

11-16358

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RIGHTHAVEN LLC

Plaintiff - Appellant,

vs.

CENTER FOR INTERCULTURAL  
ORGANIZING; KAYSE JAMA

Defendants - Appellees.

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Appeal From Order Granting Defendants' Motion for Summary Judgment  
By the United States District Court,  
District of Nevada  
Case No. 2:10-CV-01322-JCM-LRL  
The Honorable James C. Mahan, Presiding

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**APPELLEES' ANSWERING BRIEF**

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Center for Intercultural Organizing, and Kayse Jama (collectively “CIO”) state that neither have any parent corporation, and that no publicly held corporation owns 10% or more of any stock in CIO.

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## **I. STATEMENT OF JURISDICTION**

(a) District Court Jurisdiction: The jurisdiction of the U.S. District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a).

(b) Appellate Jurisdiction: This U.S. Court of Appeals for the Ninth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

(c) Filing Dates: On April 22, 2011, the U.S. District Court of Nevada entered an Order Granting Summary Judgment in favor of Defendants/Appellees Center of Intercultural Organizing and Kayse Jama (“CIO”) pursuant to Fed.R.Civ.P.56(f). On May 13, 2011, the U.S. District Court of Nevada entered judgment in favor of CIO pursuant to Fed.R.Civ.P.54(b).

(d) Appeal from Final Judgment: Plaintiff/Appellant Righthaven, LLC (“Righthaven”) filed its Notice of Appeal from Final Judgment on May 18, 2011.

## **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court erred in entering summary judgment, in favor of CIO, after issuing an Order to Show Cause Why the Complaint Should Not Be Dismissed *sua sponte*, and providing Righthaven an extensive opportunity to brief, argue and identify potential disputed issues of material fact relating to the fair use analysis.

2. Whether the District Court erred in determining that CIO's posting of the online newspaper article onto a blog constituted fair use pursuant to 17 U.S.C. §107.

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

Plaintiff/Appellant, Righthaven, LLC ("Righthaven"), who is only a limited assignee of the copyright, filed its Complaint alleging copyright infringement on August 5, 2010 against Defendants/Appellees, Center for Intercultural Organizing and Kayse Jama (collectively referred to as "CIO").<sup>1</sup> (Supplemental Excerpt of Record 1, hereinafter referred to as "SER"). CIO, an Oregon entity, initially filed an FRCP 12(b)(6) Motion to Dismiss for lack of Personal Jurisdiction. (SER 7.) After the Motion to Dismiss was fully briefed by Righthaven and CIO, on November 15, 2010, the Court issued a *sua sponte* Order to Show Cause Why the Complaint Should Not be Dismissed on the Fair Use Doctrine and pursuant to 17 U.S.C. § 107 (SER 12). On December 15, 2010, the Court granted a Motion to File Amicus Brief by Professor Jason Schultz ("Schultz"). (SER 19). On December 27, 2010, the Court granted a Motion for Leave to Appear *Amicus Curiae* at the Hearing; by *Amicus Curiae* Jason Schultz. (SER 23).

Righthaven, CIO and Schultz fully briefed the fair use issue for the District

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<sup>1</sup>

Many other Colorado and Nevada Federal District Courts have determined that Righthaven lawsuits against individuals, watchdogs and numerous bloggers were improperly instituted on numerous grounds.

Court (SER 14, 17, 18, 21 & 22). On December 28, 2010, the Court entertained the Show Cause Hearing. (EOR 27). The Court granted Righthaven's request to brief its claim that genuine issues of material fact existed with regard to the fair use doctrine. *Id.* In the interim, the Court issued its Order Denying CIO's initial Motion to Dismiss for Lack of Personal Jurisdiction. *Id.* at 32. After the parties fully briefed Righthaven's request to conduct discovery, the Court entertained oral argument on the Order to Show Cause on March 18, 2011. (EOR 36). The Court rejected Righthaven's contention that issues of material fact remained with respect to the fair use analysis. *Id.* After pronouncing that no issues of material fact remained, the Court determined that CIO's use of the newspaper article was protected under 17 U.S.C. §107. *Id.*

On April 22, 2011, the Court entered an formal order, whereby it determined that Righthaven's litigation strategy has a chilling effect on potential fair uses of Righthaven owned articles, diminishes public access to facts, and does nothing to advance the Copyright Act's purpose of promoting artistic creation. (EOR 38). On May 13, 2011, the Court entered Final Judgment in CIO's favor. (EOR 40). On May 18, 2011, Righthaven filed its appeal of the Court's Final Judgment. (EOR 42).

