

DRAFT MOTION TO QUASH LANDMARK SUBPOENA

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Movant John Doe (“Doe”) moves to quash the subpoena issued by Landmark Education LLC (“Landmark”) because Landmark is attempting to misuse the Digital Millennium Copyright Act (“DMCA”) subpoena process to unmask and intimidate its anonymous critics. Landmark, a self-help corporation that was the subject of a lengthy news documentary aired on French public television, objects to some of the content of that documentary. While it is not the copyright holder for the documentary, and—as discussed in detail below—has no valid copyright claim, Landmark nevertheless is attempting to use a bogus allegation of copyright infringement as a pretext to obtain the identity of John Doe, a person who posted the documentary on the internet, using a pseudonym.

Doe has a constitutional right to speak anonymously, and no subpoena is valid, whether issued through the DMCA or the Federal Rules of Civil Procedure, if it seeks constitutionally protected information. For this reason, courts around the nation—including this Court—have recognized that discovery requests that seek to pierce the anonymity of online speakers must be carefully scrutinized in order to prevent exactly the kinds of abuses undertaken by Landmark. Following this judicial consensus, Doe’s important yet fragile anonymity interests must be shielded unless and until Landmark makes a showing by competent evidence of viable claims, significant discovery interests and the absence of alternative means of vindicating its rights. The Court’s obligation to impose this shield is critical, for once a target’s anonymity and privacy has been eviscerated, it cannot be repaired or the speaker made whole.

Specifically, Doe respectfully submits that the Court should carefully evaluate Landmark’s discovery request in light of the following factors: (1) whether Landmark has demonstrated that it has viable copyright claims;¹ (2) the specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the seriousness of Landmark’s need for the information; and (5) whether Landmark has attempted to notify the individuals whose

¹ The DMCA only authorizes subpoenas for copyright claims, and thus this Court need not consider any other claims Landmark may have. However, Doe strongly disputes that Landmark has any such claims.

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information is sought of the pending loss of anonymity. In addition, the Court should assess and compare the magnitude of the harms that the requested production would cause to the competing interests.

Landmark's DMCA subpoena cannot survive this scrutiny and must therefore be quashed.

II. BACKGROUND AND FACTS

Landmark is an international education corporation that offers "personal growth" training and development courses in 21 countries worldwide. According to Landmark, "[m]ore than 160,000 people participate in Landmark's courses each year." See Landmark Education Company Overview, available at http://www.landmarkeducation.com/display_content.jsp?top=25&mid=260 (visited Nov. 6, 2006). Some former participants, as well as researchers and the press, have criticized Landmark's methods. For example, Landmark has been accused of employing overly aggressive recruiting techniques, and intimidating participants who wish to leave the program – or even use the bathroom, eat or take medication during Landmark's most popular workshop, the Landmark Forum. See Alison Bass, *Soul Training*, Boston Globe, Mar. 3 1999, p. F1; Amanda Scioscia, *Drive Thru Deliverance*, Phoenix New Times, Oct. 19, 2000. Landmark has repeatedly (and unsuccessfully) responded to such criticism with defamation lawsuits. See *Landmark Education Corp. Sues Elle Magazine for Libel*, Business Wire, Aug. 31, 1998; Steve Jackson, *It Happens or Does It? When It comes to Landmark Education Corporation, There's No Meeting of the Minds*, Denver Westword, Apr. 18, 1996 (discussing lawsuits against Cult Awareness Network and Self Magazine).

In 2004, a documentary film about Landmark Education's activities in France was broadcast on French television, entitled *Voyage Au Pays Des Nouveaux Gourous* (Voyage to the Land of the New Gurus) ("Documentary"). The film was produced by the French news program *Pièces à Conviction*. The documentary examines Landmark's methods, and includes hidden camera footage from inside a Landmark Forum, as well as within the Landmark offices in France. It also includes a panel discussion with the host, and interviews with Landmark

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participants and various experts regarding the alleged risks of the Landmark program and whether it is actually a cult.

