

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office

**MEDIATION QUESTIONNAIRE**

*Righthaven LLC v. Center for Intercultural Organizing, et al.,*  
Case no. 11-16358

Please briefly describe the dispute that gave rise to this lawsuit.

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”). CIO is a non-profit organization. Defendants were alleged to have published, without authorization, a 100% replication of the literary work entitled “Misdemeanor violations leading to deportations” (the “Work”) on their publicly available Internet domain located at <interculturalorganizing.org> (the “Website”). The Work was originally authored by and published by the *Las Vegas Review Journal*. The Work Righthaven validly obtained all rights, title and interest to the Work, including the right to sue for past, present and future infringements. Righthaven was granted registration of the Work from the United States Copyright Office.

Briefly describe the result below and the main issues on appeal.

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. 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. The district court’s OSC did not set forth the procedural basis for it potentially dismissing Righthaven’s Complaint. 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.

After a oral argument and the resulting continuance of the OSC, the invited Righthaven to file briefing that set forth what it believed to be genuine issues of material fact that precluded dismissal of its Complaint pursuant to Federal Rule of Civil Procedure 56 (“Rule 56”). After providing Defendants, along with *amicus curiae* Jason Schultz, with an opportunity to address Righthaven’s identified genuine issues of material fact, the district court held a second OSC hearing. At the second OSC hearing, the district court determined, as a matter of law, that each of the four factor analysis under 17 U.S.C. § 107 weighed in favor of fair use. In doing so, the district court refused to acknowledge binding precedent from this Court in view of the wholesale, unauthorized copying of the Work and refused to acknowledge the reputational benefits and membership/donation commercial activities engaged in by the Defendants on the Website where the unauthorized replication was posted. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115-16 (9th Cir. 2000). The district court then proceeded to enter summary judgment in favor of Defendants based on its fair use determination.

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(Continued)

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(continued response from page 1)

The main issues on appeal include: (1) whether the district court erred in dismissing the action pursuant to Rule 56 on fair use grounds, which is an affirmative defense that had not been asserted via an answer to the Complaint on upon which a defendant bears the burden of proof; (2) whether the district court erred in dismissing Righthaven's Complaint on fair use grounds as a matter of law before the parties had engaged in any discovery whatsoever; and (3) whether the district court erred in finding that each fair use factor weighed in favor of such a finding as a matter of law given the record presented and in view of controlling precedent from this Court.

Righthaven reserves the right to raise additional issues on appeal in its formal submissions to the Court.

Describe any proceedings remaining below or any related proceedings in other tribunals.

There are no other proceedings remaining before the district court in this action. Righthaven, however, has filed over 200 copyright infringement actions involving a host of different forms of copyright protected material in the districts of Nevada, Colorado, and South Carolina as of this submission. The analysis reached by the district court in this action has been referenced in or cited by defendants in numerous pleadings filed in other actions in support of a similar finding of fair use. Accordingly, Righthaven certainly has compelling interest in having this Court fully examine the propriety of the district court's fair use analysis and decision.

Provide any other thoughts you would like to bring to the attention of the mediator.

Counsel for Righthaven has appeared before this Court. As such, he has reached out to opposing counsel in an attempt to gauge whether or not there is an interest in settling this matter prior the mediator taking action. To date, no substantive settlement discussion have materialized as a result of these efforts.

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**9th CIRCUIT RULE 3-2. REPRESENTATION STATEMENT**

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