

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)
lpulgram@fenwick.com
 2 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice pending*)
cwebb@fenwick.com
 3 FENWICK & WEST LLP
 555 California Street, 12th Floor
 4 San Francisco, California 94104
 Telephone: (415) 875-2300
 5 Facsimile: (415) 281-1350

6 KURT OPSAHL (CA State Bar No. 191303) (*pro hac vice*)
kurt@eff.org
 7 CORYNNE MCSHERRY (CA State Bar No. 221504) (*pro hac vice*)
corynne@eff.org
 8 ELECTRONIC FRONTIER FOUNDATION
 454 Shotwell Street
 9 San Francisco, California 94110
 Telephone: (415) 436-9333
 10 Facsimile: (415) 436-9993

11 CHAD BOWERS (NV State Bar No. 7283)
bowers@lawyer.com
 12 CHAD A. BOWERS, LTD
 3202 West Charleston Boulevard
 13 Las Vegas, Nevada 89102
 Telephone: (702) 457-1001
 14 Attorneys for Defendant and Counterclaimant
 DEMOCRATIC UNDERGROUND, LLC, and
 15 Defendant DAVID ALLEN

16 **UNITED STATES DISTRICT COURT**
 17 **FOR THE DISTRICT OF NEVADA**

18 RIGHTHAVEN LLC, a Nevada limited liability company,)
 Plaintiff,)

19 v.)

20 DEMOCRATIC UNDERGROUND, LLC, a District of)
 Columbia limited-liability company; and DAVID ALLEN,)
 21 an individual,)
 Defendants.)

22 _____)
 DEMOCRATIC UNDERGROUND, LLC, a District of)
 Columbia limited-liability company,)
 23 Counterclaimant,)
 24 v.)

25 RIGHTHAVEN LLC, a Nevada limited liability company,)
 26 and STEPHENS MEDIA LLC, a Nevada limited-liability)
 company,)
 27 Counterdefendants.)
 28 _____)

Case No. 2:10-cv-01356-RLH
(RJJ)

**CONSOLIDATED BRIEF
 IN OPPOSITION TO
 PLAINTIFF'S MOTION
 FOR VOLUNTARY
 DISMISSAL TO THE
 EXTENT IT SEEKS TO
 FORECLOSE AWARD OF
 ATTORNEYS' FEES, AND
 IN SUPPORT OF CROSS-
 MOTION FOR SUMMARY
 JUDGMENT**

1 Defendant/Counter-Claimant Democratic Underground, LLC and Defendant David Allen
2 (collectively, “Defendants”), by and through their attorneys of record, hereby move pursuant to
3 Fed. R. Civ. P. 56 for summary judgment against Plaintiff Righthaven LLC on the claim of
4 copyright infringement on the grounds that (i) Defendants committed no “volitional act” giving
5 rise to a claim for direct copyright infringement; and (ii) fair use provides a complete defense to
6 infringement. As there are no genuine issues of material fact, Defendants are entitled to summary
7 judgment as a matter of law.

8 This motion is supported by the following Memorandum of Points and Authorities, the
9 pleadings and papers on file, the Declarations of Kurt Opsahl and David Allen filed separately,
10 and any oral argument the Court allows at hearing of the Motion.

11 Dated this 7th day of December, 2010

12 FENWICK & WEST LLP

13
14 By: /s/ Laurence F. Pulgram

15 Laurence F. Pulgram
16 Fenwick & West LLP
17 555 California Street, 12th Floor
18 San Francisco, California 94104

19 Attorneys for Defendant and Counterclaimant
20 DEMOCRATIC UNDERGROUND, LLC, and
21 Defendant DAVID ALLEN
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

CONCISE STATEMENT OF FACTS NOT GENUINELY IN DISPUTE 3

 A. Democratic Underground and David Allen 3

 B. The “Pampango” Post 4

 C. The Article’s Origins and Righthaven’s Claim to Ownership 5

 D. Righthaven, Stephens Media, and Their Business of Copyright Litigation..... 6

 E. Righthaven Sues Democratic Underground and David Allen 7

ARGUMENT 7

I. THE UNDISPUTED FACTS DEMONSTRATE THAT PLAINTIFF’S CLAIMS
WERE MERITLESS FROM THEIR INCEPTION 7

 A. Defendants Have Committed No Volitional Act of Infringement 7

 B. Posting the Excerpt to the DU Forum Was Fair Use 10

 1. Posting the Excerpt to the DU Website Was Highly Transformative
and Minimally Commercial 10

 2. The Highly Factual, Politically Important, and Previously Published
Nature of the Article Supports Fair Use..... 12

 3. The Small Amount of the Work Taken Supports a Finding of Fair
Use 13

 4. The Lack of Potential or Actual Market Harm Supports Fair Use 14

 5. The *Realty One* Decision Was Not a Change in the Law that Could
Excuse Righthaven’s Pursuit of this Baseless Lawsuit..... 15

 C. Plaintiff’s Demand for Domain Name Transfer Represents Another
Baseless, *In Terrorem* Tactic 16

II. THE COURT SHOULD NOT GRANT THE MOTION FOR VOLUNTARY
DISMISSAL ABSENT A CONDITION THAT DEFENDANTS MAY APPLY
FOR THEIR ATTORNEYS’ FEES 17

 A. Where Attorneys’ Fees are Afforded to a Prevailing Party By an
Independent Statute, Conditioning a Dismissal with Prejudice on Denial of
Those Fees Would be Contrary to Law..... 17

TABLE OF CONTENTS
(Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
B. The Court Should Authorize a Request For Attorneys’ Fees Regardless of Whether Plaintiff Would Have a “Right” to Withdraw its Motion.....	19
1. The Court Should Not Be Held Hostage by Plaintiff’s Refusal to Dismiss Where Justice Requires Award of Fees.....	20
2. Payment of Defendants’ Fees is Appropriate Here Because the Case Was Frivolous and/or Pursued in Bad Faith	20
3. Attorneys’ Fees and Costs Will Be Warranted Under Section 505	21
a. The Degree of Success Supports an Award of Attorneys’ Fees	21
b. Righthaven’s Lawsuit Was Frivolous and Unreasonable	22
c. Righthaven’s Claims Were Improperly Motivated and Require Compensation to Defendants as a Deterrence to Future Abuse	23
III. THE COURT SHOULD NOT DISMISS THE COUNTERCLAIM, REGARDLESS OF WHETHER VOLUNTARY DISMISSAL OF THE COMPLAINT IS APPROVED.....	26
A. Plaintiff Has No Right to Condition Its Voluntary Dismissal on any Action Respecting the Counterclaim	26
B. The Counterclaim Would Not Be Disposed of by the Voluntary Dismissal of Righthaven’s Original Complaint.....	26
C. If the Original Complaint is Not Voluntarily Dismissed, the Counterclaim is Not Subject to Dismissal as Redundant or Superfluous.....	29
CONCLUSION	30

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

AeroTech, Inc. v. Estes,
110 F.3d 1523 (10th Cir. 1997)..... 19, 20

AIR-vend, Inc. v. Thorne Indus., Inc.,
625 F. Supp. 1123 (D. Minn. 1985)..... 28

Am.Geophysical Union v. Texaco Inc.,
60 F.3d 913 (2d Cir. 1994)..... 11

Blackmer v. Shadow Creek Ranch Dev. Co.,
2007 U.S. Dist. Lexis 99224 (S.D. Tex. June 26, 2007)..... 29

Bond v. Blum,
317 F.3d 385 (4th Cir. 2003)..... 25

Bridgeport Music, Inc. v. Diamond Time, Ltd.,
371 F.3d 883 (6th Cir. 2004)..... 24

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994)..... *passim*

Cardinal Chem. Co. v. Morton Int’l, Inc.,
508 U.S. 83 (1993)..... 28, 29

Carroll v. President and Comm’rs of Princess Anne,
393 U.S. 175 (1968)..... 17

Cartoon Network LP v. CSC Holdings, Inc.,
536 F.3d 121 (2d Cir. 2008)..... 9

Colombrito v. Kelly,
764 F.2d 122 (2d Cir. 1985)..... 19

Compaq Computer Corp. v. Ergonome, Inc.,
387 F.3d 403 (5th Cir. 2004)..... 25

Consumers Union of U.S., Inc. v. Gen. Signal Corp.,
724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984)..... 13

CoStar Group, Inc. v. LoopNet, Inc.,
373 F.3d 544 (4th Cir. 2004)..... 9

Degussa Admixtures, Inc. v. Burnett,
471 F. Supp. 2d 848 (W.D. Mich. 2007), *aff’d*, 277 Fed. Appx. 530,
2008 U.S. App. Lexis 10017 (6th Cir. May 5, 2008)..... 18, 19

Diamonds.net LLC v. Idex Online, Ltd.,
590 F. Supp. 2d 593 (S.D.N.Y. 2008)..... 28

TABLE OF AUTHORITIES
(Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

<i>Dominion Elec. Mfg. Co. v. Edwin L. Weigand, Co.</i> , 126 F.2d 172 (6th Cir. 1942).....	27, 28
<i>Elvis Presley Enters., Inc. v. Passport Video</i> , 349 F.3d 622 (9th Cir. 2003).....	14
<i>Englewood Lending, Inc. v. G&G Coachella Invs., LLC</i> , 651 F. Supp. 2d. 1141 (C.D. Cal. 2009)	30
<i>Entm't Research Group v. Genesis Creative Group</i> , 122 F.3d 1211 (9th Cir. 1997).....	21
<i>Fantasy, Inc. v. Fogerty</i> , 94 F.3d 553 (9th Cir. 1996).....	21, 22
<i>Faulkner Press, LLC v. Class Notes, LLC</i> , 94 U.S.P.Q. 2d (BNA) 1318 (N.D. Fla. Mar. 17, 2010)	29
<i>Field v. Google, Inc.</i> , 412 F. Supp. 2d 1106 (D. Nev. 2006)	8
<i>Fisher v. Dees</i> , 794 F.2d 432 (9th Cir. 1986).....	10
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994).....	21
<i>Harper & Row, Publr. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	12
<i>Hofheinz v. AMC Prods., Inc.</i> , 2003 U.S. Dist. LEXIS 16940 (S.D.N.Y. Sep. 3, 2003)	25
<i>Jefferson Cty. Sch. Dist. v. Moody's Investor's Servs.</i> , 175 F.3d 848 (10th Cir. 1999).....	17
<i>L.A. News Serv. v. CBS Broad., Inc.</i> , 305 F.3d 924 (9th Cir. 2002).....	12
<i>Lau v. Glendora Unified Sch. Dist.</i> , 792 F. 2d 929 (9th Cir. 1986).....	19
<i>Lawrence v. Fuld</i> , 32 F.R.D. 329 (D. Md. 1963).....	19, 20, 21
<i>Leach v. Ross Heater & Mfg. Co.</i> , 104 F.2d 88 (2d Cir. 1939).....	29
<i>Lenz v. Universal Music Corp.</i> , 572 F. Supp. 2d 1150 (N.D. Cal. 2008)	22

TABLE OF AUTHORITIES
(Continued)