In Fall 2006, users of several video hosting sites, such as YouTube, the Internet Archive, and Google Video, began posting copies of the Documentary on those sites. In October 2006, Landmark Education sent threatening cease and desist letters to the hosting sites, demanding removal of the video. Landmark alleged that the Documentary was libelous, but also claimed the Documentary infringed its copyrights by including “portions” of its allegedly “copyrighted and proprietary” course entitled “The Landmark Forum.” The only registered copyright identified by Landmark in its correspondence, however, refers solely to a document entitled the “Landmark forum leaders manual” (Copyright Reg. No. TXu-1-120-461).

On October 19, Landmark issued the instant subpoena pursuant to the Digital Millennium Copyright Act to Google, demanding the identity of the individual who uploaded the Docuemntary to the Google Video site.² The declaration accompanying the subpoena, signed by Landmark’s General Counsel Art Schreiber, alleges only that the videos include ““portions” of its allegedly “copyrighted and proprietary” course entitled “The Landmark Forum;” there is no reference in the Declaration to any registered copyright. *In re DMCA Subpoena to Google*, N.D. Cal. Case No. CV 06-80304 MISC, Dkt. 1. However, the Declaration was apparently accompanied by a copy of a cease and desist letter referring to the “Landmark forum leaders manual” noted above. Pursuant to its usual practice, Google notified Doe of the subpoena request. The user advised Google, through counsel, of the user’s intent to move to quash the subpoena. Google has declined to respond to the subpoena pending resolution of the motion.

² Landmark sent substantially identical DMCA subpoenas to YouTube and the Internet Archive.

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III. ARGUMENT

A. **The First Amendment Requires That Landmark Show It Has a Viable Case, Serious Need for the Discovery and No Other Avenue of Vindicating Its Rights Before an Online User's Anonymity May Be Pierced.**

1. The First Amendment to the U.S. Constitution Protects the Right to Anonymous Online Communication.

“Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.” *Sony Music Entm’t v. Does*, 326 F. Supp. 2d 556, 563 (S.D.N.Y. 2004). Liberal protection for the right to engage in anonymous communication – to speak, read, listen, and/or associate anonymously – is fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that:

Anonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.

McIntyre v. Ohio Elecs. Comm’n, 514 U.S. 334, 357 (1995) (holding that an “author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment,” *id.* at 342); *see also Gibson v. Florida Legislative Investigative Comm’n*, 372 U.S. 539, 544 (1963) (“[I]t is ... clear that the [free speech] guarantee . . . encompasses protection of privacy of association”); *Talley v. California*, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, and noting that “anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (compelled identification violated group members’ right to remain anonymous; “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association”).

Moreover, these fundamental rights enjoy the same protections whether the context for speech and association is an anonymous political leaflet, an Internet message board or a video-sharing site. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the

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level of First Amendment scrutiny that should be applied to” the Internet); *see also, e.g., Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (“The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.”); *Sony v. Does*, 326 F. Supp. 2d at 562 (“The Internet is a particularly effective forum for the dissemination of anonymous speech”). Online or offline, the “ability to speak one’s mind without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

2. Discovery Requests That Seek to Pierce Anonymity Are Subject to a Qualified Privilege

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts, through the DMCA’s subpoena provisions or otherwise, to pierce such anonymity are subject to a qualified privilege. Courts must “be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas.” *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 192 (1999). This vigilant review “must be undertaken and analyzed on a case-by-case basis,” where the court’s “guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.” *Dendrite Int’l v. Doe No. 3*, 775 A.2d 756, 761 (N.J. Super. Ct. App. Div. 2001).

And, just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege when considering whether a subpoena is to be quashed. Fed. R. Civ. P. 45(c)(3)(A) (subpoena may be quashed if it “requires disclosure of privileged or other protected matter and no exception or waiver applies”). That consideration should help ensure that “[p]eople who have committed no wrong [are] able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.” *Columbia*, 185 F.R.D. at 578.

