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7 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
8

9 **Doc’s Dream, LLC.**

10 **Plaintiff and Counterclaim-**
Defendant,

11 **v.**

12 **Dolores Press, Inc.,**
13 **Melissa Scott,**

14 **Defendants and Counterclaim-**
Plaintiffs

15 **Dolores Press, Inc., Melissa Scott;**
Third Party Plaintiffs,

16 **v.**

17 **Patrick Robinson, Truth Seekers,**
18 **Inc., and Bobbi Jones,**

19 **Defendants**
20
..

Case No.: 2:15-cv-02857-R-PLA

Hon. Manuel L. Real

**REPLY IN SUPPORT OF
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF.**

Date: February 20, 2018

Time: 10:00 a.m.

Courtroom No.: 880 8th floor

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants appear to be more interested in telling Dr. Scott’s (“Doc” to his followers) life story through their laundry list of exhibits rather than addressing the evidence clearly established in the record. This is what Defendants proffer as “massive evidence” or “an avalanche of evidence,” as if the sheer number of exhibits and page count is somehow dispositive. *See generally* Doc. 110 (“Response”); *see also* Doc. 94 p. 9 (reply in support of Defendants’ motion for summary judgment) (“Reply”)¹.

Of course, when you have no evidence to refute the *evidentiary elephant* sitting right in the middle of the room, you must respond with something. *See* Response at 110. Defendants resort to *ad hominin* attacks launched at Plaintiff and undersigned counsel in what has turned into their *win-at-all costs* approach to this litigation—there is no better illustration of this than Defense counsel’s conduct during Plaintiff’s deposition. *See Exhibit A*, Declaration of Patrick Robinson (“Robinson”).

¹ A filing whose hyperbolic, non-sensical and misguided copyright abandonment argument is only surpassed by Defendants’ Response.

1 Defendants once again admit that Doc allowed downloading from his
2 website² quoting: “Instead, *all* Plaintiff offers is the fact, *readily admitted by*
3 *Defendants*, that Dr. Scott did cause certain works to be published on his website,
4 and – although there is no evidence that *Dr. Scott even knew of this feature* – the
5 software in question did permit people to download and then watch, as opposed to
6 stream, relevant programs.” [Emphasis Added] *See* Response p.3. First, as
7 discussed *infra*, it’s the browser (e.g. Firefox, Internet Explorer, Chrome, Opera,
8 etc.) that performs the download function. Second, Defendants would now have
9 this Court believe that Doc, the Stanford Ph.D., and media savvy Pastor, did not
10 know for a period of nine (9) years that he, or someone that he designated, had to
11 *intentionally instruct the browser* to download files. He not only knew, he intended
12 these results.

13 This “all” that Defendants so cavalierly dismiss, is one of the proof elements
14 of copyright abandonment; the other is intent. Defendants struggle mightily to
15 direct the Court’s attention anywhere but here. They would have this Court believe
16 that those with personal knowledge cannot testify because they are not experts and
17 that Plaintiff’s affiants should all be dismissed because of a technical error that has
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19 ² Doc distributed his Works from four different websites on the Internet, one of
20 them belonged to third-party Defendant Dolores Press, Inc. *See* Doc 82-1 #11.
.. (Plaintiff’s Separate Statement of Facts “SSOF” submitted as part of its motion for
summary judgment).

1 now been corrected³. *See* Response pp. 2-4. Apparently, according to Defendants,
2 only their evidence is worthy of consideration. *Id.*

3 Plaintiff understands that when the opposing party is woefully wrong on
4 both the facts and the law, there is nothing left for them to do other than to *scream*
5 *louder*, and to respond to arguments that *Plaintiff has never proffered*—all in a
6 desperate attempt to confuse this Court with subterfuge, obfuscation, and a
7 woefully misguided interpretation of settled Ninth Circuit abandonment doctrine.

8 Defendants’ misunderstanding of basic copyright law, as it applies to the
9 Internet, cannot be overstated. The fact that Defendants brag about spending
10 money on an expert to acquire knowledge that *any school child understands*, is
11 indicative of their big foot approach to litigation. *See* Response p. 16. Defendants
12 proffer non-sensical, and *technically incorrect* arguments, such as the “Real
13 Player” software allowed the downloads from Doc’s website(s), when every school
14 child aged over twelve⁴, understands that it’s the browser that performs that
15 function. *Id.* There are no experts required to testify to what millions of consumers
16 do daily. *Id.* According to Defendants, all those that cannot afford to spend money
17 on experts need not litigate in federal court. *Id.* As discussed *infra*, Defendants’ “so

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20 ³ *See* Doc. No. 115, Notice of Errata filed February 5, 2018.

.. ⁴ If this is hyperbole, it is only slightly so.

1 called expert” provides no refuge—his one-page⁵ three-part opinion covers only
2 “streaming,” not downloads.