		<u>Page(s)</u>
1		
2		
3	<i>Marobie-Fl., Inc. v. Nat'l. Ass'n of Fire Equip. Distribs.,</i>	
4	983 F. Supp. 1167 (N.D. Ill. 1997)	9
5	<i>Mattel, Inc. v. Walking Mt. Prods.,</i>	
6	2004 U.S. Dist. LEXIS 12469 (C.D. Cal. June 24, 2004)	23, 24, 25
7	<i>Mattel, Inc. v. Walking Mt. Prods.,</i>	
8	353 F.3d 792 (9th Cir. 2003).....	15
9	<i>Maxtone-Graham v. Burtchaell,</i>	
10	803 F.2d 1253 (2d Cir. 1986).....	13
11	<i>Med. Mut. Ins. Co. of Maine v. Indian Harbor Ins. Co.,</i>	
12	583 F.3d 57 (1st Cir. 2009)	16
13	<i>Mother & Father v. Cassidy,</i>	
14	338 F.3d 704 (7th Cir. 2003).....	18, 19
15	<i>MRSI Int'l, Inc. v. Bluespan, Inc.,</i>	
16	2006 U.S. Dist. LEXIS 68891 (D. Utah Sep. 21, 2006)	29
17	<i>New Era Publ'ns Int'l ApS v. Carol Publ'g Group,</i>	
18	904 F.2d 152 (2d Cir. 1990).....	13
19	<i>Nuñez v. Caribbean Int'l News Corp.,</i>	
20	235 F.3d 18 (1st Cir. 2000)	11
21	<i>Parker v. Google, Inc.,</i>	
22	422 F. Supp. 2d 492 (E.D. Pa. 2006)	8
23	<i>Perfect 10, Inc. v. Amazon.com, Inc.,</i>	
24	508 F.3d 1146 (9th Cir. 2007).....	10, 11, 14
25	<i>Perfect 10, Inc. v. CCBill LLC,</i>	
26	488 F.3d 1102 (9th Cir. 2007).....	22
27	<i>Quadrozzi v. The City of N.Y.,</i>	
28	127 F.R.D. 63 (S.D.N.Y. 1989)	18, 20, 21
	<i>Religious Tech. Ctr. v. Netcom On-line Commc'n Servs.,</i>	
	907 F. Supp. 1361 (N.D. Cal. 1995)	<i>passim</i>
	<i>Righthaven LLC v. Realty One Group, Inc.,</i>	
	2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 19, 2010).....	<i>passim</i>
	<i>Riviera Distribs., Inc. v. Jones,</i>	
	517 F.3d 926 (7th Cir. 2008).....	18, 19, 22
	<i>Robinson v. Lopez,</i>	
	69 U.S.P.Q. 2d (BNA) 1241 (C.D. Cal. 2003).....	21

TABLE OF AUTHORITIES
(Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

<i>Sega Enters. Ltd. v. Maphia</i> , 948 F. Supp. 923 (N.D. Cal. 1996)	9, 12
<i>Shell Trademark Mgmt. BV v. Canadian AMOCO</i> , 2002 U.S. Dist. LEXIS 9597 (N.D. Cal. May 21, 2002)	17
<i>Smith v. Lenches</i> , 263 F.3d 972 (9th Cir. 2001).....	28
<i>Smoot v. Fox</i> , 353 F.2d 830 (6th Cir. 1965).....	20
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	12, 13, 16
<i>Stewart v. Abend</i> , 495 U.S. 207 (1990).....	10
<i>Stickrath v. Globalstar, Inc.</i> , 2008 U.S. Dist. LEXIS 95127 (N.D. Cal. May 13, 2008)	28
<i>Sundeman v. Seajay Soc’y, Inc.</i> , 142 F.3d 194 (4th Cir. 1998).....	13
<i>Taubman Co. v. Webfeats</i> , 319 F.3d 770 (6th Cir. 2003).....	16
<i>Tavory v. NTP, Inc.</i> , 297 Fed. Appx. 986 (Fed. Cir. 2008).....	25
<i>Thompson v. Hubbard</i> , 131 U.S. 123 (1889).....	16
<i>Tory v. Cochran</i> , 544 U.S. 734 (2005).....	17
<i>Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.</i> , 996 F.2d 1366 (2d Cir. 1993).....	13
<i>United Wats, Inc. v. Cincinnati Ins. Co.</i> , 971 F. Supp. 1375 (D. Kan. 1997).....	29
<i>Video-Cinema Films, Inc. v. CNN, Inc.</i> , 2001 U.S. Dist. Lexis 25687 (S.D.N.Y. Nov. 28, 2001).....	15, 24
<i>Video-Cinema Films, Inc. v. CNN, Inc.</i> , 2003 U.S. Dist. LEXIS 4887 (S.D.N.Y. Mar. 31, 2003)	24, 25
<i>Vietnam Veterans of Am. v. CIA</i> , 2010 U.S. Dist. LEXIS 3787 (N.D. Cal. Jan. 19, 2010)	28

TABLE OF AUTHORITIES
(Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Wells v. Cal. Home Loan Solutions,
2007 U.S. Dist. Lexis 74291 (S.D. Cal. 2007)..... 18

Whittlestone, Inc. v. Handi-Craft Co.,
618 F.3d 970 (9th Cir. 2010)..... 16

York v. Ferris State Univ.,
36 F. Supp. 2d 976 (W.D. Mich. 1998) 19, 20

Zenith Ins. Co. v. Breslaw,
108 F.3d 205 (9th Cir. 1997)..... 18

STATUTES

17 U.S.C. § 106..... 8, 9

17 U.S.C. § 107 *passim*

17 U.S.C. § 505 *passim*

17 U.S.C. § 512..... 22

RULES

Fed. R. Civ. P. 11 22

Fed. R. Civ. P. 41 *passim*

Fed. R. Civ. P. 54..... 18

Fed. R. Civ. P. 65(d)(2)..... 16

OTHER AUTHORITIES

George C.C. Chen, *A Cyberspace Perspective on Governance, Standards and Control*, 16
J. Marshall J. Computer & Info. L. 77, 113 (1997) 17

Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*..... 14

H.R. Rep. No. 105-551(I), (1998)..... 9

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiff Righthaven, LLC is attempting to make a business out of suing Internet websites
4 for copyright infringement. It has filed 179 copyright actions in this Court—without ever first
5 asking that a work be removed from the target website—in each case alleging “willful
6 infringement” and attempting to extract settlements by threats of statutory damages (up to
7 \$150,000) and attorneys’ fees. For most defendants, it makes no economic sense to invest in
8 litigation. Regardless of the merits, it is better to pony up a settlement and get on with their work.

9 But in the present case, Righthaven shot at the wrong target. It filed a baseless action
10 naming a political discussion forum, Democratic Underground LLC, and, for added *in terrorem*
11 effect, its principal, David Allen (collectively “Defendants”). Defendants had taken no volitional
12 act to duplicate copyrighted material, as necessary to be held liable; rather Democratic
13 Underground merely hosted political commentary posted by others for discussion. Further,
14 Righthaven sued over a user’s posting that was plainly fair use—a non-commercial posting of an
15 excerpt comprising one-tenth of a news article, accompanied by a link to the article itself.

16 Defendants refused to be intimidated. They retained counsel and responded with a
17 counterclaim that joined Righthaven’s affiliate and funder, Stephens Media, LLC, and laid bare
18 the numerous defects not only in Righthaven’s claims, but in its business model itself. Not
19 surprisingly, Righthaven now wants out—so badly, in fact, that it has moved to voluntarily
20 dismiss its claim *with prejudice* in order to avoid a decision on the merits.

21 Defendants agree that this case should be over—indeed, it should never have started. But
22 it should not end until Righthaven is called to account for the cost of the defense it provoked.
23 This was a meritless lawsuit from the beginning, launched as part of a well-publicized business
24 model in which Righthaven acquires interests in copyrights for the sole purpose of suing
25 unsuspecting alleged infringers, and then seeks to leverage the cost of defending (and its own
26 purported right to attorneys’ fees and domain name seizures) to coerce settlements. To allow
27 Righthaven to avoid compensating those who have no choice but to defend would be unjust and
28 unsupportable. Defendants disagree that Righthaven has a right to “withdraw” its voluntary

1 dismissal if this Court does not immunize it from attorneys’ fees. But even assuming Righthaven
2 had that right, this provides no reason to immunize Righthaven from its responsibilities. The
3 Court should condition any dismissal on preservation of Defendants’ right to submit an
4 application for fees pursuant to Section 505 of the Copyright Act, which authorizes fees in
5 exactly this instance. Nor would preserving Defendants’ rights to seek attorneys’ fees somehow
6 “force” Righthaven to continue to litigate claims it does not want to pursue. *See* Righthaven’s
7 Motion for Voluntary Dismissal (“Motion”), Dkt. 36 at 3. Righthaven can unconditionally
8 dismiss today and end its claims. It just cannot walk away from the injury its wrongful filing has
9 caused.

10 In a twist as ironic as it is cynical, Righthaven purports to seek dismissal in the name of
11 “judicial economy and efficiency”—even as it tries to hold the termination of its claim hostage
12 unless the Court agrees to preclude a statutory claim for attorneys’ fees. As the price to clear a
13 spurious lawsuit from its docket, Righthaven demands that the Court compel Defendants to
14 forego their statutory rights to seek fees (and a precedential decision on the Counterclaim), and
15 allow Righthaven to sue undeserving victims without consequence. But Rule 41 does not
16 authorize a plaintiff to negotiate with the Court a settlement of its opponents’ rights. Rule 41
17 gives *the Court* the right to determine what conditions to apply to unilateral dismissals. This
18 Court’s docket should not be held captive by Righthaven’s tactics.

19 Defendants therefore propose an alternative method to terminate the matter: by summary
20 judgment. As described below, the undisputed facts establish that Defendants cannot be liable on
21 this Complaint under at least two grounds (among others not briefed here): (i) as the mere host of
22 a discussion forum to which a third party posted an excerpt of an article, and having taken down
23 the excerpt promptly when first informed of Plaintiff’s objections to it, Defendants committed no
24 “volitional act” of copying or distribution giving rise to copyright liability; and (ii) in all events,
25 fair use provides a complete defense to the infringement claimed. Since Righthaven has already
26 raised the merits of its claims in its Motion—arguing that its lawsuit was “non-frivolous” and
27 “objectively reasonable”—this Court will need to consider the merits in any case. When it does,
28 it will find that summary judgment is due to be granted, as Defendants now move.

1 Granting summary judgment will also address Righthaven’s purported desire to avoid
2 multiple appeals to the Ninth Circuit of rulings concerning “non-holistic copying.” After
3 summary judgment, if it wishes to test whether such a claim has merit, Righthaven can appeal. It
4 will then have no need to appeal in *Realty One*, the case in which the Hon. Larry R. Hicks found
5 fair use for another “non-holistic” copying. In fact, Righthaven has no need to appeal in *Realty*
6 *One* already: it settled (unsurprisingly) with the only defendant to appear. Its potential future
7 appeal would be against a non-appearing defendant, and only *if* Righthaven requests, and *if* Judge
8 Hicks then denies, the entry of a default judgment. Righthaven’s mantra—that it desires to
9 abandon the present case against well-represented Defendants because a potential appeal against a
10 defaulting party in *Realty One* would be more “efficient”—is, in a word, transparent.

11 Accordingly, this Court should (1) deny Righthaven’s Motion to Dismiss, absent
12 Righthaven’s stipulation that Defendants may submit their application for attorneys’ fees under
13 Section 505, and (2) absent such stipulation, enter summary judgment on the Complaint, and (3)
14 decline to dismiss the Counterclaim prior to resolution of the issues it raises.