3. The Qualified Privilege Does Not Impede Viable Claims But Instead Limits Abuse of the Discovery Process.

A qualified privilege to remain anonymous is not an absolute privilege. Litigants have a

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right to seek information necessary to pursue reasonable and meritorious litigation. Section 512(h) is designed to provide a limited ability to seek pre-lawsuit information, when necessary for meritorious copyright lawsuits. Regardless of the source of the subpoena power, the court must strike the appropriate balance between the competing interests of subpoenaing parties and the anonymous speakers they seek to unmask. *Dendrite*, 775 A.2d at 771 (strict procedural safeguards must be imposed on subpoenas to ensure that “plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet”); *Columbia*, 185 F.R.D. at 578 (when issuing subpoenas in Doe cases, plaintiff’s desire to seek redress for injury must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously).

Recognizing as much, courts around the nation have sought to “adopt a standard that appropriately balances one person’s right to speak anonymously against another person’s right” to pursue litigation. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) Because “setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously,” *id.* at 457, these courts have required plaintiffs to demonstrate that their claims are valid, they have suffered a legally recognizable harm, and they have a serious need for the requested discovery before the court will allow disclosure of the speaker’s anonymity. *Id.*; *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005).

The strength of that demonstration depends upon a variety of factors. For example, in a defamation and trademark action (among other claims), this Court held that the protected interest in speaking anonymously requires that a plaintiff seeking to pierce a Doe defendant’s anonymity must first adduce competent evidence that “if unrebutted, tend[s] to support a finding of each fact that is essential to a given cause of action.” *Highfields*, 385 F. Supp. 2d at 975-76. If the first component of the test is met, the court should then “assess and compare the magnitude of the harms that would be caused to the competing interests” and enforce the subpoena only if its issuance “would cause relatively little harm to the defendant’s First Amendment and privacy

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rights and . . . is necessary to enable plaintiff to protect against or remedy serious wrongs.” *Id.* at 976; *see also, e.g., Columbia*, 185 F.R.D. at 578-79 (requiring demonstration of viable claims and good faith effort at notice before anonymity could be pierced).

State appellate courts have adopted similar tests. In *Doe v. Cahill*, for example, the Delaware Supreme Court held that a defamation plaintiff seeking to discover an anonymous defendant’s identity must make reasonable efforts to notify the anonymous defendant, and “submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question.” 884 A.2d. at 463; *see also Best Western Int’l v. Doe*, 2006 WL 2091695 (D.Ariz. 2006) (endorsing Cahill test); *Dendrite*, 775 A.2d at 760 (defamation plaintiff seeking to pierce anonymity of Doe defendant required to attempt to notify defendant, quote actionable speech verbatim, allege all elements of claim and submit evidence in support thereof; court would then balance “defendant’s First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure.”).

Decisions in copyright infringement actions against Doe defendants are no exception to this trend, nor should they be. Allegations of copyright infringement are no more inherently reliable than allegations of trademark infringement or defamation. Thus, in *Sony Entertainment v. Does*, a copyright case, the court weighed five factors prior to enforcing a Rule 45 subpoena against the anonymous defendants: “(1) [the existence of] a concrete showing of a *prima facie* claim of actionable harm ... (2) specificity of the discovery request ... (3) the absence of alternative means to obtain the subpoenaed information ... (4) a central need for the subpoenaed information to advance the claim ... and (5) the party’s expectation of privacy” prior to enforcement. *Sony v Does*, 326 F. Supp. 2d at 564-65.

4. Vigilant Judicial Review Is Particularly Important Given the Potential for Section 512(h) Misuse

Congress designed 512(h) subpoenas to accomplish a strictly limited purpose--identifying perpetrator of a known case of infringement. Section 512(h) subpoenas were never intended to permit unrestricted fishing expeditions to unmask and thereby intimidate Internet users,

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especially those who have not infringed the subpoenaing party's copyrights.

