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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SOFA ENTERTAINMENT, INC.,

Plaintiff,

v.

DODGER PRODUCTIONS, INC.,

Defendant.

Case No. CV 08-02616 DMG (PJWx)

**ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT AND
DENYING PLAINTIFF’S MOTION
FOR PARTIAL SUMMARY
JUDGMENT [22, 27]**

This matter is before the Court on Defendant Dodger Productions, Inc.’s Motion for Summary Judgment [Doc. #22], filed on September 24, 2009, and Plaintiff Sofa Entertainment, Inc.’s Motion for Partial Summary Judgment [Doc. # 27], filed on September 28, 2009. The Court has considered the documents submitted in connection with these motions as well as the oral arguments presented at the hearing on July 9, 2010. For the reasons set forth below, Defendant’s motion is GRANTED, and Plaintiff’s motion is DENIED.

I.

PROCEDURAL HISTORY

On April 21, 2008, Plaintiff Sofa Entertainment, Inc. filed a Complaint with this Court, asserting a single copyright infringement claim against Defendant Dodger

1 Productions, Inc. and Doe defendants 1 through 10. On September 24, 2009, Defendant
2 filed a motion for summary judgment on the basis of its “fair use” affirmative defense.
3 On September 26, 2009, Plaintiff filed its motion for partial summary judgment on the
4 issues of its ownership of, and Defendant’s unauthorized copying of, the copyrighted
5 work at issue in this litigation; Plaintiff also moved for summary judgment on the ground
6 that all of Defendant’s affirmative defenses fail as a matter of law. Each party filed an
7 Opposition on October 19, 2009, and each filed a Reply on October 26, 2009. On
8 November 2, 2009, the cross-motions for summary judgment were taken off calendar and
9 under submission; thereafter, this case was transferred to the undersigned’s calendar.

10 **II.**

11 **FACTUAL BACKGROUND**

12 The facts material to the Court’s decision on the instant motions are not in dispute.¹
13 This action arises out of Defendant’s use of a seven-second clip (“the Clip”) from the
14 January 2, 1966 episode of *The Ed Sullivan Show* in which Plaintiff owns a copyright.
15 Plaintiff Sofa Entertainment, Inc. is in the business of licensing portions of its library of
16 classic programming for use in film, television, and other media. Pl’s Response to Def’s
17 Separate Stmt. (“Pl’s Response”) ¶ 1; Def’s Separate Stmt. of Genuine Issues (“Def’s
18 Sep. Stmt.”) ¶ 1. Defendant Dodger Productions, Inc. is the producer of the play *Jersey*
19 *Boys*, a successful musical production based on the lives of various members of the
20 musical group the Four Seasons. Pl’s Response ¶¶ 2, 6-8.

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23 ¹ The Court does not rely on any inadmissible evidence in reaching its decision here. The Court
24 is able to distinguish facts from argument. Each party makes a number of objections to the other’s
25 characterizations of the import of, or inferences properly drawn from, various pieces of evidence. To the
26 extent that those objections are to permissible opinion testimony or to what amounts to legal argument,
27 the objections are overruled. Defendant’s objections to statements in, and exhibits to, the declaration of
28 Andrew Solt (“Solt Declaration”) as “improper legal conclusions” regarding Plaintiff’s copyright
registration are similarly overruled. Except where otherwise noted in this Order, Defendant’s objections
to statements in the Solt Declaration are not sufficient to controvert Plaintiff’s showing regarding the
facts set forth in that declaration.

1 Plaintiff owns the copyrights to a number of television shows, feature films, and
2 musical recordings, including the entire library of *The Ed Sullivan Show*, a popular
3 television variety program hosted by Ed Sullivan from 1948 to 1971, during which time
4 the program featured numerous musical performers, including the Four Seasons. Led by
5 singer Frankie Valli, the Four Seasons were a rock and roll group that rose to
6 international fame in the 1960s. Def’s Sep. Stmt. ¶¶ 2-8. The Four Seasons topped the
7 charts throughout the 1960s, with more than twenty songs rising above #30 on the
8 Billboard Hot 100 Singles chart during that decade. *Id.* at ¶ 9. At a critical point in their
9 career, the Four Seasons were given an opportunity to perform on *The Ed Sullivan Show*.
10 *Id.* at ¶ 6. The group performed several times on the program, including on the January
11 2, 1966 episode. *Id.* The parties agree that, in the 1960s, performances on *The Ed*
12 *Sullivan Show* played an important role in the success of many musical performers and
13 groups. *Id.* at ¶ 5.

14 Defendant’s production, *Jersey Boys*, has been staged in multiple cities including
15 New York, Chicago, Las Vegas, London, and Los Angeles. *Id.* at ¶ 7. *Jersey Boys* is a
16 dramatic work that tells the story of the Four Seasons’ rise to fame and incorporates
17 historic video footage as part of the show. *Id.* at ¶ 10. The play runs over two hours, and
18 a seven-second clip of Ed Sullivan introducing the Four Seasons on the January 2, 1966
19 episode of *The Ed Sullivan Show* (“the Clip”)² is displayed on a large screen at the end of
20 the play’s first act. Pl’s Response ¶¶ 7, 15; Def’s Sep. Stmt. ¶¶ 11, 14.

