

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NO. 11-16358

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RIGHTHAVEN LLC,  
Appellant

v.

CENTER FOR INTERCULTURAL ORGANIZING, and KAYSE JAMA,  
Appellees

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**APPELLANT RIGHTHAVEN LLC'S OPENING BRIEF**

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Appeal from the United States District Court for the District of Nevada  
Case No. 2:10-cv-01322-JCM-LRL

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SHAWN A. MANGANO, LTD.  
Shawn A. Mangano, Esq.  
Nevada Bar No. 6730  
8367 West Flamingo Road, Suite 100  
Las Vegas, Nevada 89147  
Phone: (702) 304-0432  
Fax: (702) 922-3851

Counsel for Appellant Righthaven LLC

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Righthaven LLC, a Nevada limited-liability company, files this statement identifying parent corporations and publicly held companies that own 10-percent or more of its stock:

None.

Dated this 22<sup>nd</sup> day of November, 2011.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano  
SHAWN A. MANGANO, ESQ.  
Nevada Bar No. 6730  
shawn@manganolaw.com  
8367 West Flamingo Road  
Suite 100  
Las Vegas, Nevada 89147

*Attorney for Appellant  
Righthaven LLC*

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## I. STATEMENT OF JURISDICTION

(a) *District Court Jurisdiction:* Appellant Righthaven LLC (“Righthaven”) invoked the district court’s subject matter jurisdiction over its copyright infringement Complaint pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1331.

(b) *Appellate Jurisdiction:* This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(c) *Timeliness of Appeal:* Righthaven’s appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). The Final Judgment was entered in this action on May 13, 2011. Righthaven’s Notice of Appeal was filed on May 18, 2011.

(d) *Appeal From Final Judgment:* This case is an appeal of a Final Judgment entered on May 13, 2011.

## II. ISSUES PRESENTED FOR REVIEW

1. Whether the district erred in entering summary judgment, *sua sponte*, in favor of the Defendants on fair use grounds under Section 107 when no answer had been filed, no affirmative defenses had been asserted, no discovery had been conducted and Righthaven identified genuine issues of material fact upon which discovery was required.

2. Whether the district court erred in finding the Defendants 100% wholesale replication of a copyrighted work alleged was protected as fair use under Section 107 based largely on one Defendant's non-profit status and without regard to its display of infringing content on an Internet website upon which the non-profit entity was actively soliciting memberships and donations from the public, which appears directly contrary to this Court's decision in *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115-16 (9th Cir. 2000) ("*Worldwide Church of God*").

### **III. STATEMENT OF THE CASE**

On August 5, 2010, Righthaven LLC ("Righthaven") filed a copyright infringement action against Center for Intercultural Organizing ("CIO") and Kayse Jama ("Jama" and collectively referred to with CIO as "Defendants"). (EOR 1 at #1.) Defendants first responded to Righthaven's Complaint by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), which asserted they were not subject to personal jurisdiction. (*Id.* at # 8.) This motion was later denied by the district court. (*Id.* at # 32.)

While Defendants' motion to dismiss was still pending, the district court issued a *sua sponte* Order to Show Cause (the "OSC") why Righthaven's Complaint should not be dismissed on the basis that Defendants' unauthorized replication of the Work was protected as fair use under 17 U.S.C. § 107 ("Section 107"). (EOR 1 at # 12.) The district court's OSC did not set forth the procedural basis upon which it was potentially dismissing Righthaven's Complaint. (*Id.*) At the time the OSC was issued, Defendants had not answered the Complaint, asserted a fair use affirmative defense, and no discovery been conducted given that the case was at its inception.

On December 28, 2010, the district court held an initial hearing on the OSC. (EOR 27.) During the OSC hearing the district court was advised that no discovery had been conducted and genuine issues of material fact existed upon which discovery was required that precluded dismissal of Righthaven's Complaint *sua sponte* under Federal Rule of Civil Procedure 56 ("Rule 56") on fair use grounds. (*Id.*) The district court ordered Righthaven to submit an identification of genuine issues of material fact upon which it maintained discovery was necessary. (*Id.*) The Defendants and *amicus curiae* were provided with an opportunity to respond to Righthaven's identification of genuine issues of material fact. (*Id.*) The

parties filed timely submissions in response to the district court's order. (EOR 27-29.)