15 **CONCISE STATEMENT OF FACTS NOT GENUINELY IN DISPUTE**

16 **A. Democratic Underground and David Allen**

17 Defendant and Counter-Claimant Democratic Underground, LLC maintains a website at
18 www.democraticunderground.com (the “DU Website”) devoted to disseminating and discussing
19 political news and progressive policies. Declaration of David Allen (“Allen Decl.”) ¶ 3.
20 Defendant David Allen is the principal of Democratic Underground LLC. *Id.* ¶ 4. The company
21 has two other employees. The DU Website consists primarily of user-generated content in the
22 form of posting by readers in one of various discussion forums (the “DU Forum”). *Id.* ¶ 5. The
23 DU Website currently has more than 165,000 registered users who have, since its founding in
24 2001, posted more than 52 million posts to discussion threads addressing items of political and
25 public interest. *Id.* The DU Website is supported by advertising revenue generated by display of
26 advertising on the site. *Id.* ¶ 6.

27 While Democratic Underground owns and manages the DU Website, it does not pre-
28 screen posts by contributors. *Id.* ¶ 7. Once a contributor writes a post, the post gets added

1 through an automated process into a database on the server that hosts the DU Website. *Id.* When
2 a reader seeks to access the web address of a particular post or DU Forum (such as by clicking a
3 link to that location in a browser), a request is automatically sent to the server. Its software will
4 then automatically retrieve the contents of that post from the database and send them to the reader
5 through the Internet. *Id.* ¶ 8. Neither Mr. Allen nor the other two employees reads every post
6 made by users at the DU Website; in fact, such a task would be impossible as there are an average
7 of 14,000 posts per day. *Id.* ¶ 9. Neither does Democratic Underground pay posters or offer any
8 financial incentive for adding content to the site. *Id.* ¶ 10.

9 Democratic Underground proactively works against copyright infringement by, among
10 other things, advising users to post only short excerpts and to provide a link to the original when
11 posting about a news article. *Id.* ¶ 11-12; Ex. A. For example, on the forum for “Latest Breaking
12 News,” contributors must identify the source and provide a link to the news article they post
13 about in the form they fill out to make the post. *Id.* ¶ 12. In addition, Democratic Underground
14 encourages readers to notify moderators if a post contains an entire article by clicking on an
15 “Alert” link that is included on every post. *Id.* ¶ 13. The moderator will then edit the post to
16 include only a short excerpt or delete the post. *Id.*

17 **B. The “Pampango” Post**

18 On May 13, 2010, a Democratic Underground user named “Pampango” posted a portion
19 of an article (the “Article”) from the *Las Vegas Review-Journal* (“*LVRJ*”) entitled “U.S. Senate
20 Race: Tea Party Power Fuels Angle” (the “Excerpt”). *See* Righthaven’s Complaint (“*Compl.*”) Dkt. 1, Ex. 3. Pampango is neither an agent nor employee of Democratic Underground. Allen
21 Decl. ¶ 15. The Excerpt in Pampango’s post reported on the ranking and movement in political
22 polls of candidates in the Republican Senate primary in Nevada. *Compl.*, Ex. 3. On its face, the
23 Excerpt contains content that is primarily informational, factual, or news and that is of concern to
24 persons nationwide interested in the future of the Tea Party or Senate Majority Leader Reid’s
25 prospects. *Id.* The entire Article as found at the *LVRJ* is 50 sentences long; the post by
26 Pampango contained just *five* of those sentences and a link back to the full article at the *LVRJ*’s
27 website. *Id.* Exs. 2, 3. Within 40 minutes, three Democratic Underground users left comments
28

1 on the post, each of which dealt with the subject matter of the article. *Id.* Ex. 3.

2 In the 92 days it was posted, Pampango’s post garnered 565 views, less than 6.5 per day,
3 and less than one-thousandth of one-percent (0.001%) of the traffic to the DU Website. Allen
4 Decl. ¶ 16. In contrast, on a typical day, the DU Website as a whole serves roughly 700,000 page
5 views to 90,000 unique visitors. *Id.* ¶ 17. During its display, Pampango’s post appeared on pages
6 that, like the rest of the DU Website, contained advertising. However, none of that advertising
7 was sold for display with or targeted by Democratic Underground to go with Pampango’s post; it
8 was simply the same advertising displayed generally throughout the DU Website. *Id.* ¶ 18. Given
9 the average advertising revenue that the DU Website makes from views of its site, Pampango’s
10 post would not have been connected to any more than \$2 in revenue. *Id.* ¶ 19.

11 Mr. Allen had not read the post in question before he learned of this lawsuit. *Id.* ¶ 21.
12 Neither Righthaven nor the *LVRJ* ever notified Defendants that they objected to the display of the
13 Excerpt or considered it infringing. *Id.* ¶ 22. Mr. Allen learned of the claim of infringement in a
14 call from the *Las Vegas Sun* the day after this suit was filed, August 11, 2010. *Id.* ¶ 23. As a
15 precautionary matter, the Excerpt was taken down on August 13, 2010. *Id.* By the time
16 Defendants were first contacted by Righthaven—through service of the lawsuit—the allegedly
17 infringing material was already unavailable on the DU Website. *Id.* ¶ 24.

18 C. The Article’s Origins and Righthaven’s Claim to Ownership.

19 The copyright records reflect that Stephens Media (through its control of the *LVRJ*) was
20 the “author” of the Article as a work made for hire. Compl., Ex. 4. However, neither Stephens
21 Media nor the *LVRJ* first registered the copyright; Righthaven did that on July 9, 2010, claiming
22 rights through assignment by “written agreement.” Compl. ¶ 30, Ex. 4. Contrary to Righthaven’s
23 representation in obtaining this copyright registration, no such assignment had occurred by that
24 date. Stephens Media’s declaration attaches an assignment dated July 19, 2010, ten days after the
25 registration date. Dkt. 38, Ex. 1. Moreover, the entire Article remains publicly available on the
26 *LVRJ* website at no cost, with copyright notice credited to the *LVRJ*, not Righthaven. Declaration
27 of Kurt Opsahl (“Opsahl Decl.”) ¶ 3. The purported assignment reflects that Stephens Media
28 continues to own a “right of reversion” in the Article and is receiving unspecified “monetary

1 commitments” from Righthaven. Dkt. 38, Ex. 1.

2 As with other articles on its website, the *LVRJ* encouraged—and still encourages—users
3 to save and share the Article of which Pampango posted the Excerpt. Opsahl Decl. ¶ 4; Ex. A. In
4 fact, the *LVRJ* encourages users to share articles on at least 18 different third-party Internet
5 resources or to email, save, or print the article at no cost. *Id.*

6 **D. Righthaven, Stephens Media, and Their Business of Copyright Litigation**

7 Despite Stephens Media’s encouragement of its readers to share its work, it has created
8 Righthaven as a business with no purpose other than to sue those who do so. As explained further
9 in Opposition to Stephens Media’s Motion to Dismiss, Stephens Media created and funded
10 Righthaven as an instrument to bring lawsuits.¹ Righthaven has filed at least 179 suits similar to
11 this action in this District since March 2010. *Id.* ¶ 17; Ex. L. Righthaven employs a
12 “proprietary” technology to search the Internet to find news stories and excerpts from the *LVRJ*
13 posted on third-party websites. *Id.* ¶ 5; Ex. C. Once Righthaven finds an excerpt, it registers the
14 copyright, obtains a purported partial assignment from Stephens Media, and then sues its
15 victim—who usually resides outside the state—without providing prior notice or opportunity to
16 take down the work.²

17 When Righthaven files these suits, it consistently alleges “willful infringement,” thereby
18 raising potential statutory damages to \$150,000 regardless of any actual harm, demands to
19 recover its attorneys’ fees, and seeks domain name seizure. Opsahl Decl. ¶ 18. It further
20 advances its efforts to coerce quick and cheap settlements by, among other tactics, proposing
21 discovery terms with absurdly burdensome and oppressive document preservation and production
22 regimes. *Id.* ¶ 20. Many of its targets settle these cases quickly, finding it uneconomic to fund
23 any litigation, much less in a foreign forum. In at least nine cases, the defendants had posted less
24

25 ¹ According to Sherman Frederick, who was then its President and CEO, Stephens Media “grubstaked and contracted
26 with a company called Righthaven. It’s a local technology company whose only job is to protect copyrighted
27 content.” Opsahl Decl. Ex. B. Righthaven is a limited liability company owned by two more limited liability
28 companies, each with a 50 percent stakes. *Id.* Ex. D. One of those companies is composed of members of Arkansas
investment banking billionaire Warren Stephens’ family. *Id.* The Stephens’ family investments include Stephens
Media. *Id.* The other 50 percent stake in Righthaven is owned by an LLC managed by attorney Steve Gibson,
counsel for Righthaven in this case. *Id.* Ex. F; see also Complaint (with Steve Gibson as lead counsel).

² Defendants request that the Court take judicial notice of the complaints and dismissals in the other Righthaven
actions filed in this Court. Collected data about those actions is found in Ex. L to the Opsahl Decl.

1 than 50 percent of the *LVRJ* articles in question. *Id.* ¶ 19.

2 **E. Righthaven Sues Democratic Underground and David Allen**

3 Once Mr. Allen learned of this lawsuit, he had no choice but to hire attorneys to defend
4 himself and Democratic Underground. Allen Decl. ¶ 26. Unwilling to be bullied into a
5 settlement of a baseless claim, he spent \$3,600 on an attorney before finding pro bono counsel at
6 the Electronic Frontier Foundation and its cooperating law firms. *Id.* ¶ 27. These attorneys spent
7 substantial time investigating and preparing the detailed Answer and Counterclaims in this matter,
8 negotiating in an attempt to reach an early settlement, and engaging in other case management
9 efforts. Counterclaim (“C.Claim”), Dkt. 13.

10 The Counterclaim named Stephens Media, as well as Righthaven, as Counter-Defendants,
11 based on the former’s creation of, control of, financial interest in, and collusion with the latter to
12 pursue meritless claims of infringement. The 196 paragraph Counterclaim spelled out in detail
13 the facts supporting its requests for declaratory relief, including at least the following dispositive
14 issues: 1) that Defendants did not infringe Righthaven’s copyright based on a lack of a volitional
15 act; 2) that Defendants did not infringe Righthaven’s copyright because it made a fair use of the
16 Excerpt; 3) that Righthaven does not rightfully own the copyright in question, in that the
17 assignment was a sham designed solely to pursue litigation with rights being retained by Stephens
18 Media; 4) that Righthaven and/or Stephens Media have, by their invitation to copy and share the
19 Article, granted Defendants a license to post the Excerpt; 5) that Righthaven failed to mitigate its
20 damages, in that it gave no notice or opportunity to remove the allegedly infringing work; 6) that
21 any harm was not actionable as *de minimis*; and (7) that Righthaven and Stephens Media are
22 engaged in barrety, champetry and maintenance by spawning transactions designed for no
23 purpose other than to pursue litigation. *See generally* C.Claim.

24 **ARGUMENT**

25 **I. THE UNDISPUTED FACTS DEMONSTRATE THAT PLAINTIFF’S CLAIMS**
26 **WERE MERITLESS FROM THEIR INCEPTION**

27 **A. Defendants Have Committed No Volitional Act of Infringement**

28 Righthaven’s Complaint makes only a single claim for direct copyright liability, yet its

1 claim is predicated upon the Excerpt posted by Pampango, not by Defendants. Compl. ¶¶ 33-36;
2 Ex. 3. Righthaven fails to allege the elements of any theory of indirect liability, such as
3 contributory or vicarious liability, so this Court need not consider them. *Id.* Under the Copyright
4 Act, direct liability only attaches, if at all, to the party who controls the decision to copy—in the
5 case of an online forum, the user who uploaded the material.³ An online forum host like
6 Democratic Underground, whose role is limited to providing the means by which copies are
7 made, is not liable for direct infringement as a matter of law.