3 Further, Defendants have now been forced to concede that anyone that
4 downloaded the works from Doc’s website(s) had “an implied license” to do so,
5 and therefore will not be sued for copyright infringement.⁶ Plaintiff did not use the
6 word “copyright troll” lightly. As this Court well knows, Defendants have already
7 sued Plaintiff’s principal for copyright infringement on multiple occasions.⁷ In
8 both cases Defendants sued “DOES 1 through 10” as well. *Id.* That
9 notwithstanding, Defendants now tell this Court that they never sued any “John
10 Does” for copyright infringement. *See* Reply p. 13 quoting: “Defendants have not
11 sued ‘anonymous John Does for alleged infringement.’” Plaintiff’s public policy
12 argument concerns remain valid. This case is much larger, vis-à-vis how commerce
13 is conducted on the Internet, than Defendants allow—obviously something that is
14 not in Defendants’ best interest to admit.

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⁵ The Report is approximately three pages but only one page of substance.

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⁶ *See* Reply p. 12 quoting “Plaintiff therefore can **keep the copies of Dr. Scott’s works it was authorized to copy** from Dr. Scott’s websites, but it cannot further reproduce or distribute those copies, because such acts are the exclusive province of the copyright owner.” [Emphasis Added].

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⁷ *See Dolores Press, Inc. v. Patrick Robinson, et. al.*, Central District of California, Case No. 2:15-cv-02562-R-PLA (“DPI Case”) April 7, 2015; *Dolores Press, Inc. v. Patrick Robinson, et. al.* Central District of California, Case No. 2:16-cv-01275-R-PLA (“Robinson II”) February 24, 2016.

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1 It is simply an absurd proposition on its face, to have copyright holders
2 encourage the download and distribution of their works by the public on the
3 Internet, and then turn around and sue those who did so for copyright infringement.
4 To download from Doc’s websites there was no user account that needed to be
5 created, no terms of use to click “I Agree” to, no conditions at all placed on the
6 downloading of the Works (i.e. files). Defendants now, *ex post facto*, want to
7 impose license terms that never existed at the time that the downloads took place.

8 Given the parties’ diametrically opposed view on the facts and the law, this
9 case is certainly ripe for summary judgment. *See* Doc. 82 (Plaintiff’s motion for
10 summary judgment or “PMSJ”).

11 **II. THE RESPONSE IS FATALLY FLAWED**

12 Defendants’ Response is fatally flawed for the following reasons: (1)
13 Defendants’ laundry list of exhibits provide no contravening evidence to the
14 admitted fact that Doc *intentionally* allowed downloads from his website—and the
15 evidence in the record makes clear that Doc allowed downloads from other related
16 websites as well⁸; and (2) Defendants, with no supporting authority whatsoever,
17 attempt to establish new copyright abandonment doctrine (“the Doctrine” or
18 “Doctrine”) from whole cloth: for example, Defendants now argue: (a) that the

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20 ⁸ *See* SSOFF #11 (demonstrating the Doc’s Works were available for download on
four different sites).

1 Doctrine does not exist at all; (b) that the only way that abandonment can occur is
2 through a writing; (c) that the Berne Convention did away with the Doctrine; (d)
3 that the intent to abandon can be proved by statements unrelated to Doc’s overt
4 acts; and that (e) the affixing copyright notices conclusively proves intent not to
5 abandon.

6 All the authority that Defendants cite is either inapposite, completely
7 mangled, or taken out of context—so much so that it is hard to make sense of these
8 citations—the cases, as discussed *infra*, do not remotely stand for the propositions
9 that Defendants proffer.

10 **III. GROSS MISREPRESENTATION OF SETTLED DOCTRINE**

11 Defendants’ bombastic, inapposite, mangled, and out of context
12 misrepresentation of settled Ninth Circuit copyright abandonment doctrine is wide
13 in scope and an obvious attempt to mislead this Court as to the import of
14 controlling precedent. *See generally* Response.

15 **A. Copyright Abandonment Doctrine Doesn’t Exist?**

16 The first preposterous notion that Defendants proffer is that the Doctrine no
17 longer exists. Period. Full stop.

18 The Copyright Act contains no provision describing how an owner
19 can abandon that copyright or otherwise dedicate a copyrighted work
20 to the public domain. It does provide that a copyright owner can grant
his or her copyright to others, but only by a written instrument the
author signs, 17 U.S.C. § 204(a), and it allows the author or heirs to

1 terminate such a grant 35 years later. 17 U.S.C. § 203. ***Based on these***
2 ***statutory provisions, it appears copyright owners can “abandon”***
3 ***their copyright only by a written instrument signed by the owner*** that
4 describes an intent to abandon copyright, and that even then,
ownership would not be truly “abandoned” because the owner could
always terminate his or her “grant” to the public 35 years after making
it. 17 U.S.C. §§ 203, 204(a). [Emphasis Added].

5 *See* Doc. 76 p. 10 (“Defs’ MSJ”). This assertion defies any reasonable reading of
6 the extant case law. *See* Robert A. Kreiss, Abandoning Copyrights to Try to Cut
7 Off Termination Rights, p. 98-99 Missouri Law Review, Issue 1 Winter 1993
8 Article 7 (“Kreiss”). There is no authority *anywhere* that supports this proposition.