On March 18, 2011, the district court held a second OSC hearing. (EOR 36.) At the beginning of the OSC hearing, the district court rejected each and every genuine issue of material fact identified by Righthaven as being issues upon which discovery was required. (EOR 36.) The district court then entered summary judgment in favor of the Defendants on the grounds that the alleged copyright infringement at issue was protected as fair use under Section 107. (*Id.*) The district court's decision was subsequently reduced to a formal order on April 22, 2011. (EOR 38.)

On May 13, 2011, the district court entered Final Judgment in Defendants' favor. (EOR 40.) On May 18, 2011, Righthaven timely appealed the district court's decision. (EOR 81.)

#### **IV. STATEMENT OF RELEVANT FACTS**

On August 5, 2010, Righthaven filed a copyright infringement action against the Defendants one of which, CIO, is a non-profit organization. (EOR 1 at #1.) Defendants were alleged to have published, without authorization, a 100% replication of the literary work entitled "Misdemeanor violations leading to deportations" (the "Work"), which was originally published in the *Las Vegas Review Journal*, on their publicly



available Internet domain <interculturalorganizing.org> (the “Website”). (EOR 1 at #1.) Righthaven validly obtained all rights, title and interest to the Work, including the right to sue for past, present and future infringements through an assignment from Stephens Media, LLC. (*Id.*) Righthaven has been granted registration of the Work from the United States Copyright Office. (*Id.*)

As discussed above, shortly after the case was commenced, the district court issued a *sua sponte* OSC requiring Righthaven to explain why its Complaint should not be dismissed on fair use grounds pursuant to Section 107. (EOR 1 at # 12.) The OSC did not set forth the procedural grounds upon which the district court was evaluating dismissal. (*Id.*)

During an initial OSC hearing, Righthaven advised the district court that no discovery had occurred in the case and that genuine issues of material fact remained upon which discovery was required. (EOR 27.) Prior to the hearing a declaration of counsel was submitted on behalf of Righthaven requesting a continuance so that discovery may be conducted. (EOR 15.) Righthaven’s counsel’s declaration attached a copy of materials printed from Defendants’ Website that illustrated CIO, despite being a non-profit organization, actively solicited membership and donations from those who viewed content on or otherwise visited the Website upon which the

unauthorized copy of the Work appeared. (EOR 15 at 2, Ex. 1.)

Righthaven's counsel declaration also set forth the means of discovery that was anticipated in order to address the outstanding genuine issues of material fact presented under a Section 107 analysis. (*Id.*) As a result of the initial OSC hearing, the district court reluctantly and vehemently ordered Righthaven to set forth in a filing the genuine issues of material fact that it believed precluded dismissal under Rule 56. (EOR 27.) Righthaven complied with the district court's directive. (EOR 28.) Defendants and *amicus curiae* responded to Righthaven's submission. (EOR 29-30.)

At the commencement of the second OSC hearing, the district court rejected each and every genuine issue of material fact that was identified by Righthaven. (EOR 36.) The district court then determined, as a matter of law, that each of the four analysis factors under Section 107. (*Id.*; EOR 38.) It then proceeded to enter summary judgment in favor of Defendants based on its fair use determination. (*Id.*; EOR 38.)

In entering summary judgment in favor of the Defendants, the district court refused to follow binding precedent from this Court that in view of the wholesale, unauthorized copying of the Work and the reputational benefits and membership/donation solicitation engaged on the Website where the unauthorized replication was posted a finding of fair use

under Section 107 was wholly inappropriate. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115-16 (9th Cir. 2000). The district court instead attempted to distinguish this Circuit’s binding precedent on such grounds as the facts before it involved the wholesale replication of a news article, whereas the *Worldwide Church of God* decision involved the wholesale replication of an entire book. (EOR 38 at 6.) The district court further elected to disregard this Court’s decision in *Worldwide Church of God* by finding that the Defendants’ “solicitation of donations on their website is immaterial . . .” given that “CIO is a non-profit corporation with an educational mission . . . .” (*Id.* at 4.) Righthaven asserts on appeal that the district court erred in failing to apply this Court’s decision in *Worldwide Church of God*. In fact, given the record presented, the district court would have been justified in entering a finding against a fair use defense as a matter of law based this Court’s decision in *Worldwide Church of God*.