8 This Court addressed the volitional act requirement in *Field v. Google, Inc.*, 412 F. Supp.
9 2d 1106 (D. Nev. 2006), in which the plaintiff alleged that Google directly infringed when it
10 showed users copies of material that were “cached” on its computers—*i.e.*, stored automatically
11 for ease of delivery to those searching for those materials. *See id.* at 1115. The Hon. Robert Jones
12 disagreed, holding that a “plaintiff must also show volitional conduct on the part of the defendant
13 in order to support a finding of direct copyright infringement.” *Id.*; accord *Parker v. Google, Inc.*,
14 422 F. Supp. 2d 492 (E.D. Pa. 2006). This Court’s decision relied upon *Religious Tech. Ctr. v.*
15 *Netcom On-line Commc’n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995), one of the first and most
16 important cases addressing online service provider copyright liability.

17 In *Netcom*, an Internet service provider was accused of direct copyright infringement
18 based on a customer’s posting of material to the service provider’s servers. *See id.* at 1367-68.
19 The court rejected the direct infringement claim, holding that it requires “some element of
20 volition or causation which is lacking where a defendant’s system is merely used to create a copy
21 by a third party.” *Id.* at 1370. Volitional control over the copying is necessary because any other
22 “theory would create many separate acts of infringement and carried to its natural extreme, would
23 lead to unreasonable liability” through the mere operation of the Internet. *Id.* at 1369.

24 While the volitional act requirement is tremendously important to the Internet, it is not a
25 new rule. The Copyright Act has always required volition—as embodied within its protection of
26 the exclusive right “to do” one of the actions reserved for copyright owners in 17 U.S.C. § 106.
27

28 ³ As explained in Part II.B. below, no liability attaches to Pampango because he engaged in a fair use of the Article.

1 *Netcom* simply interpreted § 106 for the digital age and has been widely followed.⁴ The Fourth
2 Circuit’s holding in *CoStar* is particularly instructive. *CoStar* was a real estate listing service that
3 took photos of commercial real estate offered by its customers. LoopNet provided an online
4 hosting service for real estate listings. Some of *CoStar*’s customers also wanted listings on
5 LoopNet, and uploaded *CoStar*’s copyrighted photographs for display on the LoopNet website.
6 *See CoStar*, 373 F.3d at 546-47. *CoStar* sued for direct infringement. Following *Netcom*, the
7 Fourth Circuit held that “[b]ecause LoopNet, as an Internet service provider, is simply the owner
8 and manager of a system used by others who are violating *CoStar*’s copyrights and is not an actual
9 duplicator itself, it is not directly liable for copyright infringement.” *Id.* at 546.

10 Accordingly, the fact that Defendants operate the DU Website, upon which a third party
11 posted allegedly infringing material, does not state a claim for direct copyright infringement.
12 Although Righthaven’s burden of proof for its copyright claim includes the essential element of
13 volition, the undisputed facts shows that neither Democratic Underground nor David Allen
14 engaged in any volitional act to display the Excerpt. Allen Decl. ¶¶ 5-9; 21. As soon as
15 Defendants learned of Plaintiff’s claim, far from volitionally infringing, they removed the
16 Excerpt. *Id.* ¶¶ 23-24.

17 Nor is it sufficient for Righthaven to allege generalized knowledge that websites
18 sometimes contain infringing material (Compl. ¶ 19) or “willful blindness.” *Id.* ¶ 23. As *CoStar*
19 cogently explains, even constructive knowledge that some DU Website users may be using the
20 forum to engage in copyright infringement would be insufficient to state a direct liability claim.
21 *CoStar*, 373 F.3d at 549; *see also Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 1372 (N.D. Cal.
22 1996) (no direct liability even where defendant operating website knew infringing games were
23 uploaded and solicited others to upload games). Indeed, in *CoStar* the user-uploaded photos were
24 reviewed by LoopNet employees before posting, and *CoStar* had informed LoopNet of its claims
25

26 ⁴ *See CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004) (concluding “that *Netcom* made a
27 particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct —
28 specifically, the act constituting infringement — to become a direct infringer.”); *Cartoon Network LP v. CSC
Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (agreeing with *CoStar* that *Netcom* was “particularly rational”);
Marobie-Fl., Inc. v. Nat’l. Ass’n of Fire Equip. Distribs., 983 F. Supp. 1167, 1176-79 (N.D. Ill. 1997) (following
Netcom); H.R. Rep. No. 105-551(I), at 11 (1998) (Congress describes *Netcom* as the “leading and most thoughtful
judicial decision to date” in the subject of Internet liability).

1 for copyright infringement long before filing suit, yet, this was still insufficient. Democratic
2 Underground, by contrast, does not pre-review posts, and neither Righthaven nor Stephens Media
3 notified the forum prior to the lawsuit. Allen Decl. ¶ 9.

4 The Court should grant summary judgment on the Complaint because the undisputed facts
5 show that Defendants engaged in no volitional act respecting the alleged infringement.

6 **B. Posting the Excerpt to the DU Forum Was Fair Use**

7 Independently, the undisputed facts establish that posting the Excerpt to the DU Website
8 constitutes fair use, and accordingly is “not an infringement of copyright.” 17 U.S.C. § 107.
9 Righthaven’s conclusion that “reasonable minds may disagree” on this point (Motion at 2) is not
10 only left unexplained in its Motion, but is undermined by *Righthaven’s own acknowledgment* in
11 other actions that uses as minimal as those here are *not* infringing. Similarly, Righthaven’s
12 attempt to characterize Judge Hicks’ *Realty One* decision as a shift in the law that has motivated
13 its attempted dismissal tries to make a silk purse out of a sow’s ear. It was clear from the start that
14 the use was fair, and Righthaven had no legitimate basis to claim otherwise.

15 The fair use doctrine “creates a limited privilege in those other than the owner of a
16 copyright to use the copyrighted material in a reasonable manner without the owner’s consent.”
17 *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986). It permits and requires courts “to avoid rigid
18 application of the copyright statute when, on occasion, it would stifle the very creativity which
19 that law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)
20 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). 17 U.S.C. § 107 lays out four non-
21 exclusive factors that a court must consider in assessing whether a use is fair. *See, e.g., Perfect*
22 *10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007). Based on the undisputed
23 facts, each of these factors strongly supports a finding of fair use, and accordingly summary
24 judgment is warranted.

25 **1. Posting the Excerpt to the DU Website Was Highly Transformative**
26 **and Minimally Commercial**

27 In assessing the first factor, the “purpose the character of a use,” courts evaluate the extent
28 to which the use is “transformative” of the original work, (*Campbell*, 510 U.S. at 579), that is,

1 whether the use “does not ‘merely supersede the objects of the original creation’ but rather ‘adds
2 something new, with a further purpose or different character.’” *Perfect 10*, 508 F. 3d at 1164
3 (quoting *Campbell*, 510 U.S. at 579). As the Ninth Circuit recognized in *Perfect 10*, where the
4 use is made to “serve a different purpose,” that use can be “highly transformative.” *Id.* at 1165,
5 1168 (exact replicas of images, reduced in size to thumbnails, found transformative); *see also*
6 *Nuñez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (modeling photo taken for
7 portfolio purpose was transformed into news when published in newspaper). Criticism and
8 comment are recognized as canonical examples of a transformative use (*Campbell*, 510 U.S. at
9 579); indeed, Section 107 expressly calls out protections for uses “such as criticism, comment
10 [and] news reporting” 17 U.S.C. § 107.

11 The use made of the Excerpt on the DU Website is a classic example of a transformative
12 use. In posting an excerpt on a political discussion forum, Pampango invited the type of critical
13 analysis and commentary on an issue of important political news that is the core subject of fair
14 use protection. *Campbell*, 510 U.S. at 579 (transformative uses “lie at the heart of the fair use
15 doctrine’s guarantee of breathing space within the confines of copyright”). *Id.* Other users of the
16 forum responded to this post by posting their own comments, consistent with the purpose of the
17 DU Website of fostering criticism and debate. Compl., Ex. 3; Allen Decl. ¶ 3. In a world where
18 the public forum increasingly exists online, the ability to include excerpts of news to prompt
19 discussion is of singular importance.⁵

20 The first factor may also consider “whether the original was copied in good faith to
21 benefit the public or primarily for the commercial interests of the infringer.” *Am. Geophysical*
22 *Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). However, as a highly transformative use,
23 any potential commercial character fades in significance. *Campbell*, 510 U.S. at 579; *Perfect 10*,
24 508 F. 3d at 1164. In all events, Defendants here made no effort to commercially exploit the
25 Excerpt; while a trivial amount of revenue could have been generated from Pampango’s post, it
26
27

28 ⁵ The importance of public commentary also demonstrates the “public interest” in the use at issue—another factor the Court should consider in determining fair use. *See, e.g., Perfect 10*, 508 F.3d at 1166.

1 stemmed from the simple fact that all forums on the website contain advertising.⁶ Moreover, if
2 Righthaven were to attempt a claim of secondary liability, it would be *Pampango*'s use that
3 would be relevant, and that was wholly non-commercial.⁷ Democratic Underground provides
4 posters, like Pampango, no financial benefit or payment for their posting of material to the forum.
5 Allen Decl. ¶ 10. As a highly transformative, minimally commercial use, the first factor strongly
6 supports a finding of fair use.

7 **2. The Highly Factual, Politically Important, and Previously Published**
8 **Nature of the Article Supports Fair Use**

9 In assessing the “nature of the work” used, “[t]he law generally recognizes a greater need
10 to disseminate factual works than works of fiction or fantasy.” *Harper & Row, Publr. v. Nation*
11 *Enters.*, 471 U.S. 539, 563 (1985) (also noting greater fair use rights for works of a published
12 nature). Accordingly, where the work copied is largely composed of factual material, a finding of
13 fair use is more likely. *See, e.g., L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir.
14 2002) (republication of a video depicting a news report was a fair use because it was
15 informational rather than creative). It was these firmly established principles that led Judge Hicks
16 to conclude that a similar excerpt of a largely factual news report in the *LVRJ* in the *Realty One*
17 case constituted fair use. *See Realty One*, 2010 U.S. Dist. LEXIS 111576, at *5.

18 Here, too, the Excerpt posted was highly factual: an account of poll results in the 2010
19 Nevada Senate Republican Primary. Compl. Ex. 3. Much as in *Realty One*, the five sentences
20 actually copied from the article represent little more than pure factual reporting. Compl. Ex. 3.
21 Moreover, in the present case, the nature of the Excerpt also involved core issues of political
22 discourse which deserve the greatest fair use protection. The scope of the fair use doctrine is

24 ⁶ At most the DU Website generated approximately \$2 connected to the post. Allen Decl. ¶ 20. This in no way
25 undermines the first factor's strong support of fair use. *See, e.g., Campbell*, 510 U.S. at 584 (“If . . . commerciality
26 carries a presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative
27 uses listed” in 17 U.S.C. § 107). *Realty One* likewise followed this rule in holding that a real estate sales blog with a
28 mixed commercial and educational character was entitled to a finding of fair use as a matter of law. *See Righthaven*
LLC v. Realty One Group, Inc., 2010 U.S. Dist. LEXIS 111576, at *4-5 (D. Nev. Oct. 19, 2010).