21 Immediately before the Clip is played, an actor portraying Four Seasons member
22 Bob Gaudio addresses the *Jersey Boys* audience:

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26 ² Defendant argues, without reference to any supporting evidence, that the entire January 2, 1966
27 episode of *The Ed Sullivan Show* “is likely 45 to 50 minutes in length.” Def. Memo of P. & A. in
28 Support of Mot. for Summ. J’tmt (“Def. Mot.”) at 13:25-28. Opposing Defendant’s motion, Plaintiff
does not dispute this estimate; and, in support of its own motion, Plaintiff introduces no evidence about
the duration of the entire episode from which the Clip is excerpted.

1 Around this time there was a little dust-up called The British Invasion.
 2 Britannia’s ruling the air waves, so we start our own American
 3 revolution. The battle begins on Sunday night at eight o’clock and the
 4 whole world is watching.

5 Pl’s Response ¶ 22. As the actor speaks these lines, the actors portraying the band are
 6 seen preparing themselves to perform, and the old-style CBS cameras bearing the CBS
 7 logo roll across the stage. Pl’s Response ¶ 23 (also admitting for purposes of this motion
 8 that “[t]he audience is led to feel they are backstage with the band-performers, reading
 9 their instruments, fac[ing] the back of the stage as if the Sullivan audience is in front of
 10 them”).

11 In the Clip, Ed Sullivan has taken the stage and, striking his signature pose,
 12 introduces the Four Seasons to the studio audience: “Now ladies and gentlemen, here, for
 13 all of the youngsters in the country, the Four Seasons. . . .” Def’s Sep. Stmt. ¶ 11. As he
 14 concludes, Mr. Sullivan waves his left hand toward where the Four Seasons are to
 15 perform, at which point the Clip ends and the actors in *Jersey Boys* perform a song on
 16 stage. *Id.* The parties do not dispute that the Clip reflects an important moment in the
 17 Four Seasons’ career. *Id.* at ¶ 6. The parties similarly do not dispute that Plaintiff has not
 18 licensed the Clip or any other portions of *The Ed Sullivan Show* to be used in *Jersey Boys*
 19 or any other production. *Id.* at ¶ 15.³

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 23 ³ Defendant’s objections to paragraphs 3 and 6 of the Solt Declaration as irrelevant and lacking
 24 foundation are overruled, and these objections are not sufficient to controvert Solt’s statements as
 25 evidence that Plaintiff did not grant Defendant a license or other permission to use the Clip. *See* Solt
 26 Decl. ¶ 3 (attesting that Plaintiff owns the copyright to the January 2, 1966 episode of the Ed Sullivan
 27 Show, “a portion of which has been copied, without permission or license, in the play *Jersey Boys*”);
 28 Solt Decl. ¶ 6 (“I have since confirmed that [Plaintiff] has not licensed any clips of the Ed Sullivan
 Show to be used in *Jersey Boys*, nor has it otherwise given Defendant permission to use any footage
 from that show in Defendant’s various productions”); *see also* Def. Evidentiary Objections (“Def
 Objections”) at 2:3-6 (“The witness . . . can only testify that [Plaintiff] did not license or permit
 use . . .”).

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III.

STANDARD GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Summary judgment should be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2); *accord Farrakhan v. Gregoire*, 590 F.3d 989, 1001 (9th Cir. 2010). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Mattos v. Agarano*, 590 F.3d 1082, 1085 (9th Cir. 2010); *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (“In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its burden of persuasion at trial.”). Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324; *accord Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007). “[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, “an opposing party may not rely merely on allegations or denials in its own pleading.” Fed. R. Civ. P. 56(e). Additionally, mere disagreement or the bald assertion that a genuine

1 issue of material fact exists does not preclude the use of summary judgment. *Harper v.*
 2 *Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

3 **IV.**

4 **DISCUSSION**

5 Defendant moves for summary judgment on the basis of its “fair use” affirmative
 6 defense, and Plaintiff moves for partial summary judgment both on certain issues in
 7 connection with its copyright infringement claim and on the ground that all of
 8 Defendant’s affirmative defenses fail as a matter of law. Even assuming that Plaintiff has
 9 established the absence of a genuine issue of material fact with respect to its ownership
 10 and Defendant’s unauthorized use of the Clip, no infringement can be found if Defendant
 11 is entitled to prevail on its fair use defense as a matter of law. Accordingly, because the
 12 Court’s ruling on fair use is dispositive, the Court need not, and does not, address
 13 Plaintiff’s other arguments for partial summary judgment.