#### IV. STATEMENT OF FACTS

Righthaven's sole existence is predicated on suing third-parties for copyright infringement. At the center of its "business model" is a partnership it developed with the Las Vegas Review-Journal and Denver Post. Righthaven instituted a practice of "copyright trolling," whereby it sued individuals and entities who re-posted copies of Review-Journal articles onto other web-sites or blogs. The lawsuits were instituted without warning or a cease and desist letter. Currently, Righthaven's total number of lawsuits approaches three hundred; however it remains in question, whether Righthaven has standing to pursue any claims at this juncture.<sup>2</sup>

For purposes of the Order to Show Cause proceedings only, CIO conceded the facts as alleged in Righthaven's Complaint. (SER 18 at 2). It cannot be disputed CIO is a non-profit organization headquartered in Portland, Oregon, dedicated to the education of immigrants, refugees and allies on local, national and global social justice issues. (SER 7, Exhibit A & EOR 15, Exhibit 1). In fact, Righthaven's own

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The Court in *Righthaven LLC v. Wayne Hoehn*, Case No. 11-cv-00050 (Filed January 11, 2011) appointed a receiver over Righthaven's assets. According to the appointed receiver, attempts to garner information regarding the copyrights and other assets have been thwarted by Righthaven.

<http://www.vegasinc.com/news/2012/jan/04/receiver-says-righthaven-uncooperative-surrenderin/>



Complaint identifies CIO as a non-profit entity. (SER 1). Unlike for-profit corporations, CIO is not motivated to increase profits or maximize shareholder wealth. CIO's central purpose is to assist immigrants and refugees in the transition of becoming citizens of the United States of America. (EOR 15, Exhibit 1).

CIO reproduced a single online newspaper article that was previously posted on the Las Vegas Review-Journal (the "Review-Journal") website. (SER 1 at Exhibit 3). The article, "POLICE ARREST: Misdemeanor Violations Leading to Deportations," (the "Article") originally appeared on the Review-Journal website on June 28, 2010. (SER at Exhibit 2). Much like the balance of the content on CIO's website, the Article is highly relevant to CIO's core purpose of education. For that reason, the Article was posted onto a blog on the CIO website on July 8, 2010. While the Article is based on events occurring in Nevada, its patent relevance extends to every state and impacts millions, either directly or indirectly. Unfortunately, Righthaven does not share CIO's vision. Upon learning of CIO's use, Righthaven immediately filed a lawsuit without issuing any type of cease and desist letter requesting the Article's removal from the website. (SER 1).

At the time of the underlying hearing(s) at the District Court level, the Article was still available for anyone to read on the Review-Journal website. While viewing the Article today, as you could on June 28, 2010, any reader may simply copy and

paste the full text of the Article and reproduce it in other media. *See* the Article at *Las Vegas Review-Journal*, (available at <http://www.lvrj.com/news/questions-generated-by-287-g--97289294.html>). The website invites the visitors to save, email, print, share and post to a host of social networks by simply selecting various tabs on the page. By implication, the Review-Journal and Righthaven, as assignee to the copyrighted material, has consented to some form of reproduction of the articles posted on the Review-Journal website.

Despite granting Review-Journal website visitors the explicit right to replicate entire articles, Righthaven has brought its lawsuits to achieve a simple purpose; maximization of profits by extracting settlements. Although programs exist to enable domain owners to prevent its viewers from copying and pasting the content onto other websites, neither the Review-Journal, nor Righthaven, takes any steps to prevent these efforts.

In contrast to Righthaven's transparent business model of professional litigation, CIO freely allows visitors to access its web content without charging a membership fee or any other fee to access its content. In its Complaint, Righthaven claims that CIO's inclusion of donation banners on the website is tantamount to carrying out commercial activities. CIO, as a non-profit entity, relies upon the philanthropic kindness of its donors and members. By simply facilitating a website

where individuals can easily make donations to a non-profit cause pales in contrast to traditional notions of commercial activities.