9 Apparently, according to Defendants, they were the only ones clever enough
10 to figure out that the legal transfer of ownership of copyright requires a transfer in
11 writing, even though Circuit after Circuit has looked at the Doctrine since Judge
12 Learned Hand first articulated it in *National Comics*. *See generally National*
13 *Comics Publications v. Fawcett Publications*, 191 F.2d 594, 598 (2nd Cir. 1951)
14 (holding that ***allowing the public to freely copy*** is the ***purposeful manifestation*** of
15 an overt act of abandonment) (“National Comics”) [Emphasis Added]; *see also* 17
16 U.S. Code § 101 et seq. (“Copyright Act”).

17 According to Defendants’ first theory, the only way abandonment occurs is
18 if a copyright holder states in a writing (“I hereby donate my copyrights to the
19 public domain” listing all such copyrights and signed by the holder). This is not
20 copyright abandonment but rather a grant to the public domain. A grant is a type of
..

1 license, copyright abandonment is not. Kreiss at 98. fn 50 (“Analytically, however,
 2 abandonment is different. When an owner ‘authorizes’ another party to engage in
 3 one of these activities [usage of the copyrighted work via a grant], that
 4 authorization involves the owner’s consent while retaining ownership of the
 5 copyright rights. In contrast, under abandonment, the owner consents to the
 6 activity by surrendering ownership of the rights.”). [Emphasis Added].

7 Here, as discussed at length *infra*, Doc *intentionally abandoned* his
 8 copyright rights to the public domain by allowing the public to freely download,
 9 reproduce and distribute the Works. *See* Doc. 34 ¶¶12-14 (“Archive” or “Works”).

10 **B. The Berne Convention Mooted the Doctrine?**

11 Defendants’ opening tortured argument is followed closely by their assertion
 12 that the Berne Convention, promulgated in 1988 to harmonize U.S. Copyright Law
 13 with the International Community, somehow mooted the Doctrine. *See* Kreiss at
 14 93-94 fns 33-34 (“With the enactment of the Berne Amendments, forfeiture of
 15 copyright for failure to comply with the formalities of copyright notice is no longer
 16 possible...Although forfeiture of a copyright is no longer possible, abandonment
 17 remains possible. This situation exists because *abandonment results from the*
 18 *intent* of the owner to relinquish her copyright rights and allow public use of the
 19 copyrighted work.”). [Emphasis Added]. When enacting the Berne Amendments,
 20 Congress had the opportunity to state with particularity that the practical effect of

1 the Amendments was to render the abandonment doctrine moot. However, the
2 Berne Convention does not speak to abandonment and neither did Congress. Their
3 silence on this point is deafening, and fatal to Defendants’ interpretation of the law.

4 Even though only a few courts have dealt with the Doctrine since the Berne
5 Amendments of 1988⁹, not one has had anything to say about the latter somehow
6 mooting it.¹⁰

7 Defendants have the following to say on this topic:

8 In the Motion, Defendants pointed out that, although cases have not
9 addressed the point, the logic of the Copyright Act following the
10 Berne Implementation Act of 1988 **requires the conclusion that**
11 **abandonment cannot be done without a signed writing**. Under these
circumstances, Plaintiff’s decision to respond by saying “no authority
whatsoever” supports the argument is a mistake. (Response 11:10-12).
[Emphasis Added].

12 See Response p. 110; see also Reply pp. 12-13.

13 So, according to Defendants’ theory it was the Berne Convention
14 Amendments¹¹ that required copyright abandonment to occur **only through a**

15 ⁹ Before the Berne Convention Implementation Act of 1988, distribution of many
16 copies of a work without a copyright notice could inject the work into the public
17 domain in some circumstances, because generally a copyright notice was required
18 on those copies to preserve copyright. See, e.g., 17 U.S.C. §§ 102(a) 401, 405
(1976); *White v. Kimmell*, 193 F.2d 744, 745 (9th Cir. 1952); *Lopez v. Elec.*
19 *Rebuilders, Inc.*, 416 F. Supp. 1133, 1135 (C.D. Cal. 1976) (both holding that wide
and general publication of many works without a copyright notice could support
abandonment under former law).

20 ¹⁰ See e.g. *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392, 1395-
1397 (C.D. Cal. 1990); *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (C.A.9
(Cal.), 1998); see also fn 16 for additional cases.

1 *writing. Id.* This is Defendants’ position, even though the Amendments themselves
2 have nothing to say regarding the Doctrine and settled Ninth Circuit case law
3 pursuant to the Doctrine, after the Amendments, has been silent on the subject.¹²
4 Defendants’ position is a violation of the Federal Rules of Civil Procedure
5 (“FRCP”) which requires that in representations to the Court the “claims, defenses,
6 and other legal contentions are warranted by existing law or by a non-frivolous
7 argument for extending, modifying, or reversing existing law or for establishing
8 new law...” *See* FRCP Rule 11(b)(2). This is the canonical example of a frivolous
9 argument. There is no primary or secondary authority *anywhere* that supports this
10 position.