14 Copyright owners have certain “exclusive” rights in their copyrighted works.⁴ 17
 15 U.S.C. § 106; *Stewart v. Abend*, 495 U.S. 207, 220 (1990) (“An author holds a bundle of
 16 exclusive rights in the copyrighted work, among them the right to copy and the right to
 17 incorporate the work into derivative works.”). However, the “fair use of a copyrighted
 18 work . . . is not an infringement of copyright.” *Stewart*, 495 U.S. at 236 (“The doctrine is
 19 an equitable rule of reason, which permits courts to avoid rigid application of the
 20 copyright statute when, on occasion, it would stifle the very creativity which that law is
 21 designed to foster.” (internal quotations and citations omitted)); *see also Twentieth*
 22 *Century*, 422 U.S. at 156 (“The limited scope of the copyright holder’s statutory
 23 monopoly . . . reflects a balance of competing claims upon the public interest: Creative
 24 work is to be encouraged and rewarded, but private motivation must ultimately serve the
 25 cause of promoting broad public availability of literature, music, and the other arts.”).

26
 27 ⁴ “The Constitution gives Congress the power: ‘To promote the Progress of Science and useful
 28 Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective
 Writings and Discoveries.’” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 n.2 (1975)
 (quoting U.S. Const., art. I, § 8, cl. 8).

1 As codified in the Copyright Act of 1976, the fair use doctrine requires
2 consideration of at least “[t]he four factors identified by Congress as especially relevant
3 in determining whether the use was fair.” *Harper & Row Publishers, Inc. v. Nation*
4 *Enterprises*, 471 U.S. 539, 560 (1985). The statute provides in relevant part that:

5 [T]he fair use of a copyrighted work . . . for purposes such as criticism,
6 comment, news reporting, teaching (including multiple copies for classroom
7 use), scholarship, or research, is not an infringement of copyright. In
8 determining whether the use made of a work in any particular case is a fair
9 use the factors to be considered shall include—

- 10 (1) the purpose and character of the use, including whether such use is of
11 a commercial nature or is for nonprofit educational purposes;
12 (2) the nature of the copyrighted work;
13 (3) the amount and substantiality of the portion used in relation to the
14 copyrighted work as a whole; and
15 (4) the effect of the use upon the potential market for or value of the
16 copyrighted work.

17 17 U.S.C. § 107.

18 “The factors enumerated in the section are not meant to be exclusive: ‘[S]ince the
19 doctrine is an equitable rule of reason, no generally applicable definition is possible, and
20 each case raising the question must be decided on its own facts.’” *Harper & Row*, 471
21 U.S. at 560 (quoting House Report, at 65, U.S. Code Cong. & Admin. News 1976, p.
22 5678). At summary judgment, the Court is guided by the Ninth Circuit’s instruction:

23 “Fair use is a mixed question of law and fact.” If there are no genuine
24 issues of material fact, or if, even after resolving all issues in favor of the
25 opposing party, a reasonable trier of fact can reach only one conclusion, a
26 court may conclude as a matter of law whether the challenged use qualifies
27 as a fair use of the copyrighted work.
28

1 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986)
2 (quoting *Harper & Row*, 471 U.S. at 559; other citations omitted). Accordingly, the
3 Court addresses each of the statutory fair use factors separately here.

4 **A. Purpose And Character Of The Use**

5 Analysis of the first of the four statutory factors comprises at least three separate
6 considerations: the general purpose or character of the use, whether the use is
7 “transformative,” and whether the use is commercial in nature. 17 U.S.C. § 107(1)
8 (articulating the first factor as “the purpose and character of the use, including whether
9 such use is of a commercial nature or is for nonprofit educational purposes”).

10 **1. Purpose Of The Use**

11 The Court first considers whether Defendant’s use of the Clip in *Jersey Boys* is the
12 type of use that is likely to be considered fair. This aspect of the first of the four statutory
13 factors speaks to the question of whether the character of the secondary-user’s work is
14 created to serve purposes of the type cited by the statute as legitimate goals of fair use.
15 The list set out in the statute’s preamble is not exhaustive and identifies “purposes *such*
16 *as* criticism, comment, news reporting, teaching . . . , scholarship, or research” as
17 illustrative of the types of uses for which fair use may provide an affirmative defense. 17
18 U.S.C. § 107 (emphasis added); *see also Harper & Row*, 471 U.S. at 561 (“[W]hether a
19 use referred to in the first sentence of section 107 is a fair use in a particular case will
20 depend upon the application of the determinative factors, including those mentioned in
21 the second sentence.” (quoting S.Rep. No. 94-473, p. 62 (1975))).

22 Here, the Court is confronted with the fact that *Jersey Boys* does not fall clearly
23 within any of the purposes specifically identified in the statute’s preamble. However,
24 Plaintiff characterizes *Jersey Boys* as a fictionalized account of the Four Seasons’ rise to
25 fame, and Defendant characterizes the production as a dramatic work of biographical and
26 cultural history. Either way, the parties at least are in agreement that *Jersey Boys* is
27 “based on” the Four Seasons’ career. The parties’ arguments and evidence leave no
28 doubt that the production is an entertaining dramatization that is based at least in part, if

1 not predominantly, on actual events. *Cf. New Era Publications Intern., ApS v. Henry Holt*
2 *and Co., Inc.*, 695 F. Supp. 1493, 1506 (S.D.N.Y. 1988) (considering use of numerous
3 quotations from the writings of L. Ron Hubbard, founder of the Church of Scientology, in
4 a critical biography and explaining that, as to the first factor, “[t]here can be little doubt
5 that this aspect of the fair use analysis generally favors an overall finding in favor of the
6 biography”).

