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13
14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**
16

17
18 RIGHTHAVEN LLC, a Nevada limited-
19 liability company,

20 Plaintiff,

21 v.

22 CENTER FOR INTERCULTURAL
23 ORGANIZING, a not-for-profit Oregon entity;
and KAYSE JAMA, an individual,

24 Defendants.
25

Case No.: 2:10-cv-01322-JCM-LRL

**REPLY IN SUPPORT OF PLAINTIFF'S
26 RESPONSE TO ORDER TO SHOW
27 CAUSE**

28 Plaintiff Righthaven LLC (“Righthaven”) hereby submits the instant Reply (the “Reply”) in Support of its Response to the Order to Show Cause (the “Response”; Docket No. 14-0) why

1 Righthaven’s copyright infringement claim against Defendants Center for Intercultural
2 Organizing (“CIO”) and Kayse Jama (“Mr. Jama”; collectively with CIO known herein as the
3 “Defendants”) should not be dismissed under the 107 U.S.C. § 107 Fair Use exception.
4 Righthaven’s Reply based on the pleadings and papers on file in this action, any oral argument
5 allowed by this Court, and on any other matter of which this Court takes notice.
6

7
8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9
10 **I. INTRODUCTION**

11 The Defendants’ fair use argument fails because: (1) Righthaven clearly prevails on each
12 of the four fair use prongs; (2) the Defendants’ revealingly ignore the critical absence of any
13 transformative use; and (3) the Defendants’ act of blatant copyright infringement is not excused
14 solely because of CIO’s non-profit status. Ultimately, the Defendants seek to divert the Court’s
15 attention away from the proper inquiry by asserting unmeritorious, procedurally improper
16 arguments and by offering self-serving, arbitrary interpretations of relevant case law. Such
17 erroneous, unsubstantiated efforts fail to undermine the arguments set forth in Righthaven’s
18 Response to this Court’s Order to Show Cause (Docket No. 12-0).

19 Apparently, the Defendants are of the belief that their status as a non-profit organization
20 precludes any possibility of bearing liability for infringement. However, as demonstrated by the
21 Supreme Court and as echoed by the Ninth Circuit, an infringer’s non-profit or educationally-
22 motivated status does not, standing alone, create a blanket exemption from liability. *Campbell v.*
23 *Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *Worldwide Church of God v. Philadelphia*
24 *Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (“*Worldwide Church*”). Instead, this
25 near exclusive reliance upon CIO’s non-profit status is reflective of the Defendants’ efforts to
26 avoid a complete analysis of the collective fair use factors.

27 Ultimately, and specifically addressing the Defendants’ arguments, all four fair use
28 factors fall heavily in Righthaven’s favor: (1) the Defendants’ verbatim infringement (the
“Infringement”; Compl. Ex. 2.) contains no transformative value whatsoever; (2) the infringed,

1 Righthaven-owned literary work (the “Work”; Compl. Ex. 1.), though largely based in news
2 reporting, is the product of extensive creativity and originality; (3) the Infringement constitutes a
3 verbatim, wholesale copy of the Work in its entirety; and (4) by no means did the Defendants’
4 unauthorized exploitation of the Work have some sort of beneficial effect on the Work’s value.
5 Importantly, the Defendants’ arguments with respect to these issues highlight the various factual
6 discrepancies – and the potential need for discovery to address said discrepancies – at issue in
7 this lawsuit. Moreover, the Defendants fail to even address, in any capacity, the Infringement’s
8 (complete lack of) transformative value, and only minimally address the holistic nature of their
9 unauthorized reproduction.

10 The Defendants’ remaining contentions are similarly unfounded. The Defendants’
11 implied license argument is clearly procedurally improper: the assertion of an implied license
12 theory is entirely non-responsive to the Court’s Order to Show Cause concerning fair use.
13 Additionally, the Defendants’ implied license theory is so far-fetched, it defies hundreds of years
14 of copyright law and does not remotely approach providing a legitimate basis for dismissal.

15 Furthermore, Righthaven is surprised that the Defendants choose to cite this Court’s
16 recent holding in *Righthaven LLC v. Realty One Group, Inc., et al.*, (D. Nev.) 2:10-cv-1036-
17 LRH-PAL (“*Realty One*”), particularly because *Realty One*, as applied to the facts of *this* case, is
18 actually favorable to Righthaven’s position. Unlike the present action, *Realty One* involved an
19 infringement of approximately 30% of the protected literary work. This integral, distinguishing
20 fact arguably proved dispositive to this Court’s *Realty One* analysis: the *Realty One* Court
21 emphasized that the defendants’ infringement did “not satisfy a reader’s desire to view and read
22 the article *in its entirety*,” and that readers were appropriately “*directed . . . to the full text of the*
23 *Work* [on the LVRJ website].” *Realty One*, 2:10-cv-1036-LRH-PAL, slip op. at 4 (Oct. 19, 2010)
24 (emphasis added). Contrarily, the Infringement at present is merely a copied-and-pasted
25 reproduction of the entire Work, precluding the need for the reader to view the Work’s content in
26 any medium other than the CIO website. This significant factual distinction renders the *Realty*
27 *One* holding largely inapplicable to the present litigation. Most importantly, Righthaven
28 respectfully, yet adamantly, disagrees with the *Realty One* holding, and anticipates a procedural

1 posture in the near future whereby the Court’s fair use holding will be appealable to the Ninth
2 Circuit.