11 **C. Responses to Arguments Plaintiff Did Not Proffer**

12 Apparently out of sheer desperation, Defendants responded to arguments
13 that Plaintiff never made in its motion for summary judgment. *See generally*
14 PMSJ. Nowhere in the PMSJ does Plaintiff make an argument regarding the “free
15 distribution of websites” in any way, shape or form, let alone with respect to the
16 Doctrine. *See* Response pp. 12-14. That notwithstanding, Defendants proceed to
17 respond to a *non-existent strawman argument* with case law, which may be on
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20 ¹¹ *See generally* 17 U.S.C. §§ 401, 402, 405.

¹² *Id.*

1 point, but is otherwise inapposite and non-responsive to any issue currently before
2 this Court.

3 As the Ninth Circuit and other courts have recognized for decades,
4 computer programs and websites are works of authorship that can
5 qualify for copyright protection. *MAI Systems Corp. v. Peak*
6 *Computer, Inc.*, 991 F.2d 511, 517-18 (9th Cir. 1993); *Ticketmaster*
7 *LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1104 (C.D. Cal.
8 2007). Further, each “viewing” of a web page causes a copy of that
9 page to be downloaded from the website’s computers onto the user’s
10 computer system, an act that infringes copyright if unauthorized. *MAI*
11 *Systems Corp. v. Peak Computer, Inc.*, *supra*; *Perfect 10, Inc. v.*
12 *Amazon.com, Inc.*, 487 F.3d 701, 716 (9th Cir. 2007); *Ticketmaster*
13 *LLC v. RMG Techs., Inc.*, *supra*, 507 F. Supp. 2d at 1105-1106.

14 *Id.* Plaintiff has never made the argument that simply viewing a website causes
15 copyright infringement. *Id.*; *see also generally* PMSJ. This is a complete
16 fabrication on the part of Defendants. *Id.* They take an argument about Doc’s intent
17 to allow the “free download, reproduction, and distribution” of his Works
18 from various websites—to an absurd non-argument about websites generally. *Id.*
19 Defendants’ set up the strawman and then proceed to set it on fire. *Id.* They
20 accomplish nothing other than to demonstrate the lengths they are willing to go to
attempt to confuse this Court about non-issues. First, website owners generally do
not encourage consumers to download, reproduce and distribute their sites. Second,
the argument about the “browser making a copy of page” is specious—the Ninth
Circuit has never held that this amounts to copyright infringement. *See Perfect 10,*
Inc. v. Amazon.Com, Inc., 508 F.3d 1146,1161-1163 (9th Cir., 2007).

1 Finally, Defendants’ website argument has no relevance at all to the issue
2 before the Court. Copyright of Doc’s websites is not at issue.

3 **D. Defendants’ Authority is Inapposite & Mangled**

4 Every material citation to authority provided by Defendants is inapposite,
5 mangled, and/or taken out of context:

6 **1. *National Comics***

7 Defendants cite *National Comics* for the proposition that “placing copyright
8 notices – even defective ones – on a work is ‘conclusive evidence’ of an intent to
9 retain rights and not abandon copyright (rejecting abandonment theory).” *See*
10 *Response* at 9; *see also National Comics* at 598 (Defendants’ citation). Inasmuch
11 as the esteemed Judge Learned Hand (“Judge Hand”) first introduced the Doctrine
12 in *National Comics*, it would be an exercise in self-contradiction to reject it in the
13 very same case. *See generally Id.* Judge Hand did no such thing. *Id.* Defendants’
14 deception fails to indicate to this Court that *National Comics* was a copyright case
15 based on the 1909 Copyright Act, wherein the lack of notices might require
16 copyright “forfeiture,” which as discussed *supra*, is completely distinct from
17 copyright abandonment. *Id.*; *see also See Kreiss* at 93-94 fns 33-34. Because of the
18 Berne Amendments¹³, copyrights can *no longer be forfeited* under the 1976
19

20 _____
.. ¹³ *See generally* 17 U.S.C. § 401 *et. seq.*

1 Copyright Act, although they can still be abandoned. *Id.* Defendants apparently
2 place very little importance on such “fine” distinctions. *Id.*

3 *National Comics* does not stand for the proposition that “defective notices”
4 conclusively prove no abandonment, because as overstated as that alleged holding
5 is (i.e. according to Defendants), it applies to “forfeiture” and not abandonment.
6 *See National Comics* at 602-694. The holding in *National Comics* has everything
7 to do with “copyright forfeiture” and nothing to do with copyright abandonment.
8 *Id.* Defendants completely misrepresent the holding to this Court.