7 At oral argument, Plaintiff urged the Court to distinguish between documentaries
8 and dramatizations of historical events. Yet, Plaintiff identified no precedent clearly
9 establishing that such a distinction is dispositive. *Cf. Hofheinz v. A & E Television*
10 *Networks*, 146 F.Supp.2d 442, 446 (S.D.N.Y. 2001) (“Defendants’ [biographical film]
11 ‘Peter Graves: Mission Accomplished’ may not be a ‘scholarly’ biography, but the use
12 made of this particular footage . . . served to enrich the biography through the actor’s
13 perspective on his own work.”). The fact that the Clip is used in a dramatization, as
14 opposed to a scholarly recounting, of real events does not end the inquiry, and the Court
15 does not purport to place a value on the extent to which *Jersey Boys* is “biographical.”
16 *Cf. New Era*, 695 F. Supp. at 1506 (“It is an uncomfortable role for courts to serve as
17 literary critics, passing on whether a purported work of history, teaching or criticism is
18 entitled to respect as such. We judges generally lack both competence and the necessary
19 information to form such opinions.”). There is no doubt, however, that *Jersey Boys* is a
20 dramatic production intended to entertain. For this reason, the Court finds that the
21 “purpose of use” component of the first factor weighs in favor of Plaintiff and against a
22 determination that Defendant’s use of the Clip constitutes fair use. *See Stewart*, 495 U.S.
23 at 237 (agreeing that the use of a magazine story in a motion picture was not fair use and
24 explaining that the motion picture did not represent the type of use protected by statute);
25 *see also Public Affairs Associates, Inc. v. Rickover*, 268 F. Supp. 444, 450 (D. DC 1967)
26 (“The doctrine is usually applied in the case of scientific, legal, and historical materials,
27 and also arises in connection with compilations, listings, and digests.”).

28 ///

1 **2. Transformative Use**

2 The more “transformative” the use of a copyrighted work, the more likely it is that
3 the use will come within the protection of the fair use defense. As the Supreme Court
4 explained:

5 The central purpose of this investigation is to see . . . whether the new work
6 merely supersedes the objects of the original creation, or instead adds
7 something new, with a further purpose or different character, altering the
8 first with new expression, meaning, or message; it asks, in other words,
9 whether and to what extent the new work is “transformative.” Although
10 such transformative use is not absolutely necessary for a finding of fair use,
11 the goal of copyright, to promote science and the arts, is generally furthered
12 by the creation of transformative works. Such works thus lie at the heart of
13 the fair use doctrine’s guarantee of breathing space within the confines of
14 copyright, and the more transformative the new work, the less will be the
15 significance of other factors, like commercialism, that may weigh against a
16 finding of fair use.

17 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-579 (1994) (footnotes, internal
18 quotations, alterations and citation omitted).

19 Here, Defendant’s use of the Clip in the stage production of *Jersey Boys* is
20 transformative. It is somewhat analogous to Court TV’s use of a short excerpt of news
21 footage of the beating of Reginald Denny in an “introductory montage for its show
22 ‘Prime Time Justice,’” which the Ninth Circuit found to have at least some claim to being
23 a transformative use. *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d
24 924, 929-30, 939 (9th Cir. 2002) (“The development of the montage at least plausibly
25 incorporates the element of creativity beyond mere republication, and it serves some
26 purpose beyond newsworthiness.”), *amended and superseded*, *Los Angeles News Service*
27 *v. CBS Broadcasting, Inc.*, 313 F.3d 1093 (9th Cir. 2002). Moreover, Defendant’s use of
28 the Clip in *Jersey Boys* is certainly more than a “mere re-broadcast” of a portion of the

1 copyrighted episode of *The Ed Sullivan Show*. Cf. *Los Angeles News Service v. KCAL-*
2 *TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997) (“Although KCAL apparently ran its
3 own voice-over, it does not appear to have added anything new or transformative to what
4 made the LANS work valuable—a clear, visual recording of the beating itself.”).
5 Plaintiff’s assertion at oral argument that the use presently before the Court is more
6 closely analogous to the use to which the video footage was put in *KCAL-TV* fails to
7 recognize the fact that both parties in that case were “in the business of gathering and
8 selling news” and thus the defendant’s use of the video tape was not transformative. *Id.*
9 at 1121-22 (explaining that “the tape was simply used as part of KCAL’s coverage of the
10 riots”). Moreover, *KCAL-TV* is not reasonably read to require a voice-over or other
11 explicit “introduction” in order to render a use transformative. Even if such a
12 requirement existed, however, the lines spoken by the actor in the role of Bob Gaudio
13 serve to frame the transformative use to which the Clip is put in *Jersey Boys*. More
14 specifically, Defendant’s use of the Clip in *Jersey Boys* represents a transformative use
15 because it is “cited as [a] historical reference point[]” in the Four Seasons’ career, which
16 use the Ninth Circuit has contrasted with uses that “serve[] the same intrinsic
17 entertainment value that is protected” by the copyright in the copied work. *Elvis Presley*
18 *Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003). As the Ninth
19 Circuit explained:

20 It would be impossible to produce a biography of Elvis without
21 showing some of his most famous television appearances for reference
22 purposes. But some of the clips are played without much interruption, if
23 any. The purpose of showing these clips likely goes beyond merely making
24 a reference for a biography, but instead serves the same intrinsic
25 entertainment value that is protected by Plaintiffs’ copyrights.