Absent careful pre-discovery review, however, such fishing expeditions are all too easy. Section 512(h) empowers anyone alleging "unauthorized" use of their copyrighted work to obtain, from a district court clerk, a pre-litigation judicial subpoena demanding the name, address, telephone number, and other identifying information of any Internet user. Section 512(h) does not require the subpoenaing party to demonstrate that the copyrights allegedly at issue are enforceable; the requester of a subpoena need only state a good-faith belief of infringement in the underlying 512(c) notice, and is not expressly required to undertake any due diligence, such as actual review of the suspicious files. No clerk, much less a judge, evaluates the substance or veracity of the assertions; if the paperwork submitted is in order, the clerk must sign the subpoena for delivery to an Internet Service Provider (ISP). Thus, unless courts evaluate the claims underlying the subpoena, anyone could be unilaterally empowered to compromise an individual's privacy and anonymity on the Internet, no matter how flimsy the allegation of infringement or, as here, without any copyright claim at all.

In fact, there have already been numerous instances of misuse, overreaching, and mistakes in various sections of the DMCA, including Section 512(h) subpoenas, Section 512(c)(3)(A) notices,³ or their equivalent. To take just one of many examples: In 2002, Wal-Mart sent a Section 512(h) subpoena, along with a 512(c) notice, to a comparison-shopping website that allows consumers to post prices of items sold in stores—i.e., uncopyrightable facts—claiming incorrectly that its prices were copyrighted. Wal-Mart sought the identity of the consumer who had anonymously posted information about an upcoming sale. Other retailers, including Kmart, Jo-Ann Stores, OfficeMax, Best Buy, and Staples, also served 512(c) notices on the website based on the same theory. Eventually, all the retailers withdrew the claims, but not until after the subpoena and takedown notices had been issued. *See* McCullagh, Wal-mart

³ A Section 512(c)(3)(A) notice is a prerequisite to a Section 512(h) subpoena, and is designed to notify Internet service providers of alleged infringement. If the service provider wishes to maintain its DMCA safe harbor, it is required to remove or disable access to the material upon receipt of such a notice.

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Backs Away from DMCA Claim, CNET News, Dec. 5, 2002, <http://news.com.com/2100-1023976296.html>.

Moreover, the risk of misuse is particularly high where, as here, the innocent party has made fair use of the copyrighted material, only used the underlying ideas in the material, or used material in the public domain. See 17 U.S.C. § 107; *Baker v. Selden*, 101 U.S. 99, 103-104 (1880) (ideas are uncopyrightable); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003) (affirming right to distribute public domain works as supportive of the Copyright Act's purpose). In 2003, for example, electronic voting machine manufacturer Diebold, Inc. sent a Section 512 notice to several ISPs claiming that the posting of embarrassing internal emails on voting activists websites was a copyright violation and must be taken down immediately. A court later determined that these postings were a fair use of the copyrighted materials and that the DMCA notice was an abuse of the legal process by Diebold. See *Online Policy Group v. Diebold Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004). Also in 2003, a purported copyright owner sent a Section 512 notice to the Internet Archive, demanding that it remove two films from the historic Prelinger collection of public domain materials. The sender mistook the films for the copyrighted submarine movie *U-571*. See Chilling Effects Clearinghouse: *Universal Studios Stumbles on Internet Archive's Public Domain Films*, <http://www.chillingeffects.org/notice.cgi?NoticeID=595> (last visited June 19, 2006)

To combat such misuse, courts must provide a safeguard against improper disclosure when such subpoenas are challenged. Once an online user's anonymity and privacy have been eviscerated, they cannot be repaired or the user made whole. Due process dictates that the accused infringer should not be forced to undergo the harm of losing his or her anonymity unless and until the subpoenaing party has submitted some competent evidence as to the viability of their claims—including the ability for the claims to survive self-evident defenses such as fair use.