## V. SUMMARY OF LEGAL ARGUMENT

1. The District Court acted properly by granting summary judgment in favor of CIO pursuant to FRCP 56(f). In an exercise of judicial economy, the District Court issued a *sua sponte* Order to Show Cause why Righthaven's Complaint should not be dismissed pursuant to 17 U.S.C. 107. (EOR 1 at 12). After fully briefing whether CIO's use of the Article constituted fair use, the District Court entertained oral argument, at which time, Righthaven requested additional time to identify issues of material fact. (EOR 27 at 37-38). The District Court adjourned the December 28, 2010 hearing to allow Righthaven to file genuine issues of material fact. *Id.* This is not a highly complex, factual case where all facts are in dispute. In fact, CIO conceded the facts, as plead in the Complaint, for purposes of the fair use analysis and whether issues of material fact exist. (EOR 29 at 2). Righthaven's failure to identify any genuine issues of material fact enabled the District Court to consider fair use.

2. Where an online news article that was freely disseminated was republished by a non-profit organization for purely educational purposes, the District Court properly limited the application of the *Worldwide Church of God*, and found in favor

of fair use.

## VI. LEGAL ARGUMENT

### A. **The District Court Did Not Err When it Granted Summary Judgment in Favor of CIO Pursuant to 17 U.S.C. 107.**

Righthaven's appeal is predicated on a theme of supposed prejudice. Righthaven claims it was deprived of an opportunity to conduct discovery. In keeping with that theme, Righthaven erroneously contends that the District Court granted summary judgment *sua sponte*. (Opening Brief at 1, 8, 9, 11, 12). This was not the case. While courts may generally grant dispositive motions *sua sponte*:

[T]he preferred practice for district courts is to afford parties an opportunity to be heard (through an Order to Show Cause or otherwise) on any basis the court invokes *sua sponte*. This is particularly true where the *sua sponte* ruling results in a dispositive order.

*Wood v. City of San Diego*, 238 Fed.Appx. 310, 311 (C.A.9 (Cal) 2007)).

After considering the briefs filed for and against CIO's Motion to Dismiss for Lack of Personal Jurisdiction, the District Court identified a possible fair use defense to Righthaven's claims. (EOR 1 at #12). At that point, it directed the parties to provide evidence of material disputed facts and their respective positions on the fair use issue. Righthaven's insinuation that it was deprived of an opportunity to be heard is belied by the extensive record of judicial consideration. (EOR 1 at #7, 8, 9, 12, 14, 15, 18, 21, 27, 28, 29, 30, 36 & 38).

The District Court exercised proper discretion when it issued the Order to Show Cause. The court may “[a]fter giving notice and a reasonable time to respond...(1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not genuinely be in dispute.” Fed.R.Civ.P.56(f). Righthaven also takes issue with the fact that CIO had not yet asserted fair use as an affirmative defense because it had not yet filed an Answer to the Complaint. Fed.R.Civ.P. 56(f) does not place any limitations on the timeframes in which a court may consider summary judgment. Whether an Answer was ever filed is wholly irrelevant. Even more, CIO asked that all averments in the Complaint be deemed true for purposes of the fair use analysis. (SER 18 at 2). Given the unequivocal procedural history, any assertion that the District Court granted summary judgment *sua sponte* is inaccurate.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996); Fed.R.Civ.P.56(c). The moving party bears the burden of presenting evidence to demonstrate the absence of any genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The District Court found that additional discovery was not required to rule on fair use. Righthaven's request to conduct discovery prior to considering the merits of the fair use analysis was carefully considered on several occasions. (EOR 15, 27, 28). Likewise, the District Court also considered whether the supposed discovery would yield any evidence of genuine issues of disputed material facts. The District Court properly saw through Righthaven's transparent delay tactics and found in the negative. (EOR 38 at 2).

The District Court analyzed Righthaven's proposed discovery issues in light of each prong of the fair use test.

17 U.S.C. 107(1)-(4) instructs us to consider the following factors:

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.