26 We think Passport’s use of significant portions of *The Steve Allen*
27 *Show* is especially troubling. While showing a clip from these television
28 shows is permissible to note their historical value, Passport crosses the line

1 by making more than mere references to these events and instead shows
2 significant portions of these copyrighted materials. . . .

3 Here, Passport’s use of many of the television clips is transformative
4 because they are cited as historical reference points in the life of a
5 remarkable entertainer. The Definitive Elvis[’] “nature as a biography
6 transforms the purpose of showing these clips from pure entertainment to
7 telling part of the story of Elvis” life. But many of the film clips seem to be
8 used in excess of this benign purpose, and instead are simply rebroadcast for
9 entertainment purposes that Plaintiffs rightfully own. . . .

10 *Id.* at 629 (emphasis added); *see also Hofheinz*, 146 F. Supp. 2d at 446-47 (finding that
11 inclusion of copyrighted film clips in biographical film about an actor constituted fair use
12 because the biography “was not shown to recreate the creative expression reposing in
13 plaintiff’s [copyrighted] film, [but] for the transformative purpose of enabling the viewer
14 to understand the actor’s modest beginnings in the film business”).

15 Accordingly, even considering the evidence in the light most favorable to Plaintiff,
16 the Court finds that Defendant’s use of a seven-second excerpt from the January 2, 1966
17 episode of *The Ed Sullivan Show* serves as a historical reference point in *Jersey Boys* and,
18 as such, this aspect of the first factor weighs in favor of fair use. *See* Def’s Sep. Stmt. at
19 4:20-5:6 (responding to Plaintiff’s undisputed fact #12, which states “[t]he clip is used at
20 one of the key dramatic junctures of the show to illustrate that the Four Seasons have
21 ‘arrived,’ i.e. have gone from relative obscurity to fame.”).

22 3. Commercial Or Nonprofit Use

23 The analysis of the commercial nature of the secondary-user’s work encompasses
24 more than just whether the secondary use is a for-profit endeavor. “Although not
25 controlling, the fact that a new use is commercial as opposed to non-profit weighs against
26 a finding of fair use.” *Elvis Presley*, 349 F.3d at 627 (citing *Harper & Row*, 471 U.S. at
27 562). However, “the degree to which the new user exploits the copyright for commercial
28 gain—as opposed to incidental use as part of a commercial enterprise—affects the weight

1 we afford commercial nature as a factor.” *Id.* “The crux of the profit/nonprofit
2 distinction is not whether the sole motive of the use is monetary gain but whether the user
3 stands to profit from exploitation of the copyrighted material without paying the
4 customary price.” *Harper & Row*, 471 U.S. at 562.

5 Here, the Clip is incorporated into a production that is properly characterized as a
6 commercial endeavor, and Defendant profits, at least in some small part, from its use of
7 the Clip without a license. However, at the same time, Defendant’s use is transformative;
8 Defendant screens only a short, seven-second segment of the entire January 2, 1966
9 episode of *The Ed Sullivan Show*, featuring only Ed Sullivan’s brief introductory remarks
10 rather than the Four Seasons themselves; and there is no evidence before the Court that
11 Defendant used the Clip in the marketing of *Jersey Boys*. See *Elvis Presley*, 349 F.3d at
12 628 (“One of the most salient selling points on the box of *The Definitive Elvis* is that
13 ‘Every Film and Television Appearance is represented.’ [Defendant] is not advertising a
14 scholarly critique or historical analysis, but instead seeks to profit at least in part from the
15 inherent entertainment value of Elvis’ appearances on such shows as *The Steve Allen*
16 *Show*, *The Ed Sullivan Show*, and *The 1968 Comeback Special*.”). Thus, Defendant
17 seeks to profit in very small measure by the inherent entertainment value of Ed Sullivan’s
18 introduction of the Four Seasons. Accordingly, to the extent Defendant’s use of the Clip
19 is commercial and, as such, weighs against fair use, this aspect of the first factor is not
20 accorded great weight.