## V. ARGUMENT SUMMARY

1. The district court erred by *sua sponte* granting summary judgment in favor of the Defendants by finding that their alleged infringing conduct constituted fair use under Section 107 for several reasons. First, the district court entered *sua sponte* summary judgment on a factually intensive and case-by-case determined affirmative defense as a matter of law despite the factual record before it being contested by Righthaven. Second, the district court's action was taken without either party having engaged in any discovery whatsoever. Thus, the factual record before the district court had not been developed through the discovery process. Finally, the district court erred in entering summary judgment in favor of the Defendants despite Righthaven having identified on three occasions genuine issues of material fact upon which discovery was required. Any of the foregoing grounds justify reversal of the district court's *sua sponte* entry of summary judgment based on fair use under Section 107.

2. Substantively, the district court's *sua sponte* entry of summary judgment on fair use grounds requires dismissal because it failed to apply the controlling decision from this Court in *Worldwide Church of God* in its fair use analysis. Moreover, the district court's fair use analysis is legally and factually flawed on numerous grounds.

## VI. ARGUMENT

### **A. The District Court Erred in Granting *Sua Sponte* Summary Judgment by Finding The Defendants' Alleged Infringing Conduct Constituted Fair Use Despite No Discovery Having Been Conducted And Given Righthaven's Identification of Genuine Issues of Material Fact That Required Discovery.**

The district court's decision to grant summary judgment in Defendants' favor on fair use grounds serves as the first basis for reversal on appeal of this action. Specifically, the district court entered summary judgment despite the Defendants having yet to answer the Complaint or having asserted any affirmative defenses, including a defense of fair use under Section 107, and with absolutely no discovery having been conducted by either party. The district court's drastic decision to enter summary judgment in Defendants' favor was also done despite Righthaven having set forth on at least three occasions (prior to the first OSC hearing, during the first OSC hearing, and by submission pursuant to the district court's order to do so) that genuine issues of material fact existed upon which discovery was required before any meaningful fair use decision could be made. (EOR 15, 27, 28.) The district court's actions in view of this record compel reversal of its decision to enter summary judgment, *sua sponte*, in favor of the Defendants on fair use grounds in this action.

This Court reviews de novo a district court's entry of summary judgment. *Nolan v. Heald College*, 551 F.3d 1148, 1153 (9th Cir. 2009). District courts "possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). In such circumstances, the case must have been provided with a sufficient opportunity to appreciate the discovery topics at-issue and to conduct discovery on such topics. *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993); *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985). Granting summary judgment requires the absence of any genuine issue of material fact, thus entitling a party to entry of judgment as a matter of law. FED. R. CIV. P. 56 (c). Adjudication may be delayed in order to provide a party potentially facing an adverse decision to conduct discovery and present the court with additional evidence. FED. R. CIV. P. 56 (f). With regard to fair use, the Court may only conduct an analysis where, as a matter of law, the circumstances present dispositive presumed or admitted facts. *See Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir. 1986); *accord Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 967 (C.D. Cal. 2007).

As a threshold matter, the district court entered summary judgment on a *sua sponte* basis as a matter of law on an affirmative defense, fair use, which requires a record virtually devoid of any factual disputes given the nature of the case specific inquiry involved in making such a determination, despite Righthaven contesting the facts upon which its decision was reached. *See Fisher*, 794 F.2d at 435-36; *accord Burnett*, 491 F.Supp.2d at 967. In fact, not only did Righthaven contest the factual record presented to the district court by the Defendants, it specifically requested discovery on issues related to the fair use inquiry and identified genuine issues of material fact upon which discovery was required. (EOR 15, 27, 28.) As such, the district court was certainly not presented with dispositive presumed or admitted facts upon which it could justifiably find, as a matter of law, that Defendants' wholesale, 100% unauthorized reproduction of the copyrighted Work constituted fair use under Section 107. Accordingly, these circumstances independently support reversal of the district court's *sua sponte* entry of summary judgment.