No discovery was warranted on the first prong. The District Court's finding that CIO's use of the Article was non-commercial is supported by the record. (EOR 36 at 4-5; EOR 38 at 4). CIO is a non-profit entity that does not tie use of any portion

of its website to donations or commercial purposes. Righthaven's own affidavit attached CIO web-site printouts, which demonstrate that the donations bear no relation to the Article, or any other article. (EOR 15 at Exhibit 2). Thus, given the tenuous nature of the commercial use, there is no discovery that would overcome this presumption.

Righthaven also claimed it required additional discovery to ascertain the nature of the copyrighted work. As a mixed question of law and fact, the Court was able to conclude that the Article was factual based, and not the result of a high degree of creativity. (EOR 36 at 5-6). Unlike garden variety song parodies, fictional works of literature and religious based doctrines, this issue is easily resolved by taking notice that the Article reports facts, with minimal to no commentary. Moreover, the Article originated from a newspaper, which raises a presumption against a great deal of creative expression. *Id.* Therefore, the District Court reached the only reasonable conclusion that the Article deserved less protection than an entertainment piece. (EOR 38 at 5).

The third prong of the test lends itself to the least amount of discovery required to balance the test. 17 U.S.C. 107 analyzes the amount and substantiality of the portion used in relation to the work. CIO does not dispute the Article was reproduced in its entirety. To achieve CIO's educational purposes, the full text of the Article was

made available. Given that no dispute exists about the amount of the work reproduced, no discovery was warranted. Instead, the proverbial lynchpin of this analysis was to be determined in light of the purpose of the use, which is more thoroughly discussed below. (EOR 38 at 6-7).

Finally, Righthaven also sought to conduct discovery regarding the effect of CIO's use on the market. Because Righthaven limited its use of its articles to litigate, the District Court correctly determined that Righthaven has no real market. Without a market to call its own, Righthaven would not have benefitted from any discovery on this issue. Even if a market existed, CIO was not superseding it because they were not competing entities. CIO actually sought to disseminate the information to its readers.

**B. CIO's Use of the Article Was Properly Deemed Fair Use.**

Judgments pertaining to fair use "are legal in nature" and are to be made by the Court. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir.1986). "Fair use is an equitable rule of reason," which is to be applied in light of the statute.

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



work.” *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9<sup>th</sup> Cir. 1997) (citing *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9<sup>th</sup> Cir. 1986) (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985))).

The four factors should be considered in light of purposes of copyright to promote the progress of science and useful arts and to serve the welfare of the public. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9<sup>th</sup> Cir. 2007). After weighing all of the factors present under 17 U.S.C. §107, the District Court came to the correct conclusion that results in favor of fair use, thus entitling CIO to summary judgment.

**1. *The Purpose and Character of the Alleged Use was Educational and Non-Commercial.***

Under the first prong of the test, the Court must consider the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. As a non-profit, educational institution, CIO gathers information from numerous sources to better inform its constituency about immigration and refugee issues. Generally, if a new work is used commercially rather than for a non-profit purpose, its use will less likely qualify as fair under the copyright statute.

Here, rather than using the original work for pecuniary gain, CIO posted the Article to raise awareness on an issue that directly impacts its constituency, the immigration community. Immigration has and always will be an important issue to all residents of the United States. No region is immune or insulated from the impact of immigration enforcement and legislation. Generally, the scope of the fair use doctrine is wider when the use relates to issues of public concern. *National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559 (6th Cir. 1994). It is hard to imagine a better example of an issue affecting the general public than immigration reform.

Traditionally, Courts have found that where the use was for a purely commercial purpose, the presumption of unfairness can be rebutted by the characteristics of the use. *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir.1980). CIO's posting of the Article onto a blog is designed to stimulate conversation and raise awareness, not to profit. While CIO's website may contain donation banners, visitors are encouraged, but not obligated to, donate any money to CIO. This fact was never controverted by Righthaven for good reason. Its own copyright trolls did not pay any money to view the blog.

Even if some small commercial purpose is inherent, the existence of donation banners does not constitute *per se* copyright infringement. In cases where the alleged

copyright infringer gains commercially, courts still consider the public benefit resulting from the use in finding in favor of fair use. *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). Therefore, even if CIO obtains a monetary benefit from a donor who viewed the blog, the benefit is, at most *de minimis*.