9 Plaintiff, on the other hand, uses *National Comics*, as cited favorably in
10 *Hampton*, for the following proposition:

11 Rights gained under the Copyright Law, 17 U.S.C.A. § 1 et seq., may
12 be abandoned. Abandonment of such rights, however, must be
13 ***manifested by some overt act*** indicative of a purpose to surrender the
14 rights and ***allow the public to copy***. *National Comics Publications v.*
15 *Fawcett Publications*, 91 F.2d 594, 598 (2nd Cir. 1951). [Emphasis
16 Added].

17 *See Hampton v. Paramount Pictures Corporation*, 279 F.2d 100, 104 (9th Cir.,
18 1960) (citing with approval *National Comics*) (“Hampton”). *National Comics*
19 established the standard for proving copyright abandonment—a standard that the
20 Ninth Circuit has followed ever since. *Id.*

21 Contrary to Defendants’ misguided attempt at making new law—the
22 Doctrine remains alive and well in the Ninth Circuit to this very day.

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2. *Worldwide Church v. Philadelphia Church of God*

Defendants once again use the holding in this case to deceive. *See generally Worldwide Church v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir., 2000) (“WWC”). First, *WWC* is a copyright fair use case and not a copyright abandonment case. *Id.* Second, the facts in *WWC* are diametrically opposed to the facts in the case at bar. *Id.* In *WWC*, the copyright holder gave away hundreds of copies of his hard-bound book for free. *Id.* at 1112-1113. There is no evidence in the record that the copyright holder in *WWC* ever encouraged those to whom he gave the books to “reproduce and distribute them.” *Id.* Of course, a copyright holder can give his books away for free—but if he were to have done so on the Internet (or in the analog world for that matter), *sans any license restrictions*, encouraging the public to make perfect copies, reproduce and distribute them—then he would have abandoned his rights analogously.

In *WWC* the copyright holder did no such thing. *WWC* is readily distinguished from the instant case both legally (i.e. it was a copyright “fair use” case) and factually (no encouragement to reproduce and distribute the free copies). *Id.* Unsurprisingly, Defendants fail to point out either.

3. *A&M Records, Inc. v. Napster, Inc.*

This is a copyright vicarious liability case and not a copyright abandonment case. *See generally A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir.

1 2001) (“Napster”). Copyright abandonment is only referenced twice in *dicta* (i.e.
 2 as part of a discussion of “Waiver”). *Id.* at 1026. Paradoxically, Defendants’ use of
 3 *Napster* only serves to affirm other Ninth Circuit abandonment law that holds that
 4 two elements are required to prove copyright abandonment: (1) an overt act on the
 5 part of the copyright owner; and (2) that the overt act be intentional. *See Hampton*
 6 104 (citing *National Comics*).¹⁴

7 **4. Taylor Holland LLC v. MVMT Watches, Inc.**

8 In *Taylor*, Defendants argue against their own position. *See generally Taylor*
 9 *Holland LLC v. MVMT Watches, Inc.*, 2016 WL 6892097 (C.D. Cal. 2016)
 10 (“Taylor”). Defendants use *Taylor* to stand for the following proposition: “proof of
 11 intent must be through ‘an overt act indicative of a right-holder’s intent to
 12 completely abandon those rights and allow the public to copy.’” *Id.* at *9; *see also*
 13 Response at pp. 11-13. It’s true that the Defendant in *Taylor* did not prevail on its
 14 copyright abandonment affirmative defense, but there’s nothing else in *Taylor* that
 15 is helpful to Defendants. *Id.* at 18-20.

16 In fact, *Taylor* proves fatal to Defendants on several fronts: (1) pursuant to
 17 the nature of the overt acts required for abandonment; and (2) Defendants’ recently
 18 introduced specious argument pursuant to an “implied license.”

19
 20 ¹⁴ Defendants take issue with Plaintiff’s use of *Hampton*, completely
 21 misunderstanding the citation. *See generally* Response pp. 19; 22; *see also*
 22 *generally* Reply p. 11.

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Overt Acts

In *Taylor*, the court summarizes manifestations of overt acts that may lead to abandonment:

An overt act can also consist of public statements by the copyright owner renouncing an interest in a work. See *Marya*, 131 F. Supp. 3d at 993 (finding author’s statement to journalist that she had surrendered any claim she had to copyrighted lyrics was an overt act upon which a reasonable fact finder could base a finding of abandonment); *Melchizedek v. Holt*, 792 F. Supp. 2d 1042, 1051-54 (D. Ariz. 2011) (finding author’s public [*18] statements indicating he was not interested in protecting his work were overt acts that could be indicative of intent to abandon copyright protection). [Emphasis Added].

Id. Here, and as discussed further *infra*, the evidence in the record clearly demonstrates that Doc frequently encouraged his congregation, and anyone within the sound of his voice, to “freely download, reproduce, and distribute his online Works.” See SSOF #1-6.

