All of the cases Plaintiffs cite in support of their argument that they are entitled to an injunction as a matter of course involve the unlawful duplication and commercial sale of an entire work. *See Firma Melodiya v. ZYX Music GmbH*, 882 F. Supp. 1306 (S.D.N.Y. 1995); *Radio Corp. of Am. v. Premier Albums, Inc.*, 19 A.D.2d 62 (N.Y. App. Div. 1963), *Apple Corps*

Ltd. v. Adirondack Group, 124 Misc. 2d 351 (N.Y. Sup. Ct. 1983), *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc.2d 878 (N.Y. Sup. Ct. 1964), and *Metropolitan Opera Assoc., Inc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786 (N.Y. Sup. Ct. 1950). None of these cases concerns the use of a short excerpt of a song for the purpose of criticism and commentary in another expressive work. That is a crucial distinction. New York law recognizes an injunction against an expressive work is a “drastic remedy” and the Court’s reluctance to issue a preliminary injunction must be “heightened by the realization that we are here dealing with a book and not an ordinary subject of commerce.” *Pocket Books, Inc. v. Dell Publ’g Co.*, 267 N.Y.S.2d 269, 273-274 (N.Y. Spec. Term 1966).

Unlike piracy cases, there can be no presumption of irreparable harm where, as here, the alleged infringer has a bona fide fair use defense. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265, 1276 (11th Cir. 2001) (citing *Campbell*, 510 US. at 578 n.10; *New York Times v. Tasini*, 533 U.S. 483 (2001)). Indeed, the United States Supreme Court recently held presumptions in favor of injunctive relief are improper. *See id.* at 390-393. Instead, courts must apply traditional principles of equity when considering injunctive relief, which requires an actual showing of irreparable injury absent an injunction. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2007). Following *eBay*, Plaintiffs must show, not presume, irreparable harm. *See id.*; *Canon Inc. v. GCC Int’l, Ltd.*, 450 F. Supp. 2d 243, 251-52 (S.D.N.Y. 2006) (applying traditional equitable factors to a party’s request for preliminary injunctive relief in light of *eBay*), *aff’d*, 2008 WL 213883 (2d Cir. Jan. 25, 2008).

In order to show irreparable harm, Plaintiffs must identify an injury that money damages cannot remedy; if the injury is quantifiable in damages, a preliminary injunction is inappropriate. *SportsChannel Am. Assoc. v. Nat’l Hockey League*, 186 A.D.2d 417, 418 (N.Y. App. Div. 1st

Dept. 1992). In addition, a plaintiff must be able to show that the harm is actual and imminent, rather than remote and speculative. *Khan v. State Univ. of N.Y. Health Sci. Ctr. at Brooklyn*, 271 A.D.2d 656, 657 (N.Y. App. Div. 2d Dept. 2000).

In attempting to show irreparable harm, Plaintiffs complain that *Imagine* is a valuable asset and permitting any use without Plaintiffs' permission erodes the value of that asset. See Pl. Memo at 20; McMullan Dec. ¶ 20. In short, Plaintiffs complain their right to refuse a license is being usurped. But no one is forcing Plaintiffs to grant a license; common law copyrights simply do not prohibit every possible fragmentary use (pp. 5-8, above) and fair use expressly permits the use of copyrighted works for transformative purposes (pp. 8-19, above). Plaintiffs' copyrights in *Imagine* however valuable they are, do not give them right to preclude all uses of *Imagine*. See *Estate of Ernest Hemingway*, 53 Misc. 2d at 466. Suggesting that any use erodes the value of Plaintiffs' copyrights begs the question of which uses are protected and which are prohibited, and shows no irreparable harm.

Plaintiffs also complain the public is confused about whether *Imagine* was licensed for use in the Film, and this confusion is causing harm to its reputation based on accusations from internet bloggers that Plaintiffs "sold out" the legacy of John Lennon by permitting it to be used in the Film. See Pl. Memo at 20; McMullan Dec. ¶¶ 18-19. But any such "confusion" was the result of false accusations by internet bloggers, which were corrected in any event. See McMullan Dec. Ex. A (Wall Street Journal story stating filmmakers did not have permission to use the song). Any harm those false accusations created was inflicted by the authors of them, not Defendants, and Plaintiffs fail to explain how the injunction they request would undo that harm in any event. It is simply not Defendants' fault that bloggers do not understand the law permits some unlicensed uses of copyrighted material, and this fact should neither undermine

Defendants' rights nor support an injunction pending the resolution of those rights in this dispute.

Plaintiffs have simply shown no irreparable harm here, much less any that would be sufficient to justify the extraordinary injunction they seek.

B. The Balance of Hardships Weigh Heavily in Defendants' Favor

Even if Plaintiffs could show serious questions on the merits and irreparable harm, the balance of hardships tips strongly in favor of Defendants here.