The district court's *sua sponte* entry of summary judgment on fair use grounds under Section 107 was also in error because Righthaven had specifically identified genuine issues of material fact upon which discovery was required before such a decision could viably be reached. (EOR 15, 27,

28.) In this regard, the Court is reminded that the Defendants had not filed an answer, had not asserted any affirmative defenses, and absolutely no discovery had been conducted by either party at the time the district court entered summary judgment *sua sponte* against Righthaven on fair use grounds. These circumstances further demonstrate the district court erred by prematurely adjudicating a factually intensive fair use inquiry despite there being absolutely no opportunity for the parties to develop the factual record through the discovery process.

Not only did the district court enter summary judgment on a *sua sponte* basis with a contested factual record and without the parties having engaged in any discovery, it did so despite Righthaven having specifically identified genuine issues of material fact that precluded a finding of fair use absent an ability to engage in the discovery process. Righthaven specifically identified genuine issues of material fact upon which discovery was required three times to the district court. (EOR 15, 27, 28.) Each of these efforts was summarily rejected by the district court. (EOR 36.) Moreover, in reaching its fair use determination, the district court relied upon the uncontested declaration of Jama. (EOR 38 at 4.) In sum, Righthaven identified numerous material issues that required discovery concerning a fair use analysis in this case and the district court refused to grant the



company an opportunity to do so while adversely adjudicating its asserted copyright infringement claims on fair use grounds. (EOR 38.) As identified above, this Court must reverse the district court's *sua sponte* grant of summary judgment upon review.

**B. The District Court Erred in Its Fair Use Analysis, Which Includes Its Failure to Apply This Court's Decision in *Worldwide Church of God*.**

Substantively, Righthaven maintains that the district court's fair use analysis is fatally flawed for several reasons. In fact, Righthaven asserts that upon proper examination this case potentially warrants entry of judgment as a matter of law against a fair use defense under Section 107, which is the same result reached in the *Worldwide Church of God* decision by this Court. Regardless of whether this result is reached by the Court, in undertaking a fair use analysis, one fundamental and transcendent fact is crystal clear and which the district court refused to appreciate – that Defendants blatantly copied and used 100% of the Work without authorization. As emphasized by this Court in *Worldwide Church of God*, which rejected, as a matter of law, a non-profit organization's fair use defense for the 100% unauthorized replication and use of an author's copyrighted work:

We have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety.

*Worldwide Church of God*, 27 F.3d 1110, 1120.

This case is no different than *Worldwide Church of God*. It involves a non-profit misappropriating 100% of a copyrighted work that was used in connection with efforts to increase an organization's revenue by its display together with efforts to increase membership or donations by the general public to support its purpose. Despite these similarities, the district court refused to apply *Worldwide Church of God* in its fair use analysis. (EOR 38.) In fact, the district court distinguished this decision on dubious grounds. (*Id.* at 5-6.) As set forth below, the district court erred in refusing to apply *Worldwide Church of God* in its fair use analysis. Moreover, the district court erred on several other grounds in entering summary judgment. Accordingly, reversal by this Court is compelled.

***1. The District Court Erred in Refusing to Apply The Worldwide Church of God Decision Under Its Fair Use Analysis.***

This Court's decision in *Worldwide Church*, which resulted in a finding, as a matter of law, against fair use by a non-profit religious entity with regard to its unauthorized, wholesale copying and use of a literary work, was controlling authority the district court refused to apply under its

fair use analysis. The district court erred in doing so. As explained herein, the similarities between the defendants' conduct in *Worldwide Church of God* and those of the Defendants in this case not only require a finding against fair use but actually compel a finding, as a matter of law, against fair use. Righthaven asks this Court to correct the district court's error in its consideration of its *Worldwide Church of God* decision as it applies to the infringement case before it.

In *Worldwide Church of God*, the parties were two non-profit religious organizations – Worldwide Church of God (“WCG”) and Philadelphia Church of God, Inc. (“PCG”). *Worldwide Church*, 227 F.3d at 1112. A prominent WCG pastor had written a copyrighted work entitled “Mystery of the Ages” (“MOA”). *Id.* WCG used MOA in promoting its non-profit ministry for many years but at some point stopped doing so two years after the author-pastor's death. *Id.* at 1113. Some years later, two former WCG ministers founded PCG. *Id.* As part of PCG's new ministry, it began copying and distributing MOA “verbatim, deleting only MCG from the copyright page . . .” without requesting permission from WCG. *Worldwide Church*, 227 F.3d at 1113. WCG sued PCG for copyright infringement based on its wholesale, unauthorized copying of MOA. *Id.* at

1113-14. The district court granted summary judgment in favor of PCG by finding that PCG’s alleged infringement qualified as fair use. *Id.* at 1114.