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B. The First Amendment Qualified Privilege Requires the Application of a Balancing Test

While courts have balanced civil and litigation rights using slightly different tests, a strong unifying principle is clear: a plaintiff must show that he has a viable case, a serious need for the requested information and no other avenue of vindicating his rights before a court will allow him to pierce an online user's veil of anonymity. Keeping in mind this unifying principle, and following the lead of *Sony*, *Highfields* and *Cahill*, Doe submits that this court should evaluate Landmark's discovery request in light of the following factors: (1) whether Landmark has demonstrated that it has viable copyright claims; (2) the specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the seriousness of Landmark's need for the information; and (5) whether Landmark has attempted to notify the individuals whose information is sought of the pending loss of anonymity. *See Sony v Does*, 326 F. Supp. 2d at 564-65; *Highfields*, 84 A.2d. at 463; *Cahill*, 84 A.2d. at 463. Finally, the Court should balance the magnitude of harms to the competing interests of Landmark and the anonymous individual it seeks to unmask. *Highfields*, 385 F. Supp. 2d at 976.

With respect to the first factor, recognizing the serious due process concerns raised in *Highfields* and *Cahill*, the Court should require that Plaintiff submit some competent evidence sufficient to raise a fact dispute as to each element of its purported copyright claim. *Highfields*, 385 F. Supp. 2d at 975 ("Because of the importance and vulnerability of those [constitutional] rights ... the plaintiff [must] persuade the court that there is a real evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff"); *Cahill*, 884 A.2d at 460 ("[T]he summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously"). Only if this threshold element is met should the Court proceed to the remaining factors.

Application of this test will do much to mitigate the risk of improperly invading First Amendment rights that are "fundamental and fragile – rights that the courts have a special duty to protect against unjustified invasion." *Highfields*, 385 F. Supp. 2d at 975. Moreover, litigants

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who truly have been harmed and have made an appropriate pre-litigation investigation into the facts supporting their claims should have little difficulty crafting subpoenas that can survive the required scrutiny.

C. Landmark's Discovery Request Cannot Survive the Scrutiny Required Under the First Amendment.

Landmark's subpoena and accompanying documents fall far short of meeting the heightened discovery standard discussed above.

1. Landmark Has Not and Cannot Establish Viable Claims

Landmark must first produce competent evidence as to the validity of its claims. Landmark has not met and cannot meet even this threshold element. The allegations made by Landmark in support of their subpoena request cannot, on their face, support a copyright infringement claim.

Landmark broadly alleges that the documentary includes "portions of Landmark Education's copyrighted and proprietary course entitled "the Landmark Forum." Yet, the only specific work Landmark has actually identified as infringed is the Landmark Education's seminar leader's manual, which Forum seminar leaders apparently use to present the Landmark course. Assuming *arguendo* that this manual is the work Landmark believes to be infringed, and that the Documentary somehow contains some protectable element of the manual,⁴ Doe's posting of the Documentary in any event constitutes a self-evident fair use, privileged by the Copyright Act.⁵

Courts consider at least four factors in determining whether a particular use is a fair use

⁴ The ideas, concepts, systems explained in the manual are uncopyrightable. 17 U.S.C. 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")

⁵ Doe notes that any copyrights the Documentary's producers may have in that work are not relevant to this action. Section 512 only authorizes issuance of a subpoena if it is requested by the copyright owner or its representative; here, there is no evidence that the copyright holders have ever objected to the uploading of the Documentary on Google Video or any other video-sharing site, much less sought to subpoena information about the uploaders.