Now, the voice of one of Doc’s insiders, the wife of Charles S. Garcia, MD, a.k.a. “Buddy Garcia” (now deceased), Le Hua Garcia (herself a devoted follower of Doc who volunteered at his ministry), testifies that it was widely known and unquestioned that Doc wanted his online Works available for all to “freely download, reproduce and share forever.” See generally Exhibit B ¶¶6-9, Affidavit of LeHua Garcia (“Aff. Garcia”). Buddy was the Medical Doctor that took care of Doc and his family for over thirty (30) years; he signed Doc’s last will and

1 testament, was at Doc’s bedside when he died, and was intimately familiar with
 2 Doc’s state of mind.¹⁵ Therefore, Doc’s public statements, for a period of
 3 approximately nine (9) years, may be used as circumstantial evidence that he
 4 *intended* for the public to “freely download, reproduce and share forever.” *See*
 5 *Taylor* at 18-20. As the *Marya* court states:

6 The clear implication from the article is that Patty told the TIME
 7 journalist that she had surrendered any claim she may have had to the
 8 Happy Birthday lyrics. A ***public statement*** like this, if believed, is an
 9 ***overt act on which a reasonable fact finder could base a finding that***
 10 ***Patty abandoned her copyright interest*** in the lyrics. *See Melchizedek*
 11 *v. Holt*, 792 F.Supp.2d 1042, 1048, 1061 (D.Ariz.2011) (finding
 12 triable issue of fact where author made public statements indicating
 13 that he was not interested in protecting his work). [Emphasis Added].

14 *See Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975, 992-993 (C.D.
 15 Cal. 2015) (“Marya”)¹⁶. Here, unlike the plaintiff in *Marya*, not only is there
 16 uncontroverted evidence as to Doc’s online Works, there is a nine (9) year history
 17 of Doc’s intentional act of allowing the public (via the browser) to download his
 18 Works unrestricted by any license, implied or otherwise. *See* SSOF #1-6; *see also*

19 ¹⁵ Buddy, via a YouTube video filmed before he passed, also testified that Doc
 20 always wanted his online Works available for the public to download, reproduce
 and distribute forever. *See* YouTube video:
https://www.youtube.com/watch?time_continue=42&v=oOQDdmgx81E. Buddy,
 LeHua, and their children all left the ministry in 2007, in part, because Defendant
 Scott had, according to the family, neglected to keep her promises regarding Doc’s
 online Works. *See* Aff. Garcia ¶10.

¹⁶ *Marya*, *Melchizedek*, and *Taylor* are all copyright abandonment cases that
 occurred subsequent to the U.S.’ adoption of the Berne Convention, and not a
 single one holds that the copyright abandonment doctrine no longer exists.

1 Aff. Garcia ¶¶6-9. Defendants, unsurprisingly and wrongfully, cherry pick *Marya*
2 for the following proposition:

3 [C]opyright owner’s statement that she had “no complaint to make on
4 the use of the [copyrighted] words because she long ago resigned
5 herself to the fact that her ditty had become common property of the
6 nation” not sufficient to prove abandonment as a matter of law);
7 *Melchizedek v. Holt*, 792 F. Supp. 1042, 1053, 1054 (D. Ariz. 2011)
(copyright owner’s statement that ‘I don’t care about copyrights or
any of that stuff, that doesn’t matter. Forget it, just take it and you’ll
understand what this is all about by tomorrow’ insufficient to establish
abandonment as a matter of law.”

8 See Response pp. 11-12. This is an outright misstatement of what the *Marya* court
9 held. See *Marya* at 992-993.

10 **Implied License**

11 As discussed *supra*, Defendants have now been forced to concede that
12 everyone that freely downloaded the Works from Doc’s website(s) had an implied
13 license to do so.¹⁷ However, under settled Ninth Circuit law, Defendants’ argument
14 of an implied license fails in its entirety. Here there was no implied license
15 whatsoever, but rather the canonical example of copyright abandonment of certain
16 rights.¹⁸ See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (C.A.9 (Cal.), 1998)
17 (stating “abandoning some rights is not the same as abandoning all rights”).

18

19 ¹⁷ See fn 3.

20 ¹⁸ See PMSJ pp. 14; 19 (wherein Plaintiff argues that Doc only abandoned his
rights of reproduction and distribution of his online Works, but not his commercial
rights in same).

..

1 In *Taylor*, the court states the elements that must be fulfilled to grant an
2 implied copyright license to a licensee:

3 To determine whether a copyright owner intended to grant a license,
4 courts assess “the licensor’s objective intent at the time of the creation
5 and delivery of the [work] as manifested by the parties’ conduct.”
6 *Asset Marketing Systems, Inc v. Gagnon*, 542 F.3d 748, 756 (9th Cir.
7 2008). Accordingly, the Ninth Circuit has held that an implied license
8 has been granted when “(1) a person (the licensee) **requests the**
9 **creation of a work**, (2) the creator (the licensor) makes that particular
10 work and delivers it to the licensee who requested it, and (3) the
11 licensor intends that the licensee-requestor copy and distribute his
12 work.” 12 *Id.* at 754-55 (citing *LA.E., Inc. v. Shaver*, 74 F.3d 768, 776
13 (7th Cir. 1996)); *see also Effects Associates*, 908 F.2d at 558-59.
14 [Emphasis Added].