21 **B. Nature Of The Copyrighted Work**

22 The second of the four statutory factors considers the nature of the plaintiff’s
23 copyrighted work. “The law generally recognizes a greater need to disseminate factual
24 works than works of fiction or fantasy.” *Harper & Row*, 471 U.S. at 563. “In other
25 words, ‘this factor calls for recognition that some works are closer to the core of intended
26 copyright protection than others, with the consequence that fair use is more difficult to
27 establish when the former works [i.e., factual works] are copied.’” *Elvis Presley*, 349
28 F.3d at 629 (quoting *Campbell*, 510 U.S. at 586). Additionally, previously unpublished

1 works are afforded greater protection; accordingly, an unauthorized use of a previously
2 unpublished work is less likely to constitute a fair use. *Harper & Row*, 471 U.S. at 564;
3 *see also id.* at 550 (noting that “the fair use doctrine was predicated on the author’s
4 implied consent to ‘reasonable and customary’ use when he released his work for public
5 consumption”).

6 As the Ninth Circuit noted in *Elvis Presley*, “television footage is a close call.”
7 349 F.3d at 629-30 (“On the one hand, the appearances and concerts are creative in
8 nature and thus fit into a category of work copyright is designed to protect. On the other
9 hand, the footage is of such a significance that it can properly be characterized as
10 ‘newsworthy’ events.”). Additionally, the fact that *The Ed Sullivan Show* episode at issue
11 here has already been broadcast weighs in Defendant’s favor. *Id.* at 630; *see also Sony*
12 *Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (noting that interest in
13 expanding public access to television broadcasting is factor to be considered in
14 determining fair use). Accordingly, the second factor weighs at least slightly in favor of
15 fair use.

16 **C. Amount And Substantiality Of The Portion Used**

17 The third of the four statutory factors considers the “amount and substantiality” of
18 the portion of the original copyrighted work used “in relation to the copyrighted work as
19 a whole.” 17 U.S.C. § 107(c). Here, Plaintiff does not argue that the Clip represents a
20 substantial amount of the entire January 2, 1966 episode of *The Ed Sullivan Show*; rather,
21 Plaintiff focuses on the “substantiality” of the Clip in relation to the episode as a whole.
22 As the Ninth Circuit has explained:

23 Regarding the qualitative nature of the work used, we look to see
24 whether “the heart” of the copyrighted work is taken—in other words,
25 whether the portion taken is the most likely to be newsworthy and important
26 in licensing serialization. Finally, if the new user only copies as much as
27 necessary for his or her intended use, this factor will not weigh against the
28 new user.

1 *Elvis Presley*, 349 F.3d at 630 (concluding district court did not abuse its discretion in
2 finding this factor weighed in plaintiffs’ favor—and against a likelihood of success on
3 fair use defense—because “[w]hile using a small number of clips to reference an event
4 for biographical purposes seems fair, using a clip over and over will likely no longer
5 serve a biographical purpose”).

6 Here, Plaintiff argues that the seven-second clip is the “heart” of the work because
7 Ed Sullivan’s introduction of musical acts was the heart of the *The Ed Sullivan Show*
8 episodes in which such acts performed. At oral argument, Plaintiff clarified its position
9 that the Clip represents the entirety of Ed Sullivan’s creative effort with respect to that
10 portion of the show related to the Four Seasons’ performance. Considering all the
11 evidence in the light most favorable to Plaintiff, the Court cannot agree; and Plaintiff has
12 identified no precedent to support a determination that a copyright owner’s own
13 subjective view of what constitutes the “heart” of a particular work in any given context
14 is dispositive. At most, the introduction by Ed Sullivan can be said to be an artery
15 leading to the heart of the episode. Certainly, the actual performances by featured talent
16 were, and are, the heart of *The Ed Sullivan Show* generally, and that is true of the episode
17 on which the Four Seasons performed.

18 Finally, the Court notes that in analyzing the application of the third fair use factor,
19 it is also appropriate to consider the secondary user’s reason for using the portion of the
20 copyrighted work. *See, e.g., Harper & Row*, 471 U.S. at 565 (“As the statutory language
21 indicates, a taking may not be excused merely because it is insubstantial with respect to
22 the infringing work. . . . Conversely, the fact that a substantial portion of the infringing
23 work was copied verbatim is evidence of the qualitative value of the copied material,
24 both to the originator and to the plagiarist who seeks to profit from marketing someone
25 else’s copyrighted expression.”). As discussed above, Defendant uses the Clip as a
26 single, brief historical reference point in the context of a two-hour musical production.
27 Even assuming, for the sake of argument, that Ed Sullivan’s introduction of the Four
28 Seasons’ constituted the “heart” of the recording of the episode, the evidence before the

1 Court does not support a determination that a reasonable jury could find that Defendant
2 made that clip “the heart” of *Jersey Boys*; rather, the Clip is but a single historical
3 reference point in the context of a far longer and more elaborate story arc. Accordingly,
4 this factor weighs in favor of fair use.