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for purposes of avoiding infringement liability:

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

17 U.S.C. § 107; *see also, e.g. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (discussing fair use factors). These four factors are not meant to be exclusive; the public interest in the expression at issue is an additional factor that courts take into consideration. Nimmer, § 13.05[B][4] (“the public interest is also a factor that continually informs the fair use analysis.”); *see also Sony Computer Entm’t Am. Inc v. Bleem*, 214 F.3d 1022, 1027 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (“[W]e are free to consider the public benefit resulting from a particular use . . .”). The doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Dr. Seuss Enters., L.P. v. Penguin Books*, 109 F.3d 1394, 1399 (9th Cir. 1997) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

(a) The Purpose and Character of the Use

In determining the “purpose and character of the use,” courts generally consider (1) whether the use is commercial or nonprofit and (2) whether the use is transformative, *i.e.* whether it adds something new with a further purpose or different character than the underlying work. *See Campbell, supra*, at 578. Because it creates new information and insights, transformative use “is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Castle Rock Ent. v. Carol Pub. Group, Inc.* 150 F.3d 132, 142 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)). Thus, transformative uses are entitled to particularly broad protection; according to the

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Supreme Court, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell, supra*, at 569. Here, the Documentary is plainly transformative and Doe’s posting of it is clearly noncommercial.

The Documentary use of material from Landmark’s manual is clearly transformative. The Documentary does not seek to replicate or supercede the course, but rather to comment upon it. The hidden-camera footage of the Forum course, as well as brief excerpts from the corresponding manual describing the instructions to course leaders, are integral to that critical commentary. Indeed, the fair use doctrine was expressly designed to permit just this type of use; *i.e.*, to permit critics to “conscript[] elements from [the original work] to make war against it.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001) (finding fair use in Alice Randall’s *Wind Done Gone*’s subversion of the characters within *Gone With the Wind* to give the former servants and slaves primacy compared to the original’s Eurocentric viewpoint.); *see also Campbell, supra*, (approving use of elements from Roy Orbison’s “Pretty Woman” as part of a song intended to comment on the original).

And, Doe’s posting of the Documentary was entirely noncommercial. Doe posted the Documentary to Google’s video hosting service in an effort to broaden public debate about Landmark’s programs. He or she stood to gain no financial benefit from the posting. *Los Angeles News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (“[t]he crux of the profit/non-profit distinction is...whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”) (quoting *Harper & Row*, 471 U.S. 539, 562, (1985)).

(b) The Nature of the Copyrighted Work

Courts usually afford creative works more protection than works of fact because creative works are at “the core of intended copyright protection.” *Campbell, supra*, at 586. To the extent that it is an informational work, the manual is less creative than a work of fiction. (“informational and functional works” farther from ‘core of intended copyright protection’) *Dr.*

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Seuss, 109 F.3d at 1402 (quoting *Campbell, supra* at 586). In any event, “this factor may be of less (or even no) importance when assessed in the context of certain transformative uses,” *e.g.*, as here, for purposes of criticism. *Kane v. Comedy Partners, et al.*, 2003 WL 22383387, 5 (S.D.N.Y. 2003) (quoting *Castle Rock, supra*).

(c) The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The “amount and substantiality” factor considers both the quantity and importance of the material used. *See Campbell, supra*, at 586. Specifically, courts consider whether the portion used is reasonably necessary to accomplish the purpose of the second work and whether it supersedes or constitutes the heart of the original work. *See Campbell, supra*, at 587 (in parody fair use case, “[o]nce enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the work’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.”).

Here, the Documentary uses no more footage of the Forum and, by extension, the manual, than necessary, and only a tiny portion of the alleged work as a whole. The Documentary includes less than 16 minutes of footage from the Landmark Forum workshop, and extracts only a handful of brief quotations from what appears to be a French-language version of the accompanying instructor’s manual. Given that the workshop lasts approximately thirty hours, according to Landmark Education’s own website, the material reproduced in the Documentary represents an infinitesimal portion of the workshop. *See* Landmark Forum Basic Information, available at http://www.landmarkeducation.com/display_content.jsp?top=21&mid=59 (last visited November 6, 2006). In addition, much of the footage does not involve any use of Landmark’s copyrighted manual, but rather shows audience members asking questions or responding to the Landmark Forum leader. Landmark cannot copyright those aspects of the course. Other hidden camera portions are outside the Forum, and thus not at issue. Moreover, this use of the manual is essential to accomplishing the Documentary’s purpose: reporting and

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commenting on the nature and alleged risks of the Landmark educational program.