15 Here it is undisputed the Doc made his Works publicly available on the Internet
16 under his own initiative. *See* Response p. 3 (Defendants admit that Doc made his
17 works freely available for download). There is no evidence in the record that the
18 public came to Doc and requested that he create these Works—therefore,
19 Defendants cannot meet the elements of *Gagnon*, and hence no implied license was
20 created. *See Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 756 (9th Cir.
21 2008) (“Gagnon”). Doc never delivered his works to a single licensee, rather Doc
22 delivered his works to the world, via the Internet for all to download, reproduce
23 and distribute. *Id.*; *see also* Response p. 3; SSOF #1-6.

24 As discussed *supra*, Defendants now, *ex post facto*, want to impose implied
25 license terms that never existed at the time that the downloads took place. *See*

1 Response pp. 3-4. For example, Defendants propose the following pursuant to an
2 implied license: “all that was ever permitted on the website was downloading of
3 selected recordings for the purpose of viewing them.” *Id.* Defendants cite no
4 evidence in the record regarding these implied terms, because none exists. *Id.*
5 Defendants are simply fabricating implied terms as they go. *Id.* The evidence is
6 quite “clear, decisive and unequivocal” that Doc did not have an implied license
7 agreement with the public. Rather, what Doc’s conduct demonstrates is his intent
8 to abandon the copyright to his online Works. *See Gagnon* at 756; *see also*
9 *Interscope Records v. Time Warner, Inc.*, 2010 WL 11505708, *13 (C.D. Cal.
10 2010). Although Doc’s website(s),¹⁹ where the download of his Works was made
11 available to the public, did contain a copyright notice—Plaintiff has recently
12 discovered compelling evidence that there was no copyright notice placed on each
13 one of the Works, in direct contravention of Defendants’ position. *See* Response
14 pp. 1-3; *see also* Exhibit C, Declaration of Carlos A. Leyva ¶¶5-6, Plaintiff’s
15 counsel.

16 Further, as discussed more at length *infra*, under the Supreme Court’s
17 holding in *Medtronic*, in intellectual property based declaratory judgments, it is
18 *Defendants that bear the burden*, e.g. in the case at bar, of establishing the
19 following: (1) the validity of their copyrights; (2) what was contained in the

20 _____
..¹⁹ *See* fn 2.

1 Archive (i.e. the identification each Work; and (3) whether or not there was a
2 copyright notice placed on each one. *See Medtronic, Inc. v. Mirowski Family*
3 *Ventures, LLC*, U.S. 187 L.Ed.2d 703 (2014).²⁰

4 **5. *Interscope Records v. Time Warner, Inc.***

5 Defendants use *Interscope* to stand for the proposition that **only** “clear,
6 decisive and unequivocal conduct is admissible to show an intent to abandon.” *See*
7 *Interscope Records v. Time Warner, Inc.*, 2010 WL 11505708, *13 (C.D. Cal.
8 2010) (“Interscope”); *see also* Response p. 3. However, the *Interscope* court
9 clearly states that this level of evidentiary burden is only required if a party is
10 trying to prove that a copyright holder *implicitly* abandoned his copyright. *Id.* Here,
11 not only does Plaintiff meet this burden, but also provides this Court compelling
12 evidence that Doc abandoned his copyrights explicitly as well. *See* PMSJ pp. 15-
13 23.

14 **IV. THE EVIDENCE OF ABANDONMENT IS DISPOSITIVE**

15 Defendants assert that Plaintiff has no evidence; once again this is a
16 fabrication invented out of desperation. *See* Response p. 2.

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20 ²⁰ During discovery Defendants have consistently attempted to shift this burden to
Plaintiff.

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A. Defendants Admit the Overt Acts

First, as discussed *supra*, Defendants *admit* that Doc allowed the free download and reproduction of his Works. *Id.* at p.3. Defendants now engage in a failed attempt to add terms and conditions to a *non-existent implied license*, indicating that Doc somehow expressly restricted the distribution of what the consuming public could download for free. *Id.* at pp. 3-4. Doc did no such thing. Under *Gagnon*, Plaintiff has demonstrated that no implied license ever existed, and even if one had, Defendants are not free to add terms and conditions *ex post facto*. *See Gagnon* at 756.

B. Doc’s Statements Demonstrate Intent

Second, under *Marya* and *Melchizedek* it is settled Ninth Circuit law that Doc’s statements encouraging his followers to “freely download, reproduce, and distribute” his Works can be used as compelling circumstantial evidence of his intent to abandon. *See Marya* at 992-993; *see also Melchizedek v. Holt*, 792 F.Supp.2d 1042, 1048, 1061 (D.Ariz.2011); SSOF ##1-6; Aff. Garcia ¶¶6-9. The following statement by Doc was stipulated to by the parties in their joint pre-trial order (Doc. 107 or “PTO”).