On review, this Court reversed the district court’s decision and found, as a matter of law, PCG was “not entitled to claim fair use.” for the unauthorized 100% copying of MOA. *Id.* at 1121. Moreover, this Court directed the district court to enter a permanent injunction in WCG’s favor and to conduct a trial on damages “[b]ecause infringement by PCG of WCG’s copyright is undisputed, barring fair use . . . .” *Id.*

In its decision, this Court rejected a number of arguments that were adopted by the district court in its fair use decision. First, this Court rejected PCG’s contention that its copying of the MOA qualified as fair use because it was for “non-profit religious and educational purposes.” *Id.* at 1114. The assigned panel reasoned “[t]he crux of the profit/nonprofit distinction [under a fair use analysis] is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Id.* at 1117 (*quoting Haper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S.539, 562 (1985)). In this regard, PCG, despite its non-profit status, was found to have “unquestionably” profited by providing the MOA at no cost to its members and through the use of same to potentially generate new

memberships. *Id.* at 1118. Moreover, by virtue of the relief entered, which included directions to the district court to enter a permanent injunction and to proceed to a trial on damages, the *Worldwide Church of God* panel found a non-profit liable for copyright infringement. *Id.* at 1121. This stunning result on appeal from a record upon which the district court granted summary judgment in favor PCG on fair use grounds only serves to reinforce that non-profit entities cannot escape liability for copyright infringement based on their non-profit status or their altruistic institutional goals and purposes. Accordingly, this Court’s decision in *Worldwide Church of God* first stands for the proposition, as applied to this case, that Defendants’ cannot escape copyright infringement liability because the unauthorized display was made on a non-profit entity’s website. Despite this holding, the district court relied heavily in its fair use ruling that “CIO is a non-profit corporation with an educational mission . . . .” (EOR 38 at 4.) Furthermore, the district court concluded that the Defendants’ “solicitation of donations on their website is immaterial . . . .” (*Id.*) Both of these reasons set forth by the district court as support for its fair use decision are error because they directly conflict with this Court’s decision in *Worldwide Church of God*.

The *Worldwide Church of God* decision also controlled the district court's fair use analysis because it involved the 100% duplication and unauthorized use of a literary work. See *Worldwide Church of God*, 227 F.3d at 1113. The 100% duplication at-issue in *Worldwide Church of God* transcended this Court's Ninth four-factor analysis and unquestionably resulted in a finding, as a matter of law, against fair use. With regard to the purpose and character of the use, which is the first factor under a fair use analysis, the panel found that PCG's wholesale replication of the MOA weighed against fair use because "PCG's copying of WCG's MOA in its entirety bespeaks of no 'intellectual labor and judgment.'" *Worldwide Church of God*, 227 F.3d at 1117. The panel additionally observed, with regard to the "amount and substantiality" third fair use factor, "[w]hile 'wholesale copying does not preclude fair use per se,' copying an entire work 'militates against a finding of fair use.'" *Id.* (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)). The panel then explained that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Id.* at 1118 (quoting *Harper & Row Publishers, Inc.*, 471 U.S. at 565)). In all

practicality, this Court's decision in *Worldwide Church of God* virtually established a presumption against a finding of fair use in cases of unauthorized, wholesale copying of a protected work.

Despite this Court's almost *per se* pronouncement against a finding of fair use in cases of 100% unauthorized replication, the district court refused to adhere to these directives in its fair use decision. Specifically, under the purpose and character of the use factor, the district court found the Defendants' wholesale copying of the Work to be transformative because it was used to "educate the public . . ." despite the Work having originally been published in a newspaper specifically tasked with such a purpose. (EOR 38 at 4.) The district court additionally found that despite the Defendants having taken 100% of the Work without permission, "the amount used was reasonable in light of the purpose of the use, which was to educate the public about immigration issues." (*Id.* at 5.) These findings are directly contrary to this Court's decision in *Worldwide Church of God*.