(d) The Effect of the Use upon the Potential Market

Finally, the use of Landmark's copyrighted materials at issue here will cause no harm to the market for those materials—or at least no harm that is cognizable under copyright law. In analyzing this factor, courts must strike a balance “between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.” *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981). The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use. *Id.*; see also *American Geophysical*, 60 F.3d at 922 (“Courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest”).

As an initial matter, the Documentary is not a substitute for the Landmark Forum course, or for any manual intended for Forum instructors. Plainly, an hour-long Documentary that sharply criticizes a three-day interactive workshop cannot be said to supersede that workshop. Moreover, courts routinely recognize that critical transformative works are not market substitutes for the work being criticized. *Campbell, supra* at 591 (“when . . . the second use is transformative, market substitution is . . . less certain”); *Los Angeles News Service v. CBS Broadcasting, Inc.* 305 F.3d 924 (9th Cir. 2002) (transformative use of clip from television show in montage unlikely to impact relevant market); *Kelly v. Arriba Soft*, 280 F.3d 934, 943 (9th Cir. 2002) (“A transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work.”). In particular, critical transformative works do not supplant licensing markets, since copyright owners are generally not eager to invite criticism of their works or practices. See, e.g. *Campbell, supra*, at 592; *Mattell v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th 2003) (Copyright owner “less likely to grant a license to an artist that intends to create art that criticizes and reflects negatively on [original work]”). In fact, in the instant case, Landmark's own letter makes it clear that it has no interest in licensing the use of the Landmark Forum materials for criticism.

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As set forth above, the use in question not only does not cause any cognizable harm to the market for Landmark's instructional manual, but it also benefits the public by providing information about the alleged risks associated with a highly influential self-help movement. *Mattel, supra*, at 806 ("the public benefit in allowing . . . social criticism to flourish is great."); *see also Los Angeles Times v. Free Republic*, 2000 WL 1863566 (C.D. Cal. 2000) (assessing a website's role in fostering debate and discussions on topical news when determining public benefit).

Indeed, the only market harm that might be caused by the use is that viewers of the Documentary, thus informed of the potential problems with the workshop, might be less likely to sign up for Landmark's courses. That is not a harm copyright law can or should redress. *See Online Policy Group*, 337 F. Supp. 2d at 1203 ("Plaintiff's activity might have reduced [copyright owner]'s profits because it helped inform potential customers of problems with [the owner's product]. However, copyright law is not designed to prevent such an outcome.")

2. Plaintiff Has Failed to Meet the Remaining Elements of the First Amendment Balancing Test.

Because Landmark has failed to submit competent evidence supporting the viability of its copyright claims, there is no need for the court to consider the remaining factors of the First Amendment balancing test. That said, those factors also weigh against Landmark. There is nothing in the record to suggest that Landmark explored using alternative means to identify potential infringers or even attempted, e.g., via comments submitted to the video hosts, to notify Doe of the risk of having his or her identity subpoenaed. As for the extent of the need, absent viable claims it is difficult to identify an urgent need for the identifying information. Finally, releasing the requested information would cause significant harm to Doe by forcing him or her to give up his or her anonymity and potentially face frivolous litigation. Moreover, exposure of Doe's identity based on a bogus copyright claim is likely to intimidate and therefore chill the speech of other anonymous Landmark critics.

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IV. CONCLUSION

For the reasons stated above, John Doe respectfully requests that Landmark's subpoena be quashed.