I listened to John Hagee complaining a few weeks ago that his people, his listeners were stealing cause he paid so much for air time and he sells his messages and they were taking them off the TV, which a, *all of them take my stuff off the internet and a that’s really not a crime*

1 *unless you reproduce it and sell it to someone else.* [Emphasis
Added].

2
3 That’s fine, as long as they *give credit*, they can take a piece of any
4 message I preach. It saves them a lot of research. *But they need to
5 give credit.* And if you’re watching right now, you remember that.
6 God gives, but He gives to whom He will; the gifts....

7 *See* PTO Exhibit B p. 1-2. These statements by Doc corroborate what many of his
8 congregation have attested to, namely that the only “restrictions” Doc ever placed
9 on the “free downloading, reproduction, and distribution of his Works” were the
10 following: (1) he did not want anyone to commercialize them; and (2) he wanted
11 attribution. Of course, the website(s) where the Works were available contained no
12 such restrictions; therefore, a member of the public would have to have been a
13 close follower of Doc’s in order to learn of said restrictions. *See* SSOF ##1-6; *see*
14 *also* Aff. Garcia ¶¶8-9.

15 **C. Intentional Instrumentation of the Browser Allowed Downloads**

16 Defendants’ lack of knowledge of how the Internet works is clearly on
17 display in Defendants’ Response. *See* Response pp. 15-16. Defendants wrongfully
18 state, as a matter of *technical certitude* “that the Real Player software allowed
19 downloading.” *Id.* at p. 15 fn 3. Technically the *browser* is, and always has been,
20 the software that allows file downloads. The website owner must *intentionally*

1 “code” HTML²¹ using a special tag called an “href,”²² to allow a file to download.
2 Arguing that Real Player allowed Doc’s Works to be downloaded is akin to
3 arguing that Adobe Acrobat is the software that allows “.pdf” files to be
4 downloaded or Microsoft Word is the software that allows “.docx” files to be
5 downloaded. It’s simply *technically wrong*. Neither Doc nor his staff were
6 confused as to how to *intentionally* cause the browser to download the “.ram” files.
7 Real Player was launched only because the browser recognized that “.ram” was a
8 file type associated with it. Modern browsers no longer recognize this file type
9 because Real Player lost the “standards wars” and other “players” now dominate.
10 *See Exhibit D*, Internet Explorer fails to recognize a “.ram” file.

11 The ability for the public to download the Works was an *intentional act* and
12 did not happen by accident as Defendants would have this Court believe “because
13 Doc did not know that Real Player caused files to be downloaded.” Defendants’
14 arguments, and that of their “so called expert,” amount to nothing more than
15 technical mumbo jumbo that they themselves, and their expert, do not understand.
16

17 ²¹ *See generally* searchmicroservices.techtarget.com/definition/HTML-Hypertext-
18 Markup-Language (HTML is the set of markup symbols or codes inserted in a file
intended for display on an Internet browser page. The markup tells the browser
how to display a page’s words and images for the user.).

19 ²² *See* https://www.w3schools.com/tags/att_a_download.asp (The download
20 attribute specifies that the *target will be downloaded* when a user clicks on the
hyperlink...the *browser will automatically detect* the correct file extension and add
it to the file (.img, .pdf, .txt, .html, .docx, .xml etc.)). [Emphasis Added].
..

1 It is pure subterfuge. Doc and his staff were media savvy, they ran their own TV
2 network, they were pioneers with WEB TV—Defendants now want to make Doc
3 seem like a luddite—a hopeless and clueless technophobe, utterly confused by the
4 technology at his disposal. *See* SSOF #11.

5 **V. CONCLUSION**

6 There are no material facts in dispute with respect to Plaintiff’s Declaratory
7 Action. Doc’s actions indisputably and *intentionally*, both explicitly and implicitly,
8 abandoned the copyrights to his Works to the public domain. Defendants are
9 incapable of sustaining their evidentiary burden as to the overt acts and as to intent.
10 Therefore, Plaintiff is entitled to summary judgment in its favor, as a matter of law.
11 Further, Plaintiff asks this Court to enjoin Defendants from continuing their
12 abusive and frivolous lawsuits as to similarly situated persons or entities—that is,
13 all persons or entities that acquired Doc’s Works via the Internet Archive, wherein
14 the latter encouraged them to do so.

15 Finally, because of Defendants’ abusive and wanton actions in this case,
16 Plaintiff asks this Court to award Plaintiff its attorneys’ fees under its *inherent*
17 *powers*, to prevent Defendants from engaging in similar litigious and abusive
18 conduct going forward.

19 ///

20 ///

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1 Dated: 02/6/2018

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DOC'S DREAM, LLC

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CERTIFICATE OF SERVICE

11

I hereby certify that on February 6, 2018, I electronically transmitted the

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attached document to the Clerk's office using the CM/ECF System for filing and

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service on all registered participants of the CM/ECF System with regard to this

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matter. All parties' counsel are registered CM/ECF users and will be served by the

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CM/ECF system.

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/s/Linda S. McAleer

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Linda S. McAleer, Esq.

Attorney for Plaintiff

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