⁷ If secondary liability were asserted, the proper focus for analysis of fair use is the use made by the person who
could be a potential direct infringer, here the poster Pampango. *Sony Corp. of Am. v. Universal City Studios, Inc.*,
464 U.S. 417 (1984) (analyzing whether end user's time shift was a fair use to determine secondary liability). This
does not mean however that courts do not also recognize the possibility of an independent fair use defense for
potential indirect infringers. *See Netcom*, 907 F. Supp. at 1378 (fair use analysis based on Netcom's actions); *Sega*
Enters., 948 F. Supp. at 934 (citing *Netcom* for proposition that service provider has independent fair use rights).

1 wider where, as here, the use relates to issues of public concern. *Consumers Union of U.S., Inc.*
2 *v. Gen. Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). This
3 factor also weighs strongly in favor of fair use.

4 **3. The Small Amount of the Work Taken Supports a Finding of Fair Use**

5 The third factor asks “whether the amount and substantiality of the portion used in relation
6 to the copyrighted work as a whole . . . are reasonable in relation to the purpose of the copying.”
7 *Campbell*, 510 U.S. at 586. Courts recognize that some amount of copying is necessary in order
8 to identify “the subject matter of a writing . . . before any useful comment may be made about
9 it.” *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993).

10 Here, the amount of the work copied was minimal: 5 sentences of a 50 sentence article, or
11 10%. *Compare* Complaint, Ex. 3 to Ex. 2. Moreover, rather than copying the whole article, the
12 post provided a link to the full article at the *LVRJ* site. Compl. Ex. 3. This amount of copying
13 was indisputably reasonable for the purpose of engendering discussion. Copying a small portion
14 of the story was important to allow others to understand and comment with adequate context.
15 Without this factual background, commentary would be essentially meaningless. *See Twin Peaks*
16 *Prods., Inc.*, 996 F.2d at 1375. Indeed, the alternative of publishing *nothing* would prevent
17 entirely the productive, transformative use being made.

18 Numerous cases have upheld findings of fair use based on copying of similarly small
19 excerpts. *See, e.g., New Era Publ’ns Int’l ApS v. Carol Publ’g Group*, 904 F.2d 152, 158-159 (2d
20 Cir. 1990) (excerpts of between 5%-8% of works found fair use, especially where portions taken
21 were merely the initial sections of the work that “set the tone for the sections they precede.”);
22 *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (copying approximately 6% of
23 work and paraphrasing substantially more was found to be fair use for purposes of criticism
24 noting further that “criticism of a book will require the critic to quote and paraphrase from the
25 work.”); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986) (excerpts of 4.3%
26 of book considered fair use); *see also Sony Corp.*, 464 U.S. at 449-50 (copying even 100% of a
27 work can still constitute fair use). In *Realty One*, Judge Hicks concluded that for a blog, copying
28 only the first eight sentences of a thirty sentence *LVRJ* article, or 26%, was sufficiently small to

1 warrant dismissal on fair use grounds. *See Realty One*, 2010 U.S. Dist. LEXIS 111576, at *5.
2 This is a far greater percentage than the 10% of the Article that was posted by Pampango. Even
3 Righthaven itself has acknowledged that use of excerpts *greater* in proportion than here would be
4 fair use.⁸ This factor overwhelmingly supports fair use here.

5 **4. The Lack of Potential or Actual Market Harm Supports Fair Use**

6 The fourth factor is the potential effect of the use on the market for the work. 17 U.S.C.
7 § 107(4). The focus of this factor is the extent to which the use at issue could stand as a realistic
8 market substitute for the original work (*see Perfect 10*, 508 F.3d at 1168), and whether it can
9 supplant the demand for the original. *See Campbell*, 510 U.S. at 598.

10 As a highly transformative use, Pampango’s posting of the Excerpt cannot be presumed to
11 have any market harm. *Campbell*, 510 U.S. at 591 (“No ‘presumption’ or inference of market
12 harm . . . is applicable to a case involving something beyond mere duplication for commercial
13 purposes.”);⁹ *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003)
14 (“The more transformative the new work, the less likely the new work’s use of copyrighted
15 materials will affect the market for the materials.”).

16 Nor is any market harm remotely likely. The practice of posting small *portions* of articles
17 to blogs for comment—even assuming it to be widespread—poses no genuine threat of market
18 harm to the original articles. Like the use of thumbnails in *Perfect 10*, the use of a five sentence
19 excerpt from the Article does not supplant the original. *See Perfect 10*, 508 F.3d at 1168.

20 Instead, by providing the short Excerpt along with a link to the original Article on the *LVRJ*
21 website, the posting *encourages* users to view the original, augmenting the market rather than
22 supplanting it.¹⁰ *See* Complaint, Ex. 3. This much is all but acknowledged by Stephens Media’s
23 own policy for the *LVRJ* website, which encourages users to share articles on at least 18 different
24

25 ⁸ In opposition to the motion to dismiss in *Realty One*, Righthaven asserted that had the copying been limited to the
26 first two paragraphs of the article it would likely have constituted a fair use. *See Righthaven LLC v. Realty One*
27 *Group, Inc.*, Case. No. 2:10-cv-01036-LRH-PAL, Dkt. 12 at 10-11. In that case, the first two paragraphs contained
28 three sentences of the 28 sentence article, more than the 10% copied here. *See id.* Dkt. 1, Exs. 2, 3.

⁹ Moreover, even assuming a focus on DU as opposed to the poster, the small amount of revenue attributable to the
use warrants no presumption of any market harm.

¹⁰ *See, e.g.*, Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 Yale J. L. & Tech.
188 (Spring 2006) (discussing search engine’s use of “popularity metrics” in their algorithms which increase the
ranking of websites based on the number and popularity of other websites linking to them)

1 third-party Internet resources and to email, save, or print the article. Opsahl Decl. ¶ 4. That
2 practice undermines any suggestion that publicizing and disseminating links to the original
3 Article over the Internet along with teaser excerpts somehow diminishes the Article’s value.

4 Moreover, in this specific case, the Excerpt could not substitute for the original because it
5 does not contain the heart of the work, including the actual poll numbers at issue. Not
6 surprisingly, Judge Hicks ruled, on the pleadings, that an excerpt of a significantly larger portion
7 of a *LVRJ* article on a similar blog could not “satisfy a reader’s desire to view and read the article
8 in its entirety” and, when published with a link to the original article, constituted fair use. *See*
9 *Realty One*, 2010 U.S. Dist. LEXIS 111576, at *6.

10 Finally, although the *LVRJ* has a paid archive, the Article has always been, and still is
11 today, available for free on the *LVRJ website*. Opsahl Decl. ¶ 3. Thus, the posting of the Excerpt
12 did not deprive Stephens Media of any fees for use, since it was charging none. Likewise,
13 Righthaven has no market for the Article, because it is not a news publisher, but a “technology
14 company whose *only job* is to protect copyrighted content.” *Id.* Ex. B. Nor do Righthaven’s
15 litigation settlements in other cases evidence a market. *See Video-Cinema Films, Inc. v. CNN,*
16 *Inc.*, 2001 U.S. Dist. Lexis 25687, at *9 (S.D.N.Y. Nov. 28, 2001) (finding no market harm when
17 only payments were settlements to avoid litigation).

18 Accordingly, this, like all of the other factors, weighs in favor of a finding of fair use.
19 Given that every factor points to a finding of fair use, as does the public interest, the Court should
20 grant summary judgment of non-infringement to the Defendants. *See Mattel, Inc. v. Walking Mt.*
21 *Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (fair use is a mixed question of fact and law and where
22 the material facts are not in dispute summary judgment is appropriate).

23 **5. The *Realty One* Decision Was Not a Change in the Law that Could**
24 **Excuse Righthaven’s Pursuit of this Baseless Lawsuit**

25 The pretext for Righthaven’s Motion—that the decision in *Realty One* represents some
26 kind of change in the legal landscape that suddenly warrants a voluntary dismissal—is just silly.
27 As the above analysis makes clear, the fact that Judge Hicks *followed* longstanding and bedrock
28 principles hardly excuses Righthaven for filing claims that, from their inception, *ignored* the same

1 principles. Indeed, Righthaven has not cited a single case in any court in which users of a blog or
2 forum excerpting only 10% of a factual, news article was found unfair.

3 **C. Plaintiff’s Demand for Domain Name Transfer Represents Another Baseless,
4 *In Terrorem* Tactic**

5 The Court should also reject Righthaven’s *in terrorem* request for an order transferring the
6 domain name of the DU Website. Righthaven has included such a demand for transfer as a
7 matter of course in its 179 lawsuits, apparently intending to scare operators of websites who fear
8 losing one of their most critical assets.¹¹ But such relief is unavailable as a matter of law. *See*
9 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). “The remedies for
10 infringement ‘are *only* those prescribed by Congress,’” *Sony Corp.*, 464 U.S. at 431 (quoting
11 *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)), and they do not include transfer of domain
12 names. Indeed, Righthaven has now admitted, in its lawsuit against another EFF-represented
13 entity, that “such relief is not authorized under the Copyright Act.” *Righthaven LLC v. DiBiase*,
14 Case No. 2:10-cv-01434-RLH-PAL, Dkt 29 at 5:26-27.

15 Righthaven asserted in the *DiBiase* matter that the Court may nonetheless order seizure of
16 a domain name as part of its general equitable powers. *Id.* 6-7. That proposition is frivolous.
17 Could any Court genuinely entertain the proposition that, in the name of “equity,” DU Website’s
18 location should be shutdown and transferred to Righthaven because 10% of one *LVRJ* article was
19 published in one post out of 52 million on the site?¹² Of course, not. Again, Righthaven’s domain
20 name claims represent nothing beyond a transparent effort to intimidate.

21 Finally, a domain-name seizure would violate Democratic Underground’s First
22 Amendment rights. A domain name itself represents protected speech. *See Taubman Co. v.*
23 *Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (“The rooftops of our past have evolved into the
24 internet domain names of our present . . . the domain name is a type of public expression, no
25

26 ¹¹ As Righthaven CEO Steve Gibson explained, Righthaven sees the domain name threat as “something available to
27 deter infringements.” Opsahl Decl. Ex. K.
28 ¹² Moreover, the Court’s equitable power to issue injunctions is constrained by the Federal Rules of Civil Procedure,
which preclude orders binding individuals or entities not identified by Rule 65(d)(2). *See, e.g., Med. Mut. Ins. Co. of*
Maine v. Indian Harbor Ins. Co., 583 F.3d 57, 64 (1st Cir. 2009). Accordingly, the Court could not issue the
injunction Righthaven seeks against the non-party registrar of the domain name.

1 different in scope than a billboard or a pulpit . . .”). If Righthaven wants to restrain that speech,
2 it must allege facts demonstrating that the domain name *itself* falls outside of the First
3 Amendment’s protections. *See, e.g., Jefferson Cty. Sch. Dist. v. Moody’s Investor’s Servs.*, 175
4 F.3d 848, 860-61 (10th Cir. 1999) (affirming dismissal of complaint that attacked protected
5 speech and failed to plead any facts that would overcome First Amendment protection). It has not
6 and cannot. Further, a domain-name transfer would allow Righthaven to control the entirety of
7 DU’s Website, not just the miniscule amount of content about which Righthaven complains.¹³
8 Vesting a copyright plaintiff with that kind of power over First Amendment-protected speech
9 would be massively overbroad and patently unconstitutional. *See, e.g., Tory v. Cochran*, 544 U.S.
10 734, 738 (2005) (“An ‘order’ issued in ‘the area of First Amendment rights’ must be ‘precis[e]’
11 and narrowly ‘tailored’ to achieve the ‘pin-pointed objective’ of the ‘needs of the case’”) (quoting
12 *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

13 For the above reasons, both Righthaven’s claim for domain name seizure, as well as the
14 other claims in the Complaint, are subject to summary judgment based on the undisputed facts.