Plaintiffs suggest that "Defendants could easily edit" the Film to "delete the [excerpt of the] Imagine Recording from the soundtrack" and doing so "should impose no hardship." Pl. Memo at 20; McMullan Dec. ¶¶ 23-24. This is simply wrong. Removing the excerpt of *Imagine* from the Film would require recutting the entire Film, including both the video and audio components. This would cost hundreds of thousands of dollars and take at least four weeks. See Craft Dec. ¶¶ 35-37.

The cost is not the important issue. The Film would be completely unavailable for at least a month. This would cause a significant and irreparable injury to Defendants' free speech rights. See *CBS Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (holding plaintiff's claim that the public airing of a newscast would cause it irreparable injury by publicly disseminating its confidential and proprietary practices and processes must yield to the protections of the First Amendment); *Mason v. Jews for Jesus*, No. 06 Civ. 6433 (RMB), 2006 WL 3230279, at *5 (S.D.N.Y. Nov. 8, 2006) (denying preliminary injunction where plaintiff, a comedian, sued a religious group for using his image in a pamphlet for their organization in a comic manner because the pamphlet was both protected speech and a matter of public interest, and "the proposed restriction of Defendant's constitutionally protected speech causes the balance of hardships to favor Defendant."); see also *LucasFilm Ltd. v. Media Market Group, Ltd.*, 182 F. Supp. 2d 897, 902

(N.D. Cal. 2002) (considering defendant's First Amendment rights in balancing of the harms in a copyright case and denying injunctive relief). It would also implicate the free speech rights of the public, because the First Amendment also protects the rights of the public to see the film uncensored. (P. 17, above.)

If and when the Film is re-released, it would not be until June or July. That is the height of the summer movie season – a time during which screen space will be much more difficult, perhaps impossible, to secure, especially as interest in the film diminishes during the intervening weeks. *See* Rodgers Dec. ¶ 12A. Even if theaters are still willing to show the Film in the summer season, the Film will have lost the benefit and momentum of its multi-million dollar advertising campaign. *See* Craft Dec. ¶ 36; Rodgers Dec. ¶ 12B. That momentum cannot be regained at any price. *See id.*

This harm will only multiply if the DVD release of the Film is enjoined. Defendants plan to release the Film on DVD in October 2008 for two reasons. *See* Craft Dec. ¶ 33. First, DVD sales are stronger when the DVD release follows closely on the heels of the theatrical run. Secondly, Defendants want the DVD release to coincide with the fall election cycle. *See* Craft Dec. ¶ 34. In order to make an October 2008 release, the Film must be finalized by the end of May of 2008. If Defendants are forced to re-cut the Film (again at great expense), the four weeks it will take to re-cut the Film will almost certainly cause Defendants to miss the October 2008 release date. *See* Craft Dec. ¶ 33.

These commercial hardships are alone sufficient to show the balance of hardships tips against an injunction. *See Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 141 n. 13 (E.D.N.Y. 2001) (holding plaintiff widow of former film producer could not obtain a preliminary injunction against televised airing of documentary of her husband's work because Defendant

spent over \$400,000 producing the finalized documentary, submitted it for award consideration, and therefore such an injunction “would irreparably injure their commercial investment in the Documentary”); *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 923 (C.D. IL. 2003) (Defendants would lose benefits of its ongoing marketing campaign promoting film and would have to mount another more expensive campaign to re-release film). Once the First Amendment and free expression rights of Defendants – and the public – are considered, there can be no doubt the balance of hardships tips dramatically in Defendants’ favor.

CONCLUSION

Plaintiffs have not begun to meet the high burden they must sustain in order to silence Defendants’ expressive speech. They have failed to establish a prima facie case of infringement, and even if they had, the likelihood of success on the merits of that claim is very slight given the strength of Defendants’ fair use defense. Nor have Plaintiffs shown any irreparable injury or a balance of hardships that suggest an injunction would be appropriate here pending resolution of the claims alleged. Plaintiffs’ motion for a preliminary injunction should be denied.

Dated: New York, New York
May 14, 2008

Respectfully submitted,

Julie Ahrens by ATF

JULIE AHRENS
ANTHONY FALZONE (*pro hac* pending)
Center for Internet and Society
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 736-9050 Telephone
(650) 723-4426 Facsimile
Email: Anthony.Falzone@stanford.edu
Julie.Ahrens@stanford.edu

ALLEN C. WASSERMAN
GREGORY T. CASAMENTO
LOCKE LORD BISSELL & LIDDELL, LLP
885 Third Avenue, 26th Floor
New York, NY 10022
(212) 947-4700 Telephone
(212) 947-1202 Facsimile

Of Counsel:

Roy W. Hardin (*pro hac* pending)
April R. Terry (*pro hac* pending)
LOCKE LORD BISSELL & LIDDELL, LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000 Telephone
(214) 740-8800 Facsimile
Email: rhardin@lockelord.com
aterry@lockelord.com

Attorneys for Defendants