3 Summarily, under the present facts, a *sua sponte* dismissal of this lawsuit would run
4 counter to the venerable precedent governing fair use. The Defendants’ arguments must be
5 rejected accordingly.

6
7 **II. ARGUMENT**

8
9 **A. Righthaven Prevails on Each Fair Use Factor**

10 As plainly established by Righthaven in the Response, each of the four fair use factors¹
11 definitively falls in Righthaven’s favor, and the unfounded arguments set forth in the
12 Defendants’ Opposition fail to prove otherwise. The Defendants’ inability to put forth a viable
13 fair use argument is accentuated by the Defendants’ decision to briefly gloss over, if not outright
14 ignore, considerations vital to the fair use analysis. A portrayal of these conspicuous omissions,
15 along with a concise analysis of the remaining fair use factors, is as follows.

16
17 **1. CIO’s Non-Profit Status Does Not Excuse the Defendants’ Non-
18 Transformative, Verbatim Reproduction of the Work**

19 **a. Non-Profit Status, Standing Alone, Does Not Sway the First Fair Use
20 Factor in the Defendants’ Favor**

21 The Defendants’ near exclusive reliance upon CIO’s status as a non-profit entity does not
22 sway the first prong of the fair use analysis in the Defendants’ favor. The Defendants dedicate
23 two separate sections of the Opposition to this argument, perhaps as a means of diverting the
24 Court’s attention from the balance of the relevant facts, all of which weigh against a finding of
25 fair use. (*See* Defs.’ Opp’n 6-7, 9-10) However, this strategy fails because: (1) a defendant’s

26
27 ¹ “In determining whether the use made of a work in any particular case is a fair use the fair use factors to be
28 considered include: (1) the purpose and character of the use, including whether such use is of a commercial nature or
is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the
portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market
for or value of the copyrighted work.” 17 U.S.C. § 107.

1 non-profit status or educational motive does not somehow provide a blanket exemption from
2 liability for infringement, and (2) whether a defendant is motivated by non-profit, educational
3 purposes is only *part* of the court’s consideration within just *one* of the four prongs of the fair
4 use inquiry (*see* 17 U.S.C. § 107), and the Defendants notably fail to address the first prong’s
5 remaining considerations.

6 Venerable law dictates that an infringer cannot hide behind its non-profit or educational
7 status as a basis for avoiding the consequences of infringement. As the Supreme Court
8 succinctly explained in *Campbell*:

9 The language of the statute makes clear that the commercial or nonprofit
10 educational purpose of a work is only one element of the first factor enquiry
11 into its purpose and character. Section 107(1) uses the term “including” to
12 begin the dependent clause referring to commercial use, and the main clause
13 speaks of a broader investigation into “purpose and character.” . . .

14 Accordingly, the mere fact that a use is educational and not for profit does not
15 insulate it from a finding of infringement, any more than the commercial
16 character of a use bars a finding of fairness.

17 *Campbell*, 510 U.S. at 584 (emphasis added).

18 Since *Campbell*, the Supreme Court’s position on this issue has been expressly adopted
19 by the courts, including the Ninth Circuit. *See, e.g., Worldwide Church*, 227 F.3d at 1121 (citing
20 *Campbell* and holding non-profit defendant liable for infringement, rejecting fair use argument).
21 The same reasoning should be applied in the instant matter. The Defendants’ blatant act of
22 wholesale copyright infringement cannot be insulated from legal consequence, regardless of the
23 Defendants’ efforts to appeal to the Court’s philanthropic and educational sensitivities. The
24 Supreme Court made this unequivocally clear in *Campbell*, and there is no reason to deviate
25 from this principle at present.

26 Ultimately, the Defendants’ status as an alleged non-profit entity should not diminish the
27 fact that the Infringement is merely a non-transformative, holistic reproduction of the entire
28 Work, reproduced in an identical medium (the Internet) and exposed to an identical audience
(public viewers). To illustrate: an Internet user performing a Google search for the Work’s
content may well have been directed to the CIO website rather than being rightfully directed to
the Work’s original source, the LVRJ website. Such a consequence of the Defendants’

1 Infringement should not somehow be alleviated simply because CIO represents itself to be a non-
2 profit entity. In this context, CIO’s status as an alleged non-profit is only marginally relevant to
3 the overall analysis. *See Newport-Mesa Unified School District v. State of California Department*
4 *of Education*, 371 F. supp. 2d 1170, 1177 (C.D. Cal. 2005) (*quoting Campbell*, 510 U.S. at 584).
5 Perhaps, under a different set of facts – wherein the Defendants distributed only a small portion
6 of the Work to a discrete, limited, subscriber-based audience, and said distribution was
7 supplemented by the Defendants’ transformative, educationally-motivated comments and
8 creative framework – such heavy reliance upon non-profit status might give rise to a meaningful
9 fair use analysis. While this scenario would still not amount to fair use, a reproduction of this
10 nature would be drastically distinguishable from the present action, wherein the Defendants’
11 widely distributed, verbatim Infringement greatly diminishes the significance of their alleged
12 non-profit status.

13
14 **b. The Infringement Contains No Transformative Value**

15 The Defendants’ near exclusive reliance upon CIO’s non-profit status is further
16 marginalized by the Defendants’ total failure to discuss the issue most pertinent to the first prong
17 of the fair use analysis. In fact, the “central purpose” of the first prong’s analysis is to determine
18 “whether and to what extent the new work is transformative.” *Worldwide Church*, 227 F.3d at
19 1117 (*quoting Campbell*, 510 U.S. at 579). Simply stated, the Defendants’ decision not to
20 address the Infringement’s “transformative” value is highly revealing; the Defendants prudently
21 chose not to engage in a dispute that, in light of the evidence, is virtually unwinnable.

22 No reasonable argument can be made that the Defendants’ Infringement contains any
23 transformative value. As detailed in Righthaven’s Response, the Infringement is nothing more
24 than a copied-and-pasted, verbatim reproduction of the Work, which altogether fails to “add
25 something new, with a purpose or different character, altering the first with the new expression,
26 meaning, or message.” *Los Angeles News Serv. v. CBS Broadcasting, Inc.*, 305 F.3d 924, 938
27 (9th Cir. 2002); *quoting Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

1 The Defendants’ preference that the Court *not* focus on this utter lack of transformative value is
2 understandable, as the Supreme Court has established that “the more transformative the new
3 work, the less will be the significance of the other factors, like commercialism, that may weigh
4 against a finding of fair use.” *Campbell*, 510 U.S. at 579. Accordingly, logic dictates that when
5 an unauthorized reproduction – such as the Defendants’ reproduction – is entirely non-
6 transformative, the legitimacy of a fair use claim is greatly diminished, regardless of the court’s
7 analysis of the remaining prongs (though, in this case, each remaining prong similarly favors
8 Righthaven).

9
10 **c. Determination of the Infringement’s Transformative Value Gives Rise**
11 **to a Genuine Issue of Material Fact**

12 Notwithstanding the preceding argument, the Court’s inquiry into the first fair use factor
13 undoubtedly gives rise to a genuine issue of material fact, thereby precluding dismissal (or
14 summary judgment in Defendants’ favor) absent an opportunity for discovery. The extent (or
15 non-existence) of the Infringement’s transformative qualities, along with the commercial and
16 non-monetary benefits derived by the Defendants’ as a result of the Infringement, are both
17 questions of fact deserving of investigation. As no depositions have been taken, no documents
18 have been produced, and not a single interrogatory has been propounded by either party, it would
19 be fundamentally unfair to dismiss this action at this early stage without first permitting
20 necessary discovery. This principle has been echoed by courts across the country. *See, e.g.,*
21 *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (resolution of motions
22 to dismiss turning on questions of fact may require discovery before meaningful rulings can be
23 made); *Int’l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 950 (3d Cir. 1990)
24 (vacating summary judgment because “a factual record should be developed through discovery
25 as a basis for resolving questions of disputed issues of material fact”); *In re Cases Filed by*
26 *DIRECTV, Inc.*, 344 F. Supp. 2d 647, 655-56 (D. Ariz. 2004) (discovery appropriate when
27 presented with questions of fact which cannot be decided on a motion to dismiss). Ultimately,
28

1 the Court should not be forced to rule on fact-contingent issues at a stage in which the factual
2 record remains largely incomplete.

3
4 **2. The Work Contains Extensive Originality and Creative Expression**

5 The Work, though admittedly fact-based, was comprised as a result of considerable
6 creative efforts by its author, Lynette Curtis. The Defendants contend that “[e]very news report
7 requires its author to structure and present facts to its reader,” (Defs. Opp’n 8:18-19) thereby
8 suggesting that the Work is no different from any other news article comprised of a thoughtless
9 factual recitation. This claim shortsightedly ignores the extent of journalistic efforts required of
10 Ms. Curtis to put together this particular story. Specifically, the Work details the perceived
11 targeting of illegal immigrants by the Las Vegas Metropolitan Police Department (“LVMPD”)
12 and the volume of deportations resulting therefrom. (*See* Compl. ¶ 13.) (Compl. Ex. 1.) The
13 Work cites statements made by Clark County Sheriff Doug Gillespie, LVMPD spokesman
14 Jacinto Rivera, Las Vegas-based attorney for ACLU Nevada Maggie McLetchie, and local
15 immigration attorney Peter Ashman. (Compl. Ex. 1.) The Work further references local
16 deportation statistics, LVMPD policies concerning illegal immigrant criminals, and the local
17 partnership between LVMPD and U.S. Immigration and Customs Enforcement. (Compl. Ex. 1.)
18 It is reasonable to believe that the wealth of information contained in the subject article was not
19 available to the author prior to her excessive investigations and interviews. In addition to
20 gathering said information, Ms. Curtis was also required to organize this content in a concise and
21 readable fashion in order to best communicate her story to LVRJ readers. Such efforts hardly
22 lack creativity and original expression.²

23 Applicable case law supports Righthaven’s position. As explained by the Supreme
24 Court, The “[c]reation of a nonfiction work, even a compilation of pure fact, entails originality.”
25 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985) (“*Harper &*
26 *Row*”). Moreover, written news articles reflect the reporter’s creative endeavors in compiling a

27
28 ² Again, the extent of originality and creative expression arising from the Work’s creation gives rise to an issue of material fact, not appropriately subject to dismissal (or summary judgment) absent discovery. *See Chudasama*, 123 F.3d at 1367.

1 piece for dissemination. As noted by one court, “a news reporter must determine which facts
2 are significant and recount them in an interesting and appealing manner.” *Los Angeles Times v.*
3 *Free Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000). This theory certainly holds
4 true in this case, wherein the Work would not exist but for the substantial creative efforts of its
5 author. Such creativity cannot be ignored, or used as a platform for a fair use argument, simply
6 because it was published in a daily newspaper. To hold otherwise would suggest that nearly all
7 articles published in newspapers would be precluded from copyright protection simply because
8 of an arbitrary classification of these articles as fact-based. The Court should not reach such an
9 unjust conclusion.

10 11 **3. The Defendants’ Explanation for Copying the Entire Work is Illogical**

12 First, the verbatim, holistic nature of the Defendants’ reproduction must be reiterated: the
13 Defendants copied, on an unauthorized basis, *every single word of the Work* as it was originally
14 published. (See Compl. Ex. 1-2.) In light of such wholesale copying, the viability of the
15 Defendants’ reliance on fair use as a defense for the infringing conduct is substantially
16 diminished. The courts have clearly established that while verbatim, wholesale copying does not
17 altogether preclude a finding of fair use, it certainly “militates against such a finding.” *Am.*
18 *Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994); *see also Hustler Magazine,*
19 *Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986). Thus, in the present matter, in
20 order to justify their act of verbatim copying, the Defendants must demonstrate why it was
21 essential to infringe upon the Work in its entirety. *See Campbell*, 510 U.S. at 587-88 (the court
22 must determine whether the extent of the copying is consistent with the defendant’s intended
23 use). The Defendants have wholly failed to do so.

24 The explanation offered by the Defendants for their decision to reproduce the Work in its
25 entirety is entirely illogical and arguably disingenuous. The Defendants claim that “CIO posted
26 the Article on a blog to encourage its readers to comment and critique law enforcement’s
27 approach to dealing with non-violent, illegal immigrants.” (Defs. Opp’n 9:9-10) However, this
28 explanation curiously ignores the Defendants’ most viable, non-infringing option: *the*

1 *Defendants could have posted merely the title of the Work and perhaps the first sentence,*
2 *along with a brief summary of the Work’s content along with a hyperlink leading to the Work*
3 *on the LVRJ website.* This would have allowed to Defendants to accomplish the exact same
4 goal as that stated in the Opposition. In other words, the Defendants would have drawn the
5 attention of its viewers to the Work’s content without simultaneously engaging in blatant
6 copyright infringement. The Defendants neglected this option, and now act as if posting the
7 Infringement in its entirety on their own website was the only means to accomplish their goal.
8 This is simply not the case.

9
10 **4. The Contention that the Infringement Actually Helps the LVRJ and Increases**
11 **the Work’s Value is Inapposite to this Analysis**

12 **a. The Defendants’ Unsubstantiated Theory Has Been Venerably Rejected**

13 Finally, with respect to the fourth and final fair use prong, the Defendants’ argument
14 strays even further from, the mark. The Defendants’ somehow contend, without any
15 substantiation or support, that “CIO’s use of the Work actually promotes the Las Vegas Review-
16 Journal.” (Defs.’ Opp’n 10:8-9) This claim, thinly disguised as an expert opinion, is completely
17 unmeritorious and should not be considered by the Court. Courts in jurisdictions nationwide
18 have repeatedly rejected the proposition that the use of a copyrighted work is fair because said
19 use might somehow increase the demand for the plaintiff’s work. *See, e.g., Campbell*, 510 U.S.
20 at 591 n. 21 (even if a “film producer’s appropriation of a composer’s previously unknown song
21 . . . turns the song into a commercial success[,] the boon to the song does not make the film’s
22 simple copying fair”); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1985)
23 (“Since one of the benefits of ownership of copyrighted material is the right to license its use for
24 a fee, even a speculated increase in DC’s comic book sales as a consequence of RFI’s
25 infringement would not call the fair use defense into play as a matter of law. The owner of the
26 copyright is in the best position to balance the prospect of increased sales against revenue from a
27 license”); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 81 n. 16 (2d Cir. 1997)
28 (“Even if the unauthorized use of plaintiff’s work in the televised program might increase poster

1 sales, that would not preclude her entitlement to a licensing fee”). Furthermore, the Defendants’
2 wishful contention in this regard also fails to account for the possibility that readers may be
3 diverted from the Work’s original source publication as a result of the Infringement’s availability
4 on the CIO website. Ultimately, this wholly speculative theory has no bearing on the Court’s
5 analysis and does nothing to bolster the Defendants’ assertion of fair use.

6
7 **b. The Defendants’ Argument on Market Effect Gives Rise to a Genuine**
8 **Issue of Material Fact**

9 Clearly, the Defendants’ contention that “CIO’s use of the Article actually exposed a new
10 segment of people to the [LVRJ website]” constitutes an issue of material fact, thereby
11 warranting discovery to verify this unsupported conclusion. (Defs.’ Opp’n 10:13-14) Again, as
12 discovery has not yet commenced in this matter, it would be inappropriate to dismiss this action
13 on the basis of fair use when the Defendants’ fair use argument is predicated largely upon factual
14 speculation and conjecture.

15
16 **B. The Defendants’ Implied License Argument is Both Procedurally Improper and**
17 **Entirely Unmeritorious**

18 **1. The Implied License Argument is Non-Responsive to this Court’s Order**

19 The Defendants’ assertion of an implied license argument in the Opposition is entirely
20 non-responsive to the Court’s Order to Show Cause concerning fair use and, therefore, is
21 procedurally inappropriate. This Court’s Order (Docket No. 12-0) clearly mandated that
22 Righthaven “show cause why this case should not be dismissed under the 17 U.S.C. § 107 Fair
23 Use exception.” The Order did not authorize the Defendants to oppose Righthaven’s Response.
24 *See id.* The Order also did not invite the parties to raise additional arguments unrelated to fair
25 use, such as the implied license argument now being advanced by the Defendants. Accordingly,
26 the Defendants’ implied license argument is improper and should not be considered by the Court
27 in the context of the Order to Show Cause.

1 **2. No Implied License Exists**

2 Notwithstanding the procedural impropriety of the Defendants’ argument, no implied
3 license has ever been present in this lawsuit. The Defendants erroneously suggest that an
4 implied license existed here because, via the LVRJ website, “readers can share articles with third
5 parties by selecting an icon that is simply labeled ‘email this.’ (Defs.’ Opp’n 9:23-24) The
6 Defendants also state that “[r]eaders are invited to save copies of the article onto their own
7 personal computers.” (Defs.’ Opp’n 9:24-25) However, the Defendants are conveniently
8 ignoring the fact that the LVRJ website only permits users to save a **hyperlink** leading to the
9 articles published on the LVRJ website, or to e-mail a **hyperlink** leading to the LVRJ website.
10 Importantly, both of these options ultimately require the user (or the user’s e-mail recipient) to
11 access the LVRJ articles directly through the LVRJ website. In other words, the option to save
12 or e-mail a hyperlink to the LVRJ articles rightfully ensures that Internet users will only view
13 said articles as they are displayed by the LVRJ website, rather than by viewing unauthorized
14 copies of the articles displayed on an infringing website (such as the CIO website). This use of
15 hyperlinks, prudently employed by the LVRJ website, is seemingly intended to both ensure
16 copyright protection and invite user traffic to view LVRJ articles online. As such, the
17 Defendants cannot reasonably argue that they properly inferred the LVRJ’s consent to create a
18 wholesale reproduction the Work. By no means are the LVRJ’s use of hyperlinks intended to
19 encourage users to commit copyright infringement without any possible repercussion, and the
20 Defendants’ contention to the contrary is entirely unreasonable.

21 Moreover, the fact that copyrightable material is often published, and thus, **made**
22 **available to the public**, is not a new concept. Apparently, the Defendants are unaware that the
23 United States Copyright Office (the “USCO”) requires copyright registrants to deposit a
24 specimen of each work with the Copyright Office “for the use or disposition of the Library of
25 Congress.” 17 U.S.C. § 407(b). Once registered, each protected work deposited with the USCO
26 enters the Library of Congress and is made accessible to the public. *See id.* However, the fact
27 that a protected work is made publicly available does not mean that the work can be freely
28 copied and distributed amongst the public without repercussion. In effect, the Defendants are

1 arguing that they reasonably assumed that the infringed works could be copied and publicly
2 distributed simply because the infringed works were made freely available on the LVRJ website.
3 This proposition is highly illogical and essentially ignores hundreds of years of established
4 copyright law.

5
6 **3. The Defendants' Implied License Argument Gives Rise to a Genuine Issue of**
7 **Material Fact**

8 The Defendants should be precluded from achieving dismissal (or summary judgment) on
9 an implied license theory in light of the pertinent factual questions arising therefrom. For
10 example, Righthaven's insistence that the LVRJ website merely allows users to share and save
11 hyperlinks leading back to the LVRJ website – therefore requiring readers (or readers' e-mail
12 recipients) to view each article in its original location – represents a significant *factual*
13 distinction from the Defendants' wrongful depiction of the options available via the LVRJ
14 website. Again, Righthaven's position in this regard is strengthened by the fact that the parties
15 have yet to begin the discovery process. Should the Court choose to entertain the Defendants'
16 theory as viable, discovery of this issue would clearly be appropriate.

17 Importantly, in the context of copyright law, whether an allegedly infringing defendant
18 was granted an implied license to reproduce the plaintiff's protected work is generally a question
19 of fact not resolvable by summary judgment. *See, e.g., Netbula, LLC v. Chordiant Software,*
20 *Inc.*, No. 08-00019, 2009 WL 2044693, slip op. at 6 (N.D. Cal. Jul. 9, 2009); *Pavlica v. Behr,*
21 *397 F. Supp. 2d 519, 526 (S.D.N.Y. 2005); Systems XIX, Inc. v. Parker,* 30 F. Supp. 2d 1225,
22 1230 (N.D. Cal. 1998). As such, absent an opportunity for discovery, logic dictates that
23 copyright actions also should not be subject to pretrial, *sua sponte* dismissal on this same basis.
24 Ultimately, the Court should also consider whether the LVRJ *intended* to grant an implied
25 license to the Defendants, thereby authorizing the Works' wholesale reproduction. *See Montwillo*
26 *v. Tull,* 632 F. Supp. 2d 917, 924 (N.D. Cal. 2008). Such a determination of intent should not
27 reasonably be subject to outright dismissal at these incipient stages of litigation.

1 **C. The Defendants' Interpretation of Worldwide Church is Misleading and Unfounded**

2 The Defendants' efforts to distinguish this case from the facts in *Worldwide Church*,
3 thereby undermining the significance of the Ninth Circuit's impactful decision, is entirely self-
4 serving and are demonstrative of the far-reaching nature of the Defendants' overall position. The
5 Defendants' abbreviated discussion on this topic is limited to two purportedly distinguishing
6 characteristics concerning the work at issue in *Worldwide Church*. (Defs.' Opp'n 11:20-26)
7 However, the "distinctions" relied upon by the Defendants are clearly unfounded and, ultimately,
8 do nothing to negate *Worldwide Church's* significant precedential value to the present fair use
9 analysis.

10 The Defendants' first contention, that *Worldwide Church* is inapplicable to the instant
11 action because the infringed work in that case "consist[ed] of seven lengthy chapters," (Defs.'
12 Opp'n 11:20-21) is, at best, of minimal relevance to the current dispute. In that vein, it is not
13 surprising that the Defendants fail to cite any case law to support their theory that the
14 Infringement displayed on the CIO website is somehow less offensive merely due to the length
15 of the infringed Work. For multiple reasons, this position is unmeritorious. First, if sheer textual
16 volume was a consideration deemed vital to this analysis, written works of minimal length,
17 ranging from poems to short memoirs, would invariably be placed at a severe disadvantage with
18 respect to pursuing legal recourse for alleged infringements. Additionally, it can easily be
19 argued that the Work, as holistically infringed upon by the Defendants, is hardly a short literary
20 work (particularly when compared to other newspaper articles). The Work consists of no less
21 than 33 written paragraphs, and as detailed herein, was the product of extensive investigative
22 journalism performed by its author. (*See* Compl. Ex. 1.) A detailed literary work of this length
23 cannot reasonably be excluded from a proper fair use inquiry on the basis of brevity. Finally,
24 there is absolutely nothing to indicate that the Defendants would not have made a wholesale
25 copy of the Work had the Work been shorter in length. To the contrary, the verbatim nature of
26 the Infringement plainly suggests that the Defendants would have reproduced the Work, in its
27 entirety, regardless of its length.

1 The Defendants' next claim, concerning the level of creativity of the work at issue in
2 *Worldwide Church*, is equally baseless. (Defs.' Opp'n 11:22-24) This argument is predicated
3 entirely upon the Defendants' arbitrary, unilateral characterizations of creative expression.
4 While the infringed work in *Worldwide Church* is undoubtedly creative and was rightfully
5 afforded copyright protection, this by no means diminishes the protection deserved for literary
6 works of a different nature, such as the Work at issue in this case. As discussed herein, the Work
7 is far more than a mere recitation of facts: drafting the Work entailed the careful determination of
8 which facts were significant, along with the placement of those facts in an understandable and
9 articulate manner. The creation of such a nonfiction work clearly entails considerable
10 originality. *Harper & Row*, 471 U.S. at 547. While there is certainly an enormous amount of
11 creativity involved with drafting seven chapter of religious-based text, this does not mean that
12 every other literary work should, by comparison, be demeaned as undeserving of copyright
13 protection.

14
15 **D. This Court's Decision in *Realty One* is Favorable to Righthaven's Present Position**

16 **1. The Defendants Have Ignored the Applicable Law Governing Fair Use**

17 By citing Judge Larry Hicks' decision in *Realty One*, the Defendants are inexplicably
18 ignoring the applicable legal standard governing fair use. Ironically, at the beginning of their
19 Opposition, the Defendants cite the very law which they later choose to ignore: the fair use
20 inquiry "is not to be simplified with bright-line rules, for the statute, like the doctrine it
21 recognizes, calls for a *case-by-case analysis*." *Campbell*, 510 U.S. at 577-78 (emphasis added).
22 (Defs.' Opp'n 6:6-7) Incredibly, the Defendants seem to have forgotten this principle – that all
23 fair use challenges be examined on an individual basis – despite its obvious applicability to their
24 own argument. Nevertheless, and as further discussed in the following paragraph, this case-by-
25 case requirement greatly diminishes the present impact of Judge Hicks' decision, particularly in
26 light of the significant factual differences between this case and those at issue in *Realty One*.

1 2. **The Partial Infringement at Issue in Realty One – and Judge Hicks’**
2 **Reliance Thereon – Renders the Realty One Decision Favorable to**
3 **Righthaven’s Present Position**

4 The facts at present are clearly distinguishable from those at issue in *Realty One*, and
5 such distinctions are seemingly dispositive to the fair use analysis. The most important
6 distinction arises from the amount of the copyrighted work taken by the infringing party. As
7 repeatedly mentioned herein, the Defendants in this matter created a wholesale, verbatim copy of
8 the Work and publicly displayed said copy on the CIO website. (*See* Compl. Ex. 1-2.)
9 Contrarily, in *Realty One*, the infringement at issue was a reproduction of approximately 30% of
10 the protected work. *Realty One*, 2:10-cv-1036-LRH-PAL, slip op. at 4. This act of non-holistic
11 copying by the defendants in *Realty One* was an integral factor in Judge Hicks’ ruling. Judge
12 Hicks, in assessing the third fair use factor, ***was clearly impacted by the extent of the Realty One***
13 ***defendants’ copying***: “Nelson reproduced only the first eight sentences of a thirty sentence news
14 article . . . [t]he court finds that this use weighs in favor of a fair use of the copyrighted material.”
15 *Realty One*, 2:10-cv-1036-LRH-PAL, slip op. at 4. Similarly, Judge Hicks emphasized that,
16 because the infringement was not a full copy, ***the infringing “use [did] not satisfy a reader’s***
17 ***desire to view and read the article in its entirety . . .”*** *Id.* (emphasis added). Judge Hicks also
18 noted that “Nelson ***directed readers of his blog to the full text of the Work.***” *Id.* (emphasis
19 added). These considerations simply do not apply to the present action, as the Defendants’
20 wholesale reproduction and public display of the Work on the CIO website wholly obviated the
21 need for any reader to re-access the Work on the LVRJ website. In other words, it appears
22 highly likely that Judge Hicks would have reached a far different conclusion in *Realty One* had
23 the infringement at issue been a holistic reproduction, rather than a 30% copy, of the protected
24 work.

25 Furthermore, Judge Hicks supported his ruling in *Realty One* by citing the Ninth
26 Circuit’s decision in *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 941
27 (9th Cir. 2002), a case in which the Ninth Circuit held that copying only as much as necessary
28 weighs in favor of fair use. In this case, the Defendants copied far more than necessary to

1 accomplish their stated purpose. The Defendants could easily have copied a small portion of the
2 Work and provided a hyperlink leading back to the Work as displayed on the LVRJ website.
3 Instead, the Defendants chose to blatantly infringe on the Work’s copyright by reproducing its
4 entire content with authorization to do so. This significant distinction from *Realty One*
5 completely undermines the Defendants’ reliance upon Judge Hicks’ decision.

6
7 **3. Judge Hicks’ Decision in Realty One was in Error**

8 Notwithstanding the factual distinctions between *Realty One* and the present case,
9 Righthaven nevertheless maintains that Judge Hicks’ decision was in error. Though the
10 reproduction at issue in *Realty One* was limited to a partial copy, said copy was completely
11 devoid of transformative value and merely constituted a copied-and-pasted portion of the original
12 literary work.³ Moreover, the reproduction displayed by the *Realty One* defendants was
13 unquestionably exploited for commercial gain,⁴ thus Righthaven should have been entitled to a
14 presumption of market harm. *See Sony Corporation of America v. Universal City Studios, Inc.*,
15 464 U.S. 417, 451 (1984). Judge Hicks did not address this presumption, instead finding – in an
16 extremely brief analysis – that the defendants’ “use of the copyrighted material [was] likely to
17 have little to no effect on the market for the copyrighted news article.” *Realty One*, 2:10-cv-
18 1036-LRH-PAL, slip op. at 4. Righthaven respectfully, yet vehemently, disagrees. The utter
19 lack of transformative value in the defendants’ reproduction, along with the verbatim nature of
20 the portion copied and deserved presumption of market harm, did not warrant a finding of fair
21 use.

22 While Righthaven believes that Judge Hicks’ *Realty One* decision is in error, Righthaven
23 simultaneously understands that it is incumbent upon us to presently respect and give due
24 deference to Judge Hicks’ decision. Moreover, Righthaven anticipates a procedural posture in
25 the near future whereby Judge Hicks’ fair use holding will be appealable. Specifically, given
26 that Judge Hicks’ dismissal applied only to one of the *Realty One* defendants and, notably, did

27 ³ *See Realty One*, 2:10-cv-1036-LRH-PAL (Docket Nos. 1-0, 1-1, 1-2, 1-3).

28 ⁴ *See id.*

1 not dismiss all of the defendants from the lawsuit, Righthaven plans to move for default
2 judgment against defendant Realty One Group, Inc.⁵ However, as Righthaven’s infringement
3 action against Realty One Group, Inc. arises from the same set of operative facts as Righthaven’s
4 (now defunct) claim against the dismissed defendant, Righthaven recognizes that Judge Hicks,
5 given his own recently established precedent, may very well deny Righthaven’s forthcoming
6 default judgment motion and dismiss Realty One Group, Inc. from the lawsuit, *sua sponte*, on the
7 basis of purported fair use.⁶

8 As Righthaven has reached a private settlement with the dismissed defendant in *Realty*
9 *One*, Righthaven is not in position to appeal Judge Hicks’ dismissal of said defendant to the
10 Ninth Circuit, as this would constitute a breach of the governing settlement agreement.
11 Contrarily, Realty One Group, Inc. is *not* subject to said settlement agreement, and as
12 Righthaven anticipates that Realty One Group, Inc. will benefit from Judge Hicks’ position on
13 fair use by way of being dismissed, *sua sponte* (and protected from default judgment),
14 Righthaven fully intends to appeal *Realty One* to the Ninth Circuit on the fair use issue.
15 Summarily, in addition to being significantly factually distinguishable from the present action,
16 Righthaven ultimately believes that the fair use finding in *Realty One* was rendered in error.

17
18 **E. In the Event of a Sua Sponte Dismissal, Righthaven is Entitled to Leave to Amend or**
19 **Limited Discovery**

20 The Defendants’ arguments that Righthaven’s procedural concerns with a potential *sua*
21 *sponte* dismissal are merely a “delay tactic” are asserted without any regard for relevant law.
22 (Defs.’ Opp’n 12-13) First, there is no question that Righthaven would be entitled to leave to

23
24 ⁵ Clerk’s Entry of Default has already been entered against defendant Realty One Group, Inc. See Default, *Realty One*, No. 2:10-cv-01036-LRH-PAL (Docket No. 16-0).

25 ⁶ In fact, given the Ninth Circuit’s unambiguous position on this exact issue, it will be difficult for Judge Hicks to
26 deviate from his prior fair use holding (granting Mr. Nelson’s dismissal) when ruling upon Righthaven’s
27 forthcoming motion for default judgment against Realty Group. See *In re First T.D. & Investment, Inc.*, 253 F.3d
28 520, 532 (9th Cir. 2001) (“It follows that if an action against the answering defendants is decided in their favor, then the action should be dismissed against both answering and defaulting defendants . . . It would likewise be incongruous and unfair to allow the Trustee to prevail against Defaulting Defendants on a legal theory rejected by the bankruptcy court with regard to the Answering Defendants in the same action.”).

1 amend, given the nature of the Defendants’ Infringement and the legal standards governing
2 copyright actions. As discussed in Righthaven’s original Response, a *sua sponte* dismissal is
3 only “appropriate when it is clear that no relief could be granted under any set of fact that could
4 be proven consistent with the allegations set forth in the complaint.” *See Burnett v. Twentieth*
5 *Century Fox Film Corp.*, 491 F.Supp.2d 962, 966 (C.D. Cal. 2007). Similarly, upon a 12(b)(6)
6 dismissal, leave to amend should be granted unless doing so would be futile. *In re Silicon*
7 *Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 991 (9th Cir. 1999). At present, it is hard to imagine
8 how, in accordance with the allegations set forth in the Complaint, relief for infringement could
9 **clearly** not be granted to Righthaven, or how it would be futile to grant leave to amend. It is
10 well-established that to prove copyright infringement, the plaintiff must demonstrate: “(1)
11 ownership of the allegedly infringed work and (2) copying of the protected elements of the work
12 by the defendant.” *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991). In the
13 instant matter, the elements of Righthaven’s copyright claim are expressly pled in the Complaint,
14 wherein Righthaven alleges copyright ownership of the Work and also alleges the Defendants’
15 Infringement. (Compl. ¶¶ 8, 10-11.) Furthermore, Righthaven presents evidence in support of
16 these allegations by exhibiting both the copyright registration granted by the USCO and the
17 Defendants’ verbatim Infringement. (Compl. Ex. 2-3.) As such, any suggestion that this lawsuit
18 is somehow futile, despite the sufficiency of Righthaven’s pleadings and the 100%, wholesale
19 nature of the Defendants’ infringing conduct, is simply erroneous.

20 Additionally, in the event that this matter is dismissed *sua sponte* pursuant to Rule 56,
21 such a dismissal would only be appropriate if Righthaven, as the losing party, “was on notice that
22 she had to come forward with all of her evidence.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 326
23 (1986). In that vein, Righthaven must first be provided with a sufficient opportunity to
24 appreciate the discovery topics at-issue and to conduct discovery on such topics. *Portsmouth*
25 *Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985). Righthaven
26 has not yet been afforded any opportunity for discovery, thus a Rule 56 dismissal absent such an
27 opportunity would run directly counter to Ninth Circuit authority.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Righthaven LLC and that on this twenty-third day of December, 2010, I caused the **REPLY IN SUPPORT OF PLAINTIFF'S REPOSENSE TO ORDER TO SHOW CAUSE** to be served by the Court's CM/ECF system.

By: /s/ J. Charles Coons
J. CHARLES COONS, ESQ.
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