The scope of fair use is greater when "informational" as opposed to more "creative" works are involved. *Hustler Magazine Inc., v. Moral Majority, Inc.*, 796 F.2d 1148 (1986). The Article was not the result of the creative expression of its author, but instead based in fact and contained no opinion commentary. The District Court specifically found that Article is an "...informational work that that's what newspapers do and other news media, and informational works that readily lends themselves to productive use by others deserve less protection." (EOR 36 at 5-6 & EOR 38 at 4-5). Where the disputed use can be characterized as news-reporting, this factor weighs heavily in favor of a finding of fair use. *Los Angeles News. Serv.*, 108 F.3d 1119, 1121.

The District Court also found that CIO's use differed from both the Review-Journal and Righthaven. While CIO and the Review-Journal both sought to inform their readers, they still differed in their motives. CIO is motivated by educational purposes. In contrast, the Review-Journal seeks to derive a profit off from its content.

In a further departure from CIO, Righthaven, as the current holder of the copyright, derives profits solely through the settlements it attempts to extract through the hundreds of lawsuits it has filed. For these reasons, the District Court determined that CIO's use was transformative and not as a substitute of Righthaven's use. (EOR 38 at 4).

***2. Because the Article is Fact-Based and Contains Minimal Creative Expression, the District Court's Finding in Favor of the Second Prong is Substantiated.***

The second prong of the test requires the Court to assess the nature of the copyrighted work. "Works that are creative in nature are 'closer to the core of intended copyright protection' than are more fact-based works." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d, 1004, 1016 (9<sup>th</sup> Cir. 2001). Thus, a work that is fact based, rather than opinion based, favors a finding of fair use. CIO respects the underlying policy of protecting the interests of creative works. Creative efforts should be protected, however, there is a substantial public benefit to allowing reproduction of certain works. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984). CIO's use is consistent with this notion.

The Article focuses on what is commonly known as the "287(g) Partnership" formed by the Las Vegas Metropolitan Police Department and the U.S. Immigration

and Customs Enforcement. (SER 1 at Exhibit 3). Authored by Review-Journal reporter, Lynnette Curtis, the Article focuses on the proportionality of inmates who are facing potential deportation currently detained for misdemeanor violations versus violent, "higher-level" immigrants. *Id.* The Article contains a number of statistics and numerous quotes from interviews with various law enforcement members and American Civil Liberties Union employees. *Id.* Righthaven acknowledges that the Article is based on fact, but that the manner in which the content was structured and articulated demonstrates considerable creativity. Righthaven also claims that the Article contains "highly expressive attributes." While the Article contains the opinions of law enforcement members and ACLU members, it does not contain any opinions of the author. If the legislative intent of 17 U.S.C. §107(2) was to apportion considerable weight to the "structure" of a news reporting article, there would never be an instance in which Courts can find in favor of fair use. Every news report requires its author to structure and present facts to its reader.

Therefore, despite Righthaven's claim that Ms. Curtis contributed substantial creativity to the Article, the nature of the work favors a finding of fair use under the second prong.

3. ***Reproducing the Entire Article Under the Totality of the Circumstances Did Not Result in Favor of Finding Against Fair Use.***

Although there is no dispute that CIO posted the entire Article onto its blog, the District Court found this to be “...reasonable in relation to the purpose of the copying.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994). Unlike *Worldwide Church of God*, which is discussed in further detail below, CIO’s posting retained the source publication and the author of the Article. Prior decisions have held that copying an entire work does not preclude fair use *per se*. *Sony*, 464 U.S. at 449-450. Moreover, to declare that any one prong is dispositive would render the whole test moot.

Because the Article was used for educational purposes on immigration issues, the Court found the entire reproduction to be reasonable. (EOR 38 at 5). Discussion boards, blogs and other media that facilitate comment and raise public awareness on important issues should be encouraged, not stifled. To guarantee that the readers receive the entire information, CIO used the entire article rather than trying to distill facts from the very brief news story. (EOR 38 at 5). Given the nature and purpose of the Article, the District Court held that it would have been impracticable for CIO to abbreviate the Article and still provide benefit to its readers. *Id.*

4. *CIO's Use of the Article Does Not Diminish a Market for Righthaven.*

The fourth factor examines "...the extent of market harm caused by the particular actions of the alleged infringer..." *Campbell*, 510 U.S. at 590. Here, where the use is transformative, it is less likely to impact the market for the original than a work that merely supersedes the Article. *Id.* at 591. CIO's website is meant to be informative, and not created for commercial gain. Moreover, CIO and Righthaven do not even exist within the same marketplace. Righthaven does not conduct any business outside of purchasing copyrights for the exclusive right to sue. Righthaven does not possess the right to license, sell or distribute content, or use it for any purpose incidental to initiating lawsuits.