5 **D. Effect On The Market**

6 The fourth of the statutory factors considers “the effect of the use upon the
7 potential market for or value of the copyrighted work.” 17 U.S.C. § 107(d). This factor
8 generally carries considerable weight in the determination of whether a secondary use
9 constitutes a fair use. *Elvis Presley*, 349 F.3d at 630-31 (“The last, and ‘undoubtedly the
10 single most important’ of all the factors, is the effect the use will have on the potential
11 market for and value of the copyrighted works.” (quoting *Harper & Row*, 471 U.S. at
12 566)); *but see also Campbell*, 510 U.S. at 591 n. 21 (“[T]he importance of this [fourth]
13 factor will vary, not only with the amount of harm, but also with the relative strength of
14 the showing on the other factors.”) As the Supreme Court has explained, this fourth
15 factor is concerned with protecting the original copyright holder’s “incentive to create”:

16 The purpose of copyright is to create incentives for creative effort.
17 Even copying for noncommercial purposes may impair the copyright
18 holder’s ability to obtain the rewards that Congress intended him to have.
19 But a use that has no demonstrable effect upon the potential market for, or
20 the value of, the copyrighted work need not be prohibited in order to protect
21 the author’s incentive to create.

22 *Sony*, 464 U.S. at 450; *see also American Geophysical Union v. Texaco Inc.*, 60 F.3d 913,
23 929 (2d Cir. 1994) (“It is indisputable that, as a general matter, a copyright holder is
24 entitled to demand a royalty for licensing others to use its copyrighted work, and that the
25 impact on potential licensing revenues is a proper subject for consideration in assessing
26 the fourth factor.” (citations omitted)).

27 Generally, the fourth factor is concerned with whether the unauthorized use
28 competes for a share of the market for the original work. *See Harper & Row*, 471 U.S. at

1 568 (quoting S.Rep. No. 94-473, p. 65 (1975), as follows: “With certain special
2 exceptions . . . a use that supplants any part of the normal market for a copyrighted work
3 would ordinarily be considered an infringement”); *see also Bill Graham Archives v.*
4 *Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (“This analysis requires a
5 balancing of the benefit the public will derive if the use is permitted and the personal gain
6 the copyright owner will receive if the use is denied.” (internal quotations and citation
7 omitted)). “The market for potential derivative uses includes only those that creators of
8 original works would in general develop or license others to develop.” *Campbell*, 510
9 U.S. at 592; *see also Texaco*, 60 F.3d at 929-30 (“[N]ot every effect on potential
10 licensing revenues enters the analysis under the fourth factor. Specifically, courts have
11 recognized limits on the concept of potential licensing revenues by considering only
12 traditional, reasonable, or likely to be developed markets when examining and assessing a
13 secondary use’s effect upon the potential market for or value of the copyrighted work.”
14 (internal quotations and citations omitted)). Additionally, “[t]he more transformative the
15 new work, the less likely the new work’s use of copyrighted materials will affect the
16 market for the materials.” *Elvis Presley*, 349 F.3d at 631.⁵

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19 ⁵ In *Elvis Presley*, the Ninth Circuit found that the district court did not clearly err in determining
20 that the defendant’s use of the plaintiffs’ television clips, photographs, and musical recording likely
21 affected the market for those copyrighted materials. The Circuit reached that conclusion on facts
22 distinguishable from those before the Court in this case. As the Ninth Circuit explained:

23 First, [Defendant]’s use is commercial in nature, and thus we can assume market
24 harm. Second, [Defendant] has expressly advertised that *The Definitive Elvis* contains
25 the television appearances for which Plaintiffs normally charge a licensing fee. If this
26 type of use became widespread, it would likely undermine the market for selling
27 Plaintiffs’ copyrighted material. This conclusion, however, does not apply to the music
28 and still photographs. It seems unlikely that someone in the market for these materials
would purchase *The Definitive Elvis* instead of a properly licensed product. Third,
[Defendant]’s use of the television appearances was, in some instances, not
transformative, and therefore these uses are likely to affect the market because they serve
the same purpose as Plaintiffs’ original works.

We do not think this factor weighs strongly in either side’s favor. But, for the
reasons stated above that support the district court’s decision, we cannot say that the
district court abused its discretion in analyzing this factor. Furthermore, because we do
not see any legal error or clear error in the district court’s factual findings underlying any

1 Here, the fact that Defendant’s use of the copyrighted material is primarily for
2 purposes of entertainment, which is not a use to which the fair use defense traditionally is
3 extended, may contribute to this factor weighing against fair use. Additionally, to the
4 extent that Defendant’s use of the Clip is “commercial,” as the term is used in the context
5 of the first factor, the fourth factor weighs against fair use. As discussed above, however,
6 Defendant incorporates the Clip into the context of a full-length stage show so that the
7 marketability of *Jersey Boys* (its “commercial” aspect) cannot reasonably be said to be
8 primarily dependent on Defendant’s transformative use of the Clip. It follows that the
9 extent to which Defendant stands to profit specifically from the use of the Clip itself is
10 minimal.