15 **II. THE COURT SHOULD NOT GRANT THE MOTION FOR VOLUNTARY**
16 **DISMISSAL ABSENT A CONDITION THAT DEFENDANTS MAY APPLY FOR**
17 **THEIR ATTORNEYS’ FEES**

18 While Plaintiff’s lawsuit is ripe for summary judgment, the Court would not need to reach
19 that decision *if* Righthaven had agreed to cover Defendants’ reasonable attorneys’ fees as part of a
20 voluntary dismissal with prejudice. Righthaven has refused that course. Righthaven’s effort to
21 dismiss while preventing Defendants from even seeking an award of attorneys’ fees is wholly
22 without merit.

23 **A. Where Attorneys’ Fees are Afforded to a Prevailing Party By an Independent**
24 **Statute, Conditioning a Dismissal with Prejudice on Denial of Those Fees**
25 **Would be Contrary to Law**

26 Righthaven admits that Defendants will be the prevailing parties if it dismisses with
27 prejudice—indeed, it argues that such dismissal “effects a full and final judgment on the merits in
28

¹³ Essentially, a domain name is like “a street sign in the real world, indicating the location of the Internet merchant and the nature of his business.” George C.C. Chen, *A Cyberspace Perspective on Governance, Standards and Control*, 16 J. Marshall J. Computer & Info. L. 77, 113 (1997); *see also Shell Trademark Mgmt. BV v. Canadian AMOCO*, 2002 U.S. Dist. LEXIS 9597, at **10-11 (N.D. Cal. May 21, 2002) (analogizing domain names to road signs). With a transfer of a domain, the street sign would point to a new location.

1 the Defendants’ favor, just as if the defendants were to prevail at trial.” Motion at 3; *see also*
2 *Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997) (defendant is prevailing party upon
3 voluntary dismissal with prejudice). In such circumstances, the availability of a cost award to the
4 prevailing party may not be negated. *Mother & Father v. Cassidy*, 338 F.3d 704 (7th Cir. 2003)
5 (reversing denial of Rule 54 costs after voluntary dismissal with prejudice); *see also Riviera*
6 *Distribs., Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008); *Wells v. Cal. Home Loan Solutions*,
7 2007 U.S. Dist. Lexis 74291, at *4 (S.D. Cal. 2007) (citing *Zenith Ins.*). “Nothing in the language
8 of Rule 41 suggests that the prevailing defendant [who is voluntarily dismissed with prejudice]
9 should not enjoy the normal benefits of a final judgment in its favor.” *Mother & Father*, 338 F.3d
10 at 710.

11 The same logic applies to an award of attorneys’ fees here, where Section 505 of the
12 Copyright Act prescribes an award of “reasonable attorney’s fee to the prevailing party *as part of*
13 *the costs.*” 17 U.S.C. § 505 (emphasis added). Judge Easterbrook explained this rule in reversing
14 a denial of attorneys’ fees in a copyright suit after plaintiff’s dismissal with prejudice:

15 [Defendant] obtained a favorable judgment. That this came about when [plaintiff]
16 threw in the towel does not make [defendant] less the victor than it would have
17 been had the judge granted summary judgment or a jury returned a verdict in its
18 favor. [Plaintiff] sued; [Defendant] won; no more is required. . . . Because
[Defendant] is the prevailing party for regular costs, it must be the prevailing party
for the purpose of § 505, which allows an award of attorneys' fees as part of costs.

19 *Riviera*, 517 F.3d at 928.

20 *Riviera* teaches that, although Rule 41(a)(2) by *its* terms vests discretion in the Court to
21 determine conditions for a voluntary dismissal, it by no means allows the Court to negate a
22 statutory authorization of fees to a prevailing party. Other courts hue to the same rule, awarding
23 attorneys’ fees following a voluntary dismissal with prejudice where an independent statutory
24 authority allows them. *See Quadrozzi v. The City of N.Y.*, 127 F.R.D. 63, 78 n.25 (S.D.N.Y.
25 1989) (awarding attorneys’ fees based on independent statutory authority); *Degussa Admixtures,*
26 *Inc. v. Burnett*, 471 F. Supp. 2d 848 (W.D. Mich. 2007), *aff’d*, 277 Fed. Appx. 530, 2008 U.S.
27 App. Lexis 10017, at *6 (6th Cir. May 5, 2008) (granting plaintiff’s motion for voluntary
28 dismissal with prejudice and awarding attorneys’ fees to defendants under Uniform Trade Secrets

1 Act); *Colombrito v. Kelly*, 764 F.2d 122, 134 (2d Cir. 1985) (independent statutory authority
2 affords attorneys' fees to defendant where plaintiff voluntarily dismisses with prejudice);
3 *Lawrence v. Fuld*, 32 F.R.D. 329, 331-32 (D. Md. 1963) (same). These cases reflect that it would
4 be legal error to make it a condition of dismissal that Defendants *cannot* petition for the fees to
5 which they are statutorily entitled to seek as prevailing parties. *See Mother & Father*, 338 F.3d at
6 710; *Riviera*, 517 F.3d at 928.

7 While the Ninth Circuit recognizes a plaintiff's ability to reject conditions imposed under
8 Rule 41 if the court's conditions are too "onerous," an award of costs provided by an *independent*
9 *statute* is not an "onerous" condition or one for which a party has the right to withdraw dismissal.
10 *See, e.g., Degussa Admixtures*, 277 Fed. Appx. at 535 (6th Cir. 2008)(affirming dismissal with
11 prejudice and award of attorneys' fees to defendants where award was based on independent
12 statutory authority, not simply as a condition under FRCP 41(a)(2)). For this reason, Plaintiff's
13 reliance on *Lau v. Glendora Unified Sch. Dist.*, 792 F. 2d 929 (9th Cir. 1986) is entirely
14 misplaced. The condition that the plaintiff was entitled to reject in that case was a court's
15 discretionary grant of fees under Rule 41, not an award authorized by an independent statute. For
16 these reasons, this Court may not ignore Section 505's mandate to consider an application for
17 attorney's fees, nor may Plaintiff condition its dismissal on this Court's granting immunity from
18 that statute.

19 **B. The Court Should Authorize a Request For Attorneys' Fees Regardless of**
20 **Whether Plaintiff Would Have a "Right" to Withdraw its Motion**

21 Even assuming Righthaven had a right to withdraw its motion to dismiss (which it does
22 not), the Court should still not approve a dismissal that immunizes it from a fee claim under
23 Section 505. Requiring payment of attorneys' fees upon a voluntary dismissal with prejudice is
24 entirely appropriate where, as here, one or more of the following circumstances are present: (a)
25 exceptional circumstances justify an award of fees in order to do justice; (b) plaintiffs' claim is
26 frivolous and/or pursued in bad faith; and/or (c) an independent statute authorizes attorneys' fees.
27 *See York v. Ferris State Univ.*, 36 F. Supp. 2d 976, 980 (W.D. Mich. 1998); *AeroTech, Inc. v.*
28 *Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997). Each of those bases exists here.

1 **1. The Court Should Not Be Held Hostage by Plaintiff’s Refusal to**
2 **Dismiss Where Justice Requires Award of Fees**

3 Even in the absence of a statutory authorization, Rule 41 allows attorneys’ fees as a
4 condition to a voluntary dismissal in exceptional circumstances where they are needed “in order
5 to do justice.” *York*, 36 F. Supp. 2d at 980 (citing *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir.
6 1965). One example of an exceptional circumstance is “when a litigant makes a repeated practice
7 of bringing claims and then dismissing them with prejudice after inflicting substantial litigation
8 costs on the opposing party and the judicial system.” *AeroTech, Inc.*, 110 F.3d at 1528. Plaintiff
9 Righthaven’s litigation machinery, which has filed almost 179 lawsuits in six months, certainly
10 qualifies as “exceptional,” and in a manner that requires an award of fees to do justice.

11 Righthaven’s model starts by intentionally proliferating litigation—suing first, rather than
12 providing notice and opportunity to take down alleged infringements. The suits themselves then
13 pursue scare tactics such as threatening to seize domain names, alleging statutory damages to
14 \$150,000, and demanding Righthaven’s attorneys’ fees, in an effort to bully out of state victims
15 into settling for a lesser cost than defending the suit. Plaintiff banks on its ability to voluntarily
16 dismiss with prejudice and avoid paying fees, even when Defendants prevail in full. Allowing
17 Righthaven to walk away from losing claims would afford them all the power of judicial process
18 without any accountability for its misuse. Under these circumstances, justice requires that
19 attorneys’ fees be awarded. *See AeroTech, Inc.* 110 F.3d at 1528; *York*, 36 F. Supp. 2d at 980.

20 **2. Payment of Defendants’ Fees is Appropriate Here Because the Case**
21 **Was Frivolous and/or Pursued in Bad Faith**

22 Likewise, attorneys’ fees would be appropriately awarded, even apart from a statutory
23 authorization, where dismissed claims were frivolous or pursued in bad faith. *Lawrence*, 32
24 F.R.D. at 331-32; *Quadrozzi*, 127 F.R.D. at 78-80. As to frivolousness, as discussed above, this
25 case was devoid of merit under at least the volitional act and fair use doctrines.

26 Moreover, Righthaven has pursued this litigation in bad faith. First, Plaintiff’s threat to
27 seize the domain name of the DU Website was not only contrary to the Copyright Act (as Plaintiff
28 has now admitted) but also an obvious effort to instill fear of consequences completely

1 disproportionate to the issues in the case. Similarly, Plaintiff’s inclusion of David Allen as an
2 individual defendant was an unnecessary scare tactic seeking unnecessarily to ratchet up the
3 stakes. Righthaven had neither any factual basis to subject Mr. Allen to liability, nor any need to
4 have him in the case, other than to punish him personally or coerce him to fold like many other
5 defendants it has sued. Such unjustifiable tactics authorize the court to award Defendants
6 attorneys’ fees. *See Lawrence*, 32 F.R.D. at 331-32; *Quadrozzi*, 127 F.R.D. at 78-80.

7 **3. Attorneys’ Fees and Costs Will Be Warranted Under Section 505**

8 Finally, Defendants will also be entitled to their fees under the independent statutory
9 authority of the Copyright Act. Under Section 505, an award of fees is proper when either
10 successful prosecution or successful defense of the action furthers the purposes of the Copyright
11 Act. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996) (“[A] successful defense of a
12 copyright infringement action may further the policies of the Copyright Act every bit as much as
13 a successful prosecution of an infringement claim by the holder of a copyright”) (*quoting*
14 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994)). In vindicating the right to fair use provided
15 by Section 107, Defendants will further the policies of the Act. The standards for evaluating
16 whether an award is proper are the same regardless of which party prevails. *Id.* at 534.

17 Courts have identified non-exclusive factors to guide a district court’s discretion in
18 awarding attorneys’ fees under Section 505: “(1) the degree of success obtained; (2)
19 frivolousness; (3) motivation; (4) objective unreasonableness (both in the factual and in the legal
20 components of the case); and (5) the need, in particular circumstances, to advance considerations
21 of compensation and deterrence.” *Entm’t Research Group v. Genesis Creative Group*, 122 F.3d
22 1211, 1229 (9th Cir. 1997). To award fees, not all of these factors must be met; fees may be
23 based on a single factor. *See Robinson v. Lopez*, 69 U.S.P.Q. 2d (BNA) 1241 (C.D. Cal. 2003).