The Review-Journal allows its readers to disseminate its articles to third parties. Rather than institute measures to ensure third parties do not copy and paste articles onto other web-sites, the Review-Journal seemingly invites third parties to do just that. Readers can share articles by selecting an icon that is simply labeled "email this" at the top of each web-page. Readers may also save copies of articles onto their own personal computers. These options lull the readers into a false of security. On one hand, the Review-Journal freely encourages its readers to disseminate its articles, while Righthaven lies in wait to ambush the innocent users with lawsuit.

The District Court determined that Righthaven failed to even allege that a

market exists for its copyright at all. (EOR 38 at 7). The District Court also refused to presume the existence of a market. *Field v. Google, Inc.*, 412 F.Supp. 2d 1106, 1121 (D.Nev. 2006). Righthaven could not claim the Review-Journal's market as its own because it was not operating as a traditional newspaper. (EOR 38). It was merely using the assignment to sue CIO and hundreds of other non-profit entities and bloggers. Accordingly, it could not be demonstrated that there was any harm to the value of the copyright as Righthaven owned it. *Cf. eBay v. MercExchange, LLC*, 547 U.S. 388 (2006).

**5. *The Record Reflects that the Decision in Worldwide Church of God is Distinguishable from this Matter.***

Over the objection of Righthaven, the District Court correctly found that *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 1997) consisted of very different issues resulting in minimal application to the instant matter. (EOR 36 at 6-8). Every fair use analysis is dependent on the individual merits of each case and this case is no different. *Campbell*, 510 U.S. at 577. Rather than focus on the totality of the four prongs of 17 U.S.C. §107, Righthaven is seeking a determination that a single prong is more determinative than any other. "The text of 17 U.S.C. §107 employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limited' function of the



examples given.” *Id.* “Courts must consider and weigh all four factors.” *Id.* If the legislature meant any of the prongs to be dispositive, it simply would have drafted the statute in that manner. Instead the test was created to shun an analysis that ignores the totality of the circumstances.

The original work in *Worldwide Church of God* was authored by Herbert Armstrong ("Armstrong"), a spiritual leader of the Worldwide Church of God ("WCG"). Although Armstrong authored the *Mystery of the Ages* ("MOA"), the copyright was held in the name of WCG. In that case, the Court was charged with determining whether appropriation of an entire book for distribution to church members constituted fair use. After Armstrong's death, WCG discontinued dissemination of MOA because WCG changed its positions on several religious doctrines. In 1989, two former WCG pastors formed their own church, the Philadelphia Church of God ("PCG") seeking to preserve Armstrong's ideals. PCG claimed to strictly follow the teachings of Armstrong, and in keeping with that purpose, began copying MOA for its own use. PCG copied MOA verbatim and distribute approximately thirty thousand copies to its members. In return, many PCG members gave substantial contributions from people who received a copy of MOA.

Unlike the Article at issue, MOA consists of 380 pages devoted to discussion of Armstrong's controversial religious opinions. MOA has been described by some

as a compendium of theological concepts as articulated by Armstrong. Given the controversy surrounding MOA and other beliefs associated with WCG, the theories espoused in MOA are based on one man's opinions, unlike the fact reporting contained in the Article. This wide discrepancy between the type and substance of the Article requires the Court to reject any idea that the *Worldwide Church of God* holding is controlling.

Righthaven incorrectly states that the District Court "...refused to apply *Worldwide Church of God* in its fair use analysis." Opening Brief at 13. The District Court merely declined to follow the distorted interpretation proffered by Righthaven. In a not so veiled attempt to rewrite 17 U.S.C. §107, Righthaven seeks to eschew all other considerations in favor of the third prong analysis. Righthaven's claim that the "...wholesale copying and use of a literary work..." can never rise to the level of fair use is unsupported. First, the statute does not provide for this interpretation or the Legislature would have limited such use. Second, "[t]he extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586-587. In reality, the facts in these two cases could not be more different.