11 Both moving for summary judgment and opposing Defendant’s motion for
12 summary judgment, Plaintiff has staked out the position that there are no factual issues in
13 play and all the issues before the Court are questions of law. Plaintiff is not well served
14 by this position in that Mr. Solt’s declaration represents Plaintiff’s *only* evidence in
15 support of its argument that Defendant’s use of the Clip has a deleterious effect on an
16 existing or potential market for Plaintiff’s copyrighted work. Solt Decl. in Support of
17 Pl’s Mot ¶ 2 (attesting that Plaintiff “is in the business of licensing clips from its library
18 of classic programming for use in film, television, and other media”); *id.* at ¶ 8 (“One of
19 SOFA’s significant sources of income is licensing fees generated from its copyright in
20 ‘The Ed Sullivan Show.’ If third parties such as Defendant were able to reproduce, copy
21 and/or display this copyrighted material, such as the Clip, for free, it would have a severe
22 [e]ffect on SOFA’s licensing market for ‘The Ed Sullivan Show.’ In fact, it would
23 drastically reduce the value of SOFA’s investment in the copyright[ed] work.”). Plaintiff
24 introduces no evidence demonstrating that it currently licenses (or plans to license) the
25 Clip, and the Court agrees with Defendant that the notion that any such market could ever
26

27 of the fair-use factors, we hold that the district court did not abuse its discretion in
28 granting the preliminary injunction.
Elvis Presley, 349 F.3d at 631.

1 materialize is speculative at best. Even viewing statements in Solt’s declaration in the
2 light most favorable to Plaintiff, they are not sufficient to support a determination that a
3 reasonable jury could view the evidence as sufficient to establish that the use of the Clip
4 in *Jersey Boys* serves as a substitute for the original Clip. Additionally, to the extent that
5 any existing or potential derivative market is, in fact, one for similarly transformative
6 uses, this factor is less likely to weigh in Plaintiff’s favor. In light of the lack of evidence
7 of an existing or potential market for the Clip, this factor weighs in Defendant’s favor.

8 **E. Weighing Of The Factors**

9 No single factor or combination of factors controls the fair use analysis; rather, the
10 Court must weigh all the facts “in light of the purposes of copyright.” *Campbell v. Acuff-*
11 *Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (“The task is not to be simplified with
12 bright-line rules. . . . Nor may the four statutory factors be treated in isolation, one from
13 another. All are to be explored, and the results weighed together, in light of the purposes
14 of copyright.”); *see also Twentieth Century*, 422 U.S. at 156 (“Creative work is to be
15 encouraged and rewarded, but private motivation must ultimately serve the cause of
16 promoting broad public availability of literature, music, and the other arts.”).

17 On the basis of the record before the Court, the “purpose of use” component of the
18 first factor is the one element that weighs most heavily in favor of Plaintiff and against a
19 determination that Defendant’s use of the Clip constitutes fair use; Defendant’s
20 dramatization of some aspects of the Four Seasons’ career does not fall clearly within any
21 of the purposes specifically identified in the statute’s preamble, *e.g.*, criticism, comment,
22 news reporting, teaching, scholarship. *See* 17 U.S.C. § 107(d). Nevertheless, the Court
23 is mindful that its inquiry does not end there. *Cf. Pacific and Southern Co., Inc. v.*
24 *Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984) (finding that district court erred in failing
25 to consider the four statutory factors because the court determined that the use in question
26 did not fall within statute’s preamble). In sum, with respect to the remaining issues
27 relevant to the analysis of the first statutory factor, Defendant’s use of the Clip in *Jersey*
28 *Boys* is decidedly transformative, and the weight accorded the “commercial” nature of

1 Defendant's use is limited by the fact that the Clip represents only a very small part of the
2 inherent entertainment value of the copyrighted work. As explained above, to the extent
3 that Defendant's use of the Clip is commercial and, as such, weighs against fair use, this
4 aspect of the first factor is not accorded great weight. The second factor, which is
5 concerned with the nature of the copyrighted work, weighs at least slightly in favor of fair
6 use because the television footage at issue does not strongly support or negate a
7 determination that the secondary use is a fair use and because *The Ed Sullivan Show*
8 episode at issue here has already been broadcast. Additionally, neither the amount nor
9 the substantiality of the copyrighted excerpt supports a determination that the third factor
10 weighs in favor of Plaintiff and against a finding of fair use; the seven-second Clip
11 cannot reasonably be said to constitute the heart of the January 2, 1966 episode of *The Ed*
12 *Sullivan Show*. Finally, the evidence in the record does not provide a sufficient basis for
13 a reasonable jury to find that an existing or potential market that Plaintiff can exploit is
14 adversely affected by Defendant's transformative use of the Clip. Accordingly, the Court
15 concludes as a matter of law that Defendant's use of the Clip qualifies as a fair use.

16 V.

17 **CONCLUSION**


18 In light of the foregoing:

- 19 1. Defendant Dodger Productions Inc.'s Motion for Summary Judgment is
20 GRANTED; and
21 2. Plaintiff Sofa Entertainment, Inc.'s Motion for Partial Summary Judgment is
22 DENIED.

23 Counsel for Defendant is directed to prepare and file a Judgment for the Court's
24 signature within twenty (20) days of the date of this Order.

25 IT IS SO ORDERED.

26 DATED: July 12, 2010

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28 _____
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE