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CENTER FOR INTERCULTURAL ORGANIZING

10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13
14 RIGHTHAVEN, LLC, a Nevada limited liability company)
CASE NO. 2:10-cv-01322-JCM-LRL)
15 Plaintiff,)
16 vs.)
17 KAYSE JAMA, an individual, and)
CENTER FOR INTERCULTURAL)
18 ORGANIZING, a Non-Profit Organization,)
ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
19 Defendant.)
DEFENDANTS
20

21 Presently before the Court is the Order to Show Cause why the Case should not be
22 Dismissed pursuant to 17 U.S.C. § 107. The Court issued the Order to Show Cause why the
23 Case should not be Dismissed pursuant to 17 U.S.C. § 107. (Dkt. #12). Plaintiff, Righthaven,
24 LLC ("Righthaven") filed a Response to Order to Show Cause, and Alternatively Request for
25 Continuance to Conduct Discovery Pursuant to FRCP 56(f). (Dkt. #14). Defendants, Kayse
26 Jama and Center for Intercultural Organizing ("Defendants") filed an Opposition to the Response
27 to Order to Show Cause, and Alternatively Request for Continuance to Conduct Discovery
28 Pursuant to FRCP 56(f). (Dkt. #18). Professor Jason Schultz filed Brief of Amicus Curiae.

1 (Dkt. #21). Righthaven filed its Reply in Support of Plaintiff's Response to Order to Show
2 Cause. (Dkt. #22). Righthaven filed an Opposition to Professor Jason Schultz filed Brief of
3 Amicus Curiae. (Dkt. #24). Righthaven filed Plaintiff's Identification of Genuine Issues of
4 Material Fact that Require Resolution Prior to Continued Fair Use Hearing. (Dkt. #28).
5 Defendants filed an Opposition to Plaintiff's Identification of Genuine Issues of Material Fact
6 that Require Resolution Prior to Continued Fair Use Hearing. (Dkt. #29). Professor Schultz
7 filed Brief of Amicus Curiae Professor Jason Schultz in Response to Plaintiff's Identification of
8 Genuine Issues of Material Fact that Require Resolution Prior to Continued Fair Use Hearing.
9 (Dkt. #30). Thereafter, the Court reset the hearing for oral argument on the Order to Show Cause
10 for March 18, 2011.

11 The Court, having considered the papers and pleadings submitted and oral arguments of
12 the parties present, finds there are no issues of material fact precluding the entry of judgment
13 pursuant to Fed. R. Civ. P. 56(f)(3).

14 Specifically, as to the first fair use factor - the purpose and character of the use - the Court
15 finds there is no dispute as to Defendants' non-profit status and the fact that Defendants did not
16 sell, license, or publish the work commercially. *See* Affidavit of Kayse Jama (Dkt. #7-2) and
17 Complaint, Exhibit 2 (Dkt. #1-1). The Court further finds that no reasonable jury could conclude
18 that any general donation or solicitation for donations to Defendants' mission would constitute
19 using the work for a commercial purpose. Moreover, the Court finds that Defendants have made
20 a transformative use by targeting a different audience for a different purpose than the original
21 publisher, the *Las Vegas Review-Journal*. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F. 3d
22 701, 722 (9th Cir. 2007) (finding fair use where defendant used a copyrighted work "in a new
23 context to serve a different purpose"). The Court also finds that because Righthaven does not
24 exploit or offer the work to the public in any form, there can be no substitution of the Defendants'
25 use for Righthaven's use of the work under the first fair use factor. *See Perfect 10, Inc. v.*
26 *Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). This factor weighs in favor of Defendants.

27 As to the second fair use factor - the nature of the work - the Court finds no genuine issue
28 of material fact, because the nature of the work can be determined by examination of the article.

1 Complaint Exhibit 1 (Dkt. #1-1). The news story at issue is largely factual and thus deserving of
2 minimal copyright protection. This factor weighs heavily in favor of Defendants. *See Los Angeles*
3 *News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997).

4 As to the third factor - the amount and substantiality of the use - the Court finds that
5 while Defendants posted the entirety of the work, this was reasonable in light of the purpose and
6 character of the use under the first factor - to inform its members of important social and political
7 information about immigrant issues. *See Amazon*, 508 F.3d at 1165; *Kelly v. Ariba Soft Corp.*,
8 336 F.3d 811, 820-21 (9th Cir. 2003). *See also A.V. v. iParadigms, LLC*, 562 F.3d 630, 642 (4th
9 Cir. 2009); *Bond v. Blum*, 317 F.3d 385, 393 (4th Cir. 2003). *Nuñez v. Caribbean Int'l News*
10 *Corp.*, 235 F.3d 18, 24 (1st Cir. 2000); *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev.
11 2006). Because the amount copied was reasonable in relation to the purpose of the copying, this
12 factor favors neither party. *See Campbell v. Acuff-Rose Music, Inc.*, 510 US 569, 586 (1994).
13 Righthaven's reliance on *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227
14 F.3d 1110 (9th Cir. 2000) is misplaced. As an initial matter, that case does not stand for the
15 broad proposition that use of an entire work precludes a fair-use finding. *Id.* at 1118
16 (recognizing that " 'wholesale copying does not preclude fair use per se' ") (quoting *Hustler*
17 *Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)).