Not only was the district court's fair use analysis flawed, its attempt to distinguish the *Worldwide Church of God* decision was equally without merit and in error. First, the district court reasoned that the Defendants in this case were using the unauthorized copy of the Work for informational purposes rather than in competition to garner membership from another

entity. (EOR 38 at 6.) Second, the district court distinguished *Worldwide Church of God* based on the quantity of the 100% copyright content misappropriated. (*Id.*) Specifically, the district court reasoned that this case was distinguishable from *Worldwide Church of God* because it involved the unauthorized replication of a news article as opposed to an entire book. (*Id.*) Finally, the district court reasoned that because the Defendants had attributed the unauthorized, wholesale copy of the Work to the source publication the facts were distinguishable from those in *Worldwide Church of God* where copyright information was deleted in the unauthorized replication. (*Id.*) Righthaven maintains that none of the district court's stated reasons for distinguishing this Court's decision in *Worldwide Church of God* have merit under a fair use analysis. This further demonstrates the district court erred in refusing to apply this Court's controlling to its fair use analysis. Accordingly, reversal of the district court's fair use analysis is mandated on this basis alone.

***2. The District Court Erred in Its Fair Use Analysis For Several Additional Reasons.***

As argued above, the district court erred in refusing to apply this Court's decision in *Worldwide Church of God* under its fair use analysis. This fatal flaw permeates throughout the district court's fair use analysis.



This reversible error aside, the district court erred in its fair use analysis for several additional reasons that support reversal upon review.

Turning first to the purpose and character of the use analysis employed by the district court, it improperly concluded that a non-profit entity could not engage in commercial activity on almost a *per se* basis. (EOR 38 at 4.) According to the district court, if a non-profit entity does not publish, license, or sell an unauthorized work and it is engaged in some educational mission, it cannot engage in commercial activity under a purpose and character of the use inquiry as part of a fair use analysis. (*Id.*) Moreover, the solicitation of donations and membership by the non-profit in the same media in which the unauthorized copy of a work is displayed is immaterial under a purpose and character fair use analysis. (*Id.*) In short, the district court has found that a non-profit entity can raise countless amounts of money in membership dues and in donations as long as it does not commercially sell a misappropriated copyrighted work while concurrently being permitted to display such wrongfully acquired content in connection with the entity's efforts to promote its activities and cause. This analysis is directly contrary to this Court's decision in *Worldwide Church of God*.

Next, the district court applied an analysis under the second fair use factor, which considers the nature of the copyrighted work that essentially establishes a presumption in favor of the defense when news material is misappropriated on a wholesale basis. (EOR 38 at 5.) In essence, the district court found that because the Work was a news article, the totality of its content was informational and permissible for productive use by others. (*Id.*) In reaching this erroneous conclusion, the district court failed to accord any degree of creative effort to the Work whatsoever. In this regard, the “[c]reation of a nonfiction work, even a compilation of pure fact, entails originality.” *Harper & Row Publishers, Inc.*, 471 U.S. at 547. Moreover, written news articles reflect the reporter’s creative endeavors in compiling a piece for dissemination. *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000) (“*Free Republic II*”). As noted by the court in *Free Republic II*, “a news reporter must determine which facts are significant and recount them in an interesting and appealing manner.” *Id.*

In complete disregard for the foregoing decisions, the district court has determined by virtue of its decision that news content is simply not sufficiently worthy of copyright protection based on its informative content. Moreover, the district court has reached this result, which it believes no reasonable juror could conclude otherwise, without any substantive

discussion of the Work at issue. Simply put, if it is a news article, the nature of the copyrighted work supports a finding of fair use. This is an improper and erroneous analysis by the district court under the second fair use analysis factor.

Next, the district court erroneously concluded that despite the Defendants' unauthorized misappropriation of 100% of the Work, the amount and substantiality fair use factor was neutral. (EOR 38 at 5.) Again, there is simply no dispute that the Defendants took the entirety of the Work for their own use. Despite this fact, the district court reasoned that taking 100% of the Work was "reasonable in light of the purpose of the use . . . ." (*Id.*) This determination is directly at odds with this Court's observation that it had "found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety." *Worldwide Church of God*, 227 F.3d at 1120. Accordingly, the district court's finding that the amount of the copyrighted work used under its fair use analysis was neutral clearly constitutes an unprecedented finding that amounts to unquestionable error.