24 **a. The Degree of Success Supports an Award of Attorneys’ Fees**

25 If Righthaven dismisses with prejudice (or if this Court grants summary judgment),
26 Defendants’ success will be total. It is ironic for Plaintiff to claim otherwise in their argument
27 about this factor (Motion at 14-15), given the concession elsewhere in its Motion that dismissal
28 will be “a full and final judgment on the merits in Defendants’ favor.” Motion at 3; *see also*

1 *Riviera*, 517 F.3d at 928 (voluntary dismissal of copyright claim with prejudice entitles a
2 defendant to Section 505 fees). Righthaven’s suggestion that Defendants’ total success should be
3 tempered by the *Realty One* decision is less than feeble. Motion at 14-15. As discussed above,
4 the *Realty One* decision could in no way be a surprise to anyone with even a passing familiarity
5 with fair use law. But regardless, the fact is that Plaintiff has given up, declining to pursue this
6 case against this opponent, and conceding complete defeat, with prejudice. This factor strongly
7 supports an award of attorneys’ fees.

8 **b. Righthaven’s Lawsuit Was Frivolous and Unreasonable**

9 Righthaven’s claims justify an award of attorneys’ fees as either, or both, “frivolous” or
10 “objectively unreasonable.” It speaks volumes that, in its efforts to rebut the unreasonableness of
11 its claims, Righthaven focuses entirely on its allegation of the “prime facie” case for copyright
12 infringement, while ignoring the dispositive issues. Motion at 16, 19. Righthaven never
13 mentions the element of volition, although—as a party filing 179 cases, all subject to Rule 11’s
14 pre-filing inquiry—it surely is not unfamiliar with this basic rule that has been followed in
15 Internet cases since the *Netcom* decision in 1995. On fair use, Righthaven asserts only that
16 “reasonable minds may differ,” while failing to present any analysis of fair use that might
17 “reasonably” support its claim, and failing to mention that it admitted in another case that a
18 *higher* percentage of an article would be fair use. *Realty One*, Dkt. 12 at 10-11. Whether a lawsuit
19 is legally or factually unreasonable is measured by an *objective* standard. *See Fogerty*, 510 U.S.
20 at 534 n.19; *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1120 (9th Cir. 2007). Plaintiff’s
21 lawsuit is both factually *and* legally unreasonable, weighing doubly in favor of an award of fees.

22 As to fair use, a party bringing a copyright infringement suit has an obligation to assess
23 any possible fair uses at the outset, even before sending a DMCA takedown notice. *Lenz v.*
24 *Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008).¹⁴ Righthaven certainly
25 failed to make that assessment here, when it undertook to sue a discussion forum for a third party
26 posting using only 10% of the original Article—an instance that no one could reasonably dispute

27 _____
28 ¹⁴ The Digital Millennium Copyright Act provides a safe harbor (not asserted here) against copyright infringement
claims for internet service providers who timely respond to takedown notices and who have registered copyright
agents with the U.S. Copyright Office. *See generally* 17 U.S.C. § 512.

1 was fair use.¹⁵ By failing to take even this most basic step, it ran the risk of being subject to an
2 award of fees. Indeed, where a fair use may be “reasonably perceived,” it is objectively
3 unreasonable to bring infringement claims. *See Mattel, Inc. v. Walking Mt. Prods.*, 2004 U.S.
4 Dist. LEXIS 12469, at **4-5 (C.D. Cal. June 24, 2004). Plaintiff’s effort to punish a fair use was
5 objectively unreasonable and warrants a fee award.

6 The same can be said for Plaintiff’s failure to allege any volitional act of infringement. It
7 has been clear since *Netcom* that no viable claim for direct infringement can lie in this context.
8 *See* Argument Part I.A., *supra*. Likewise, as explained above, it was wholly frivolous for
9 Plaintiff to seek seizure of the Democratic Underground domain name.¹⁶ Having brought wholly
10 unreasonable claims seeking frivolous remedies, Righthaven cannot now avoid the consequences
11 of its actions by threatening not to “consent” to dismissal if it is held accountable.

12 **c. Righthaven’s Claims Were Improperly Motivated and Require**
13 **Compensation to Defendants as a Deterrence to Future Abuse**

14 Righthaven’s motivation in filing this action and over 178 others was not to remedy a
15 wrong, but to profit from inventing one. It bears remembering that Righthaven possesses no
16 claim whatsoever until it chooses to buy assignments of copyrights, after already knowing that the
17 alleged infringement has occurred. Its motive is purely mercenary. It has built a business model
18 with Stephens Media around bringing hundreds of strike suits for use of excerpts or copies of
19 *LVRJ* articles, month after month. Opsahl Decl. ¶ 17-21. Armed with statutory remedies that
20 overwhelm the actual value of the uses challenged, they seek to leverage economic pressure that
21 can be offset only by the Court’s imposition of economic responsibility.

22 As the present case and *Realty One* exemplify, Righthaven brings these suits without
23 making any fair assessment of whether the excerpts at issue are actually infringing. Although its
24 counsel’s declaration claims that there are only 4 suits now pending with less than 75% of an
25 original used, in fact there have been at least 9 lawsuits filed based on excerpts of less than 50%.

26 ¹⁵ This is despite the fact that Righthaven’s former counsel recognizes its obligation to consider fair use at the outset.
Opshal Decl. ¶ 6.

27 ¹⁶ Righthaven’s assertion that this Court has previously “agreed that Righthaven’s copyright cases are objectively
28 reasonable” and “repeatedly validated [their] factual and legal merit” overstates reality. The four cases cited in the
Motion (at 20-22) concluded merely that Righthaven had *pleaded* sufficient *allegations* to allow standing to begin
litigation, not that any claim had merit.

1 *Id.* ¶ 19. Nor may Righthaven curry the Court’s leniency by including in an unsworn brief the
2 hedged statement that “[i]t is Righthaven’s *current* belief that, for the *foreseeable* future, *nearly*
3 all Righthaven copyright cases” will not be like this present one. Motion at 6 (emphasis added).
4 Righthaven still does not commit that it *will not sue against partial excerpts*, and that it *will not*
5 *sue hosts of third party commentary*. Motion at 7. The Court’s imposition of financial
6 responsibility for a meritless suit like this one is necessary to deter similar suits, and is the only
7 way to compensate those willing to stand up to Righthaven’s shake down.

8 Under similar circumstances, courts have repeatedly recognized that the motivations
9 underlying these types of serial nuisance suits are not supported by the Copyright Act and
10 accordingly must be deterred and recompensed by an award of attorneys’ fees. *See, e.g., Video-*
11 *Cinema Films, Inc. v. CNN, Inc.*, 2003 U.S. Dist. LEXIS 4887, at *15-16 (S.D.N.Y. Mar. 31,
12 2003); *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, 371 F.3d 883, 896 (6th Cir. 2004)
13 (attorneys’ fees were appropriate where plaintiff’s “choice to sue hundreds of defendants all at the
14 same time, regardless of the strength of the individual claims” resulted in their “dragnet inevitably
15 [sweeping] up parties against whom they had little or no chance of succeeding”).

16 In *Video-Cinema*, much as here, the plaintiff had brought a series of copyright
17 infringement lawsuits against news organizations for having used excerpts of the movie *G.I. Joe*
18 in television obituaries for the actor Robert Mitchum. *Id.* at *13-14. Just as with Righthaven, it
19 was only after these excerpts were used that the plaintiff acquired the rights to the copyright in
20 “an elaborate scheme to place himself in a position to sue.” *Id.* Plaintiff then proceeded to
21 demand quick settlements from numerous news organizations, and the court concluded that airing
22 the excerpts was a fair use. *Id.* Addressing motivation, the court concluded that “Plaintiff’s
23 conduct was nothing more than an obvious effort to use the Copyright Act to secure payment
24 from Defendants for their fair use,” a motivation the court unequivocally termed “improper.” *Id.*
25 at 15. Given this, the court concluded that “fees are appropriate . . . to deter future copyright
26 owners from using the threat of litigation to chill other fair uses.” *Id.* at 15-16.

27 Here, too, fees are surely appropriate. Righthaven, much like in *Video-Cinema*, is
28 operating as a copyright troll: waiting for any organization to make use of an *LVRJ* article,

1 acquiring the copyright, and bringing suit regardless of whether that use is fair in an attempt to
2 extract quick settlements with the threat of high statutory damages and improper *in terrorem*
3 remedies like domain name seizure. Where this copyright dragnet ensnares innocent uses, as
4 here, it is especially egregious. Unless Righthaven faces the deterrence of attorneys' fees awards
5 to successful defendants, the likelihood that fair uses will be chilled is as good as certain. That
6 chilling effect is already evident here, where the DU Website had to remove Pampango's
7 perfectly fair posting as a precautionary measure, and another user of the DU Website also pulled
8 its posting from the *LVRJ* out of fear of being targeted. Allen Decl. Ex. C.

9 Courts routinely award attorneys' fees under Section 505 where defendants prevail on fair
10 use defenses, as "[t]o hold otherwise would diminish any incentive for defendants to incur the
11 often hefty costs of litigation to defend the fair use doctrine. See *Video-Cinema*, 2003 U.S. Dist.
12 LEXIS 4887, at *15-16; see also *Tavory v. NTP, Inc.*, 297 Fed. Appx. 986, 991 (Fed. Cir. 2008)
13 (awarding fees to a prevailing defendant on a fair use defense); *Compaq Computer Corp. v.*
14 *Ergonome, Inc.*, 387 F.3d 403, 411 (5th Cir. 2004) (same); *Bond v. Blum*, 317 F.3d 385, 398 (4th
15 Cir. 2003) (same); *Mattel, Inc.*, 2004 U.S. Dist. LEXIS 12469, at *4-5 (same). Courts recognize
16 the importance of "encouraging the creators of works of commentary and criticism to litigate the
17 fair use defense . . . by compensating them for their legal expenses [as this] will enrich the public
18 by increasing the supply and improving the content of commentary and criticism." *Hofheinz v.*
19 *AMC Prods., Inc.*, 2003 U.S. Dist. LEXIS 16940, at *20-21 (S.D.N.Y. Sep. 3, 2003). For exactly
20 these reasons, the purposes of the Copyright Act require an award of fees to Defendants for their
21 defense against Righthaven's claims.

22 Given Defendants' numerous bases for entitlement to fees under Section 505, the
23 exceptional nature of this case, and Plaintiffs improper prosecution of it, conditioning dismissal
24 on denial of attorneys' fees would be inappropriate. If it does not grant summary judgment, the
25 Court should order that, upon entry of any voluntary dismissal of this action, Defendants may
26 submit a request for statutory attorneys' fees and costs.

1 **III. THE COURT SHOULD NOT DISMISS THE COUNTERCLAIM, REGARDLESS**
2 **OF WHETHER VOLUNTARY DISMISSAL OF THE COMPLAINT IS**
3 **APPROVED**

4 **A. Plaintiff Has No Right to Condition Its Voluntary Dismissal on any Action**
5 **Respecting the Counterclaim**

6 Whatever Plaintiff's rights to withdraw its own Complaint under to Rule 41, Plaintiff does
7 not control Democratic Underground's Counterclaim and has no right to compel its dismissal
8 simply because Plaintiff has determined that its own claims should not be pursued. Rule 41(a)(2)
9 contemplates that a counterclaim must continue pending after plaintiff's voluntary dismissal,
10 providing that "[i]f a defendant has pleaded a counterclaim before being served with the
11 plaintiff's motion to dismiss, an action may be dismissed over the defendant's objection *only if*
12 *the counterclaim can remain pending for independent adjudication.*" Thus, Plaintiff's demand
13 that the Counterclaim "shall be dismissed" as a condition to the voluntary dismissal of its
14 Complaint (Motion at 23) turns the rule on its head. Tellingly, Plaintiff has cited no authority for
15 its ill-conceived condition, and the Court may simply ignore it.