18 In *Worldwide Church of God*, a church owned the copyright in a 380-page book written
19 by its founder entitled "Mystery of the Ages." 227 F. 3d at 1112. The church stopped distributing
20 the book when certain of its doctrines changed. *Id.* at 1113. A splinter group countermanded
21 that directive by printing and distributing 30,000 copies of "Mystery of the Ages." *Id.* When the
22 new group ignored the church's cease-and-desist letter, the church filed a copyright infringement
23 action. *Id.* The splinter group made no attempt to claim that its use was transformative or served
24 some different purpose than the original work. Instead, the group merely relied on its non-profit
25 status as a defense. That was unavailing. By distributing "Mystery of the Ages" in bulk, the
26 splinter group was able to draw thousands to its congregation, and those members tithed 10% of
27 their income to the new church. *Id.* at 1118.

28 *Worldwide Church of God* is distinguishable. First, Defendants' use of the short news

1 article at issue serves a different purpose than the original work by providing information to its
2 members concerning the specialized topic of immigrant and refugee rights. See *Amazon*, 508
3 F.3d at 1165 ("making an exact copy of a work may be transformative so long as the copy serves
4 a different function than the original work"). Second, as discussed above, Defendants' use was
5 not competitive with either Righthaven's use or even the use of the original copyright owner, the
6 Review-Journal. By contrast, the parties in *Worldwide Church of God* were directly competing
7 for same tithing members.

8 As to the fourth factor - the effect of the use upon the potential market for or value of the
9 original work - the Court finds that Defendants use was socially beneficial in that it informed its
10 members of important social and political information. *Amazon*, 487 F.3d at 724-25; Field, 412
11 F. Supp. 2d at 1119 (finding fair use where Google's cache of works served "different and
12 socially important purposes" than the original works). Furthermore, Righthaven has failed to
13 produce any evidence that there is a potential market for the work in this case, as it does not
14 make any commercial use of the work. See Fed. R. Civ. P. 56(d) Declaration of Shawn Mangano
15 (Dkt. #15) and Righthaven's Identification of Genuine Issues of Material Fact that Require
16 Resolution Prior to Continued Fair Use Hearing (Dkt. #28). See also Fed. R. Civ. P. 56(c)(1) ("A
17 party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to
18 particular parts of materials in the record."); *Matushita Elec. Indus. Co., Ltd. v. Zenith Radio*
19 *Corp.*, 475 U.S. 574, 587 (1986) ("the nonmoving party must come forward with 'specific facts
20 showing that there is a *genuine issue for trial*.'") (quoting former Fed. R. Civ. P. 56(e)) (emphasis
21 in *Matushita*); *Precision Airmotive Corp. v. Rivera*, 288 F.Supp.2d 1151, 1154 (W.D. Wash.
22 2003) ("A continuance is not justified when all the information and knowledge is already in
23 Plaintiff's possession.").

24 Moreover, in light of *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), where the
25 Supreme Court held that there should be no presumption of harm where the holder of a patent
26 does not commercially exploit the patented invention, this Court finds that the same reasoning
27 should apply under the fourth fair use factor where a copyright holder does not commercially
28 exploit a copyrighted work. See *Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010) (applying

1 *eBay's* reasoning to copyright law); *Blanch v. Koons*, 467 F. 3d 244, 258 (2d Cir. 2006) (fourth
2 factor "greatly favors" a fair use finding where the copyright holder was not commercially
3 exploiting photograph); *Field*, 412 F. Supp. 2d at 1121 (fourth factor favored defendant where
4 there was "no evidence of any market for [the copyright holder's] works."); NIMMER ON
5 COPYRIGHT §13.05[A][4] (2010) ("On occasion, the lack of market harm is apparent."). This
6 factor also weighs in favor of defendants.

7 Finally, the four factors must be considered "in light of the purposes of copyright," which
8 are "[t]o promote the Progress of Science and useful Arts and to serve the welfare of the public."
9 *Perfect 10 v. Amazon.com*, 508 F.3d at 1163 (internal citations omitted). In light of the above
10 findings, the Court concludes that Defendants' use advances the Copyright Act's purpose.

11 Accordingly,

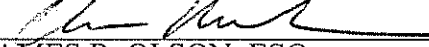
12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment be
13 GRANTED in favor of Defendants.

14 DATED this ____ day of April, 2011.

15
16 UNITED STATES DISTRICT JUDGE

17
18 Submitted by:

19 OLSON, CANNON,
20 GORMLEY & DESRUISSEAU

21 By: 
22 JAMES R. OLSON, ESQ.
23 Nevada Bar No. 000116
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on this 1st day of April, 2011, I did serve, via the Court's CM/ECF System, a copy of the above and foregoing ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS..



An Employee of OLSON, CANNON, GORMLEY & DESRUISSEAU

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