Finally, the district court erred in its analysis of the effect on the market in its decision. (*Id.* at 6.) Based on its prior refusal to acknowledge that a non-profit entity can engage in a commercial purpose under a fair use

analysis, the district court failed to afford Righthaven with a presumption of market harm. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). Likewise, given that the district court had erroneously determined that the wholesale replication of the Work by the Defendants was transformative, it declined to recognize that any market substitution could be present. (EOR 38 at 7.) Both of the foregoing conclusions by the district court were in error based on the record presented. Accordingly, as detailed above, the district court's fair use analysis was flawed for several reasons and therefore requires reversal upon review by this Court.

## **V. CONCLUSION**

In sum, the district court erred in entering *sua sponte* summary judgment in favor of the Defendants based on a finding that their alleged infringing conduct constituted fair use under Section 107. Specifically, the district court took this drastic step despite the absence of any discovery having been conducted by the parties. Moreover, it did so despite a disputed factual record and despite Righthaven's efforts to specifically identify genuine issues of material fact upon which discovery was required. Reversal of the district court's entry of summary judgment is compelled on these procedural grounds.

The district court's *sua sponte* entry of summary judgment is further compelled on substantive grounds. In short, the district court's fair use analysis is fatally flawed and completely disregarded this Court's binding precedent in *Worldwide Church of God* without a justifiable basis for doing so. Upon a proper analysis of the four fair use factors, this case not only warrants reversal on a substantive basis, but it is equally amenable to entry of judgment as a matter of law against assertion of fair use defense as was done in the *Worldwide Church of God* decision. Even if this relief is not entered, the district court's fair use determination still compels reversal upon substantive examination by this Court.

Dated this 22<sup>nd</sup> day of November, 2011.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano  
SHAWN A. MANGANO, ESQ.  
8367 West Flamingo Road, # 100  
Las Vegas, Nevada 89147  
*Attorney for Appellant*  
*Righthaven LLC*

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Righthaven identifies the following related cases pending in this Court that raise the same or closely related issues or involve the same transaction or event:

1. *Righthaven LLC v. Hoehn*, Case No. 11-16751: This case involves the alleged infringement of a copyrighted work assigned by Stephens Media, LLC, which was dismissed by the district court for lack of subject matter jurisdiction. A companion appeal concerning the award of attorneys' fees and costs is also pending as Case No. 11-16995.
2. *Righthaven LLC v. DiBiase*, Case No. 11-16776: This case involves the alleged infringement of a copyrighted work assigned by Stephens Media, LLC, which was dismissed by the district court for lack of subject matter jurisdiction.
3. *Righthaven LLC v. Newman*, Case No. 11-17690: This case involves the alleged infringement of a copyrighted work assigned by Stephens Media, LLC, which was dismissed by the district court for lack of subject matter jurisdiction.
4. *Righthaven LLC v. Democratic Underground, LLC*, Case No. 11-17210: This case involves the alleged infringement of a copyrighted work assigned by Stephens Media, LLC. This appeal involves the district court's denial of leave to intervene as a matter of right following dismissal of Righthaven's complaint for lack of subject matter jurisdiction.
5. *Righthaven LLC v. Realty One Group, Inc.*, Case No. 11-15714: This case involves the alleged infringement of a copyrighted work assigned by Stephens Media, LLC in which the district court dismissed Righthaven's complaint on fair use grounds.

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X this brief contains 5,245 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

\_\_\_ this brief uses a monospaced typeface and contains \_\_\_ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because:

X this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14 point font size and Times New Roman style, *or*

\_\_\_ this brief has been prepared in a monospaced spaced typeface using \_\_\_\_\_ with \_\_\_\_\_.

DATED this 22<sup>nd</sup> day of November, 2011.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano  
SHAWN A. MANGANO, ESQ.  
8367 West Flamingo Road, #100  
Las Vegas, Nevada 89147  
*Attorney for Appellant*  
*Righthaven LLC*