The District Court found *Worldwide Church of God* to be distinguishable for several reasons. (EOR 38 at 6). First, CIO was utilizing the Article for informational purposes, rather than to increase a membership in an organization competing directly

with the plaintiff. *Id.* at 6. Second, the infringing conduct in *Worldwide Church of God* was of a 380-page book, not a single article contained in a daily newspaper, published 365 days a year. *Id.* Finally, CIO's use of the Article retained all references to the original publisher, the Review-Journal, whereas the infringer in *Worldwide Church of God* removed copyright material and misrepresented the origins of the work. *Id.* Therefore, the District Court properly found that *Worldwide Church of God* was not controlling.

## **VII. CONCLUSION**

Righthaven has failed to demonstrate the District Court erred in granting summary judgment in favor of CIO. Summary judgment was only granted after the parties were able to flesh out details through briefing on a Motion to Dismiss, Order to Show Cause and Motion to Determine Issues of Material Fact. In addition, the Court held two hearings during which Righthaven was given the opportunity to argue why CIO's posting of the Article did not constitute fair use pursuant to 17 U.S.C. §107. Righthaven failed to produce any issues upon which discovery was required.

After considering the extensive briefing and oral argument(s), the District Court exercised proper procedure under Fed.R.Civ.P. 56(f) and granted judgment in favor of CIO. Moreover, Righthaven's almost exclusive reliance on *Worldwide Church of God* was misplaced and correctly distinguished from CIO's use. For all

these reasons, the District Court correctly granted summary judgment.

DATED this 6<sup>TH</sup> day of January, 2012.

OLSON, CANNON, GORMLEY &  
DESRUISSEAU

*/s/Michael E. Stoberski*

By:

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Court Rule 28-2.6, CIO identifies the following related cases pending in this Court that have been previously heard in this Court, raise the same or close related events or involve the same transaction or event.

1. *Righthaven LLC v. Wayne Hoehn*, Case No. 11-cv-00050 (Filed January 11, 2011). This case involves the alleged infringement of an entire newspaper article first published in the Las Vegas Review-Journal. Although the Court determined that the use constituted fair use, it dismissed the case for lack of subject matter jurisdiction. An appeal of the decision to award attorneys fee and costs is also pending as Case No. 11-16995.
2. *Righthaven LLC v. David Tina, Michael J. Nelson and Realty One Group, Inc.*, Case No. 11-15714 (9th Cir. March 24, 2011). This case involves the alleged infringement of a newspaper article first published in the Las Vegas Review-Journal. The Court found in favor of defendants on fair use and dismissed Righthaven's Complaint
3. *Righthaven LLC v. DiBiase*, Case No. 11-16776 (9<sup>th</sup> Cir. July 22, 2011). This case involves the alleged infringement of a newspaper article first published in the Las Vegas Review-Journal. The case was dismissed by the district court for lack of subject matter jurisdiction.
4. *Righthaven LLC v. Democratic Underground*, Case No. 11-17210 (9<sup>th</sup> Cir. September 19, 2011). This case involves the alleged infringement of a newspaper article first published in the Las Vegas Review-Journal. The case was dismissed by the district court for lack of subject matter jurisdiction.
5. *Righthaven LLC v. Neman*, Case No. 11-17690 (9<sup>th</sup> Cir. November 8, 2011). This case involves the alleged infringement of a newspaper article first published in the Las Vegas Review-Journal. The case was dismissed by the district court for lack of subject matter jurisdiction.

**CERTIFICATION PURSUANT TO FED. R. APP. P. 32(a)(7)(C) and  
CIRCUIT RULE 32-1**

I certify that:

\_\_\_\_ 1. Pursuant to Fed. R. App. P. 32(A)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

[ X] Proportionately spaced, has a typeface of 14 points or more and contains [6338] words.

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2. The attached brief is not subject to the type-volume limitations of Fed. R. App. 32(a)(7)(B) because

[X] This brief complies with Fed. R. App. P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of not more than 15 pages;

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*/s/Michael E. Stoberski, Esq.*

DATE: January 6, 2011

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