16 **B. The Counterclaim Would Not Be Disposed of by the Voluntary Dismissal of**
17 **Righthaven's Original Complaint**

18 At the outset, Righthaven's argument that voluntary dismissal of its Complaint would
19 dispose of Democratic Underground's Counterclaim ignores that the Counterclaim also states a
20 claim against Stephens Media, which would not be bound by Righthaven's concession on the
21 Complaint. Stephens Media has been alleged to be the actual holder of any copyright interest
22 (ignoring the sham assignment), and indisputably possesses a reversionary interest in the
23 copyright. *See* C.Claim ¶¶ 38-42; Stephens Media's Motion To Dismiss. Dkt. 38, Ex. 1
24 (assignment recites that it is "subject to Assignor's rights of reversion"). Absent a judgment
25 binding Stevens Media, Democratic Underground could be sued again tomorrow for reactivating
26 the Pampango post that it took down as a protective measure, or for postings of other excerpts.
27 *See* Allen Decl. Ex. B; ¶ 25.

28 Moreover, as to Righthaven alone, dismissal of the Complaint with prejudice is no
substitute for adjudication of the Counterclaim. In order to establish a definitive ruling on the

1 legality of Righthaven’s conduct going forward, the Counterclaim specifically seeks a declaration
2 that there was no volitional act (C.Claim ¶ 186), only *de minimis* copying (¶ 189), fair use (¶
3 190), and failure to mitigate by Righthaven’s failure to provide notice before suing. ¶ 191. It
4 also introduces numerous additional issues, including invalidity of the assignment, (¶¶ 38-40)
5 license resulting from the *LVRJ*’s invitation to share its works, and estoppel (¶¶ 83-101) , and it
6 incorporates those allegations into its request for a declaration that no infringement has occurred
7 “based on the circumstances described above.” ¶¶ 184, 196. Dismissal of the Complaint would
8 not decide any of those issues. Indeed, it is intended precisely to avoid a decision on the merits.

9 Declaration of rights on these issues is both necessary and reasonable to protect
10 Democratic Underground from harassing lawsuits by Righthaven and Stephens Media in the
11 future. Righthaven continues to assert that it has valid claims based even on the minimal copying
12 that occurred here. *E.g.*, Motion at 4. It continues to assert Defendants’ liability for third party
13 postings despite their lack of volitional acts, and despite what Defendants believe is the sham
14 nature of the assignments and a fatally defective failure to give notice. Absent an adjudication of
15 fair use under the Counterclaim, Righthaven will be free, after dismissing, to sue again if
16 Democratic Underground restores Pampango’s post since it could argue that the restoration now
17 satisfies the volitional act element. Additionally, Righthaven may bring suit against Defendants
18 whenever another user makes a post to the DU Website. In at least one instance, a DU Website
19 user already removed his own post for fear of being sued and replaced an article from the *LRVJ*
20 with one from the *Las Vegas Sun*, a newspaper that does not sue its readers. Allen Decl. Ex. C.
21 Failure to decide the issues in the Counterclaim means continued chill not just of Defendant’s
22 conduct, but of user postings necessary to fulfill the DU Website’s mission. Democratic
23 Underground thus has a live and legitimate basis to pursue a decision on the Counterclaim.

24 The courts have long provided declaratory relief in exactly this context, recognizing that
25 while one “defendant exonerated of infringement may be content with such adjudication, another
26 may not . . . [since] the mere exoneration from infringement does not always meet the necessities
27 of a wrongfully accused defendant.” *Dominion Elec. Mfg. Co. v. Edwin L. Weigand, Co.*, 126
28 F.2d 172, 174 (6th Cir. 1942) (declaratory judgment counterclaim allows defendant to “represent

1 not only himself, but in a sense, also the public” in freeing the restraint of invalid claims).
2 Counterclaims seeking a declaration of invalidity consistently survive resolution of infringement
3 claims. *See Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83 (1993) (holding that “case or
4 controversy” in patent suit survives the resolution of the infringement claim when a counterclaim
5 for invalidity still remains unresolved, as a “declaratory judgment of invalidity presents a claim
6 independent of the patentee’s charge of infringement”). The same is true when an infringement
7 claim is resolved *with prejudice* against the plaintiff. *See, e.g., Diamonds.net LLC v. Idex Online,*
8 *Ltd.*, 590 F. Supp. 2d 593, 603 (S.D.N.Y. 2008) (noting “importance to the public *at large of*
9 *resolving questions of . . . validity*”); *AIR-vend, Inc. v. Thorne Indus., Inc.*, 625 F. Supp. 1123,
10 1126-27 (D. Minn. 1985). The Supreme Court’s reasoning in *Cardinal* applies equally in the
11 copyright context.¹⁷ Democratic Underground’s Counterclaim presents “a claim independent of
12 [Righthaven’s] charge of infringement,” in that it seeks declaration of the underlying validity of
13 the rights asserted now—and that may be asserted in the future—against the DU Website and its
14 users. *Cardinal*, 508 U.S. at 96. *See also Vietnam Veterans of Am. v. CIA*, 2010 U.S. Dist.
15 LEXIS 3787, at *19 (N.D. Cal. Jan. 19, 2010) (declaratory relief regarding legality of secrecy
16 oaths could be pursued as it could “avoid potential future litigation by clarifying whether veterans
17 may discuss their experiences without facing consequences”).¹⁸

18 Finally, the Counterclaim also seeks attorneys’ fees and costs under the Copyright Act in
19 its own right, independent of the Complaint. *Id.* at 25. Righthaven claims that dismissal of the
20 Complaint with prejudice would amount to an “adjudication” on the merits of the Counterclaim,
21 and expressly “moves for the adjudication” of the Counterclaim in its Motion at 2:11,3-4. Even
22 assuming this were proper (which it is not), “adjudication” in Counterclaimant’s favor would then
23 trigger Democratic Underground’s right to fees as prevailing party on the Counterclaim. Plaintiff

24 ¹⁷ The same rule applies in the trademark context. *See, e.g., Stickrath v. Globalstar, Inc.*, 2008 U.S. Dist. LEXIS
25 95127 (N.D. Cal. May 13, 2008) (applying rule from *Cardinal* to trademark case; declining to dismiss counterclaim);
see also, Dominion Elec., 126 F.2d at 175.

26 ¹⁸ The one case Righthaven cites does not require otherwise. In *Smith v. Lenches*, 263 F.3d 972, 975, 977-78 (9th Cir.
27 2001) unlike the present case, the declaratory relief counterclaim covered separate supplemental state law claims,
28 already pending in state court, that *would be litigated in state court regardless of the dismissal of the counterclaim*.
See Id. (holding that “the determination of whether California securities laws were violated will . . . be decided by
California state courts So for the federal court to retain jurisdiction to give declaratory judgment of the same
claims would result in a needless determinate of state law.”). *Smith* is, in fact, the exact opposition of the situation at
bar, where Righthaven contends that dismissal of the Counterclaim is warranted because the issue need *not* be
independently litigated. Dkt. No. 36 at 23-24.

1 provides no support for the proposition that it may dispose of the Counterclaim by conceding its
2 merit, and yet avoid paying the fees the Counterclaim seeks and that Section 505 authorizes.

3 **C. If the Original Complaint is Not Voluntarily Dismissed, the Counterclaim is**
4 **Not Subject to Dismissal as Redundant or Superfluous**

5 Righthaven's Motion concludes with a half-hearted suggestion that Democratic
6 Underground's Counterclaim is "superfluous," regardless of Plaintiff's dismissal of the
7 Complaint. Motion at 24. That argument is meritless. Counterclaims for declaratory relief in
8 similar cases are allowed as a matter of course, even where they negate the claims in a complaint
9 or include issues raised as affirmative defenses, because they serve the added purpose of ensuring
10 adjudication of the issues that the Counterclaimant desires to resolve but that might not otherwise
11 be reached in adjudicating the complaint. *See, e.g., Leach v. Ross Heater & Mfg. Co.*, 104 F.2d
12 88, 91-92 (2d Cir. 1939) (overruling district court's dismissal of counterclaim as duplicative of
13 underlying infringement claim); *Faulkner Press, LLC v. Class Notes, LLC*, 94 U.S.P.Q. 2d
14 (BNA) 1318 (N.D. Fla. Mar. 17, 2010) (refusing to dismiss counterclaim where it raised the
15 possibility of the copyright's invalidity); *MRSI Int'l, Inc. v. Bluespan, Inc.*, 2006 U.S. Dist.
16 LEXIS 68891, at *3-7 (D. Utah Sep. 21, 2006) (refusing to dismiss counterclaims as duplicative
17 of underlying claims or affirmative defenses because the court could potentially adjudicate the
18 underlying claims without reaching issues in declaratory relief claim); *United Wats, Inc. v.*
19 *Cincinnati Ins. Co.*, 971 F. Supp. 1375, 1381 (D. Kan. 1997) (rejecting as "without merit" motion
20 to dismiss counterclaims as redundant to underlying claim). Indeed, because the answer
21 responds to the claims as the plaintiff frames them, the counterclaim is the opportunity for the
22 defendant to articulate the factual and legal bases that it claims need to be adjudicated and, in so
23 doing, define the issues subject to discovery, expert testimony, and adjudication.

24 Here, the Counterclaim alleges several different theories, in parallel with affirmative
25 defenses. Many of these would not have to be addressed by the Court in rejecting Righthaven's
26 claims, as any one would suffice. As the Supreme Court has put it, "an unnecessary ruling on an
27 affirmative defense is not the same as the necessary resolution of a counterclaim for declaratory
28 judgment." *Cardinal*, 508 U.S. at 93-94; *see also Blackmer v. Shadow Creek Ranch Dev. Co.*,

1 2007 U.S. Dist. Lexis 99224, at *4-5 (S.D. Tex. June 26, 2007) (there is a “qualitative difference
2 between merely prevailing in Plaintiff’s lawsuit, and receiving an affirmative declaration of
3 rights”). The Counterclaim therefore should proceed.¹⁹

4 **CONCLUSION**

5 For the reasons stated above, this Court should grant summary judgment in favor of
6 Defendants on the Complaint, deny the conditions proposed for the motion for voluntary
7 dismissal, deny the motion to dismiss the Counterclaim, and permit the Defendants to move for
8 attorneys’ fees and costs pursuant to the Copyright Act.

9 Dated: December 7, 2010

FENWICK & WEST LLP

11 By: /s/ Laurence F. Pulgram

12 LAURENCE F. PULGRAM, ESQ.
13 Fenwick & West LLP
14 555 California Street, Suite 1200
15 San Francisco, CA 94104
16 Telephone: (415) 875-2300
17 Facsimile: (415) 281-1350
18 lpulgram@fenwick.com

19 Attorneys for Defendant and Counterclaimant
20 DEMOCRATIC UNDERGROUND, LLC, and
21 Defendant DAVID ALLEN

22
23
24
25
26
27 ¹⁹ The sole case that Plaintiff’s cite in support of their “redundancy” argument does not undermine these conclusions.
28 That case dealt with the narrow scenario, not present here, where the counterclaims and underlying claims
“overlap[ped] entirely” and where the relief sought was “indistinct.” See *Englewood Lending, Inc. v. G&G
Coachella Invs., LLC*, 651 F. Supp. 2d. 1141, 1143-44 (C.D. Cal. 2009).