

NO. 11-16358

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RIGHTHAVEN LLC,

APPELLANT,

v.

CENTER FOR INTERCULTURAL ORGANIZING, and KAYSE JAMA,

APPELLEES.

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On Appeal From The United States District Court  
For The District of Nevada  
Case No. 2:10-cv-01322-JCM-LRL  
Honorable James C. Mahan, District Judge

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**BRIEF AMICI CURIAE OF ELECTRONIC FRONTIER FOUNDATION,  
DIGITAL MEDIA LAW PROJECT, PUBLIC KNOWLEDGE AND  
PROFESSORS IN SUPPORT OF AFFIRMANCE**

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

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae the Electronic Frontier Foundation, the Digital Media Law Project, Public Knowledge, and the professor amici (collectively, “Amici”) state that none of the Amici have any parent corporation, and that no publicly held corporation owns 10% or more of the stock of any of the Amici.

Dated: January 13, 2012

By: /s/ Kurt Opsahl

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## STATEMENTS OF INTEREST AND CONSENT TO FILE

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF and its over 16,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. EFF has been deeply involved in the Righthaven cases almost from their inception, allowing it to offer the Court a unique viewpoint.<sup>1</sup>

Digital Media Law Project (“DMLP”) provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. DMLP is affiliated with Harvard University’s Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development.

Public Knowledge is a non-profit public interest organization devoted to protecting citizens, rights in the emerging digital information culture and focused on the intersection of intellectual property and technology. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our

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<sup>1</sup> EFF is counsel to defendants-appellees in *Righthaven v. Democratic Underground*, D. Nev. 2:10-cv-01356-RLH, 9th Cir. No. 11-17210 and *Righthaven v. DiBiase*, D. Nev. 2:10-cv-01343-RLH, 9th Cir. No. 11-16776, counsel for amicus Democratic Underground in *Righthaven v. Pahrump Life*, D. Nev. 10-cv-01575-JCM, and amicus in *Righthaven v. Wolf*, D. Colo. 1:11-cv-00830-JLK.

culture through legislative, administrative, grass-roots, and legal efforts, including regular participation in copyright and other intellectual property cases that threaten consumers, communication, and innovation.

The Professors Amici are professors at universities throughout the country who are interested in copyright policy and fair use, and have been following Righthaven and the issues arising from mass copyright infringement suits.<sup>2</sup>

Patricia Aufderheide is a University Professor and the Director of the Center for Social Media at the American University School of Communication, and is the co-author with Prof. Peter Jaszi of *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, July 2011).

Annemarie Bridy is an Associate Professor of Law at the University of Idaho College of Law.

Thomas G. Field, Jr. is a Professor of Law at the University of New Hampshire School of Law (formerly Franklin Pierce).

Eric Goldman is an Associate Professor and Director of the High Tech Law Institute, Santa Clara University School of Law. He has taught and researched in the area of Internet copyright law for over 15 years.

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<sup>2</sup> The Professors Amici submit this brief on their own behalf, not on behalf of their respective universities and institutions.

William T. Gallagher is an Associate Professor of Law and the Co-Director of the IP Law Program at the Golden Gate University School of Law.

Greg Lastowka is a Professor of Law at the Rutgers School of Law-Camden.

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Matthew Sag is a Professor of Law at the Loyola University of Chicago School of Law.

Jason Schultz is an Assistant Clinical Professor of Law and the Co-Director of the Samuelson Law, Technology & Public Policy Clinic at the University of California's Boalt Hall School of Law.

Rebecca Tushnet is a Professor of Law at the Georgetown University Law Center.

Jane K. Winn is the Charles I. Stone Professor of Law at the University of Washington School of Law.

Counsel for all parties have consented to the filing of this brief.<sup>3</sup>

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<sup>3</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for Amici or their counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

## **I. Introduction**

Appellant Righthaven LLC seeks to have this Court undo two sound tenets of law: (1) that summary judgment is appropriate where no material facts are genuinely disputed; and (2) that summary judgment on fair use is appropriate where a court has balanced all four factors under Section 107 of the Copyright Act and found that the secondary use is fair. As explained below, the Court should deny Righthaven's attempt to rewrite the standard for summary judgment and affirm the District Court's decision.

Amici also urge the Court to uphold the district court's ruling as a matter of sound copyright policy. Amici are counsel, law professors, and public interest lawyers who have been writing about, commenting on, and defending against Righthaven's "scorched earth" campaign of mass copyright infringement suits. These suits have been brought against the operators of numerous blogs and websites on the Internet, including disabled children, political bloggers, electoral candidates, etc. *See generally Righthaven Stories*, VEGAS INC, <http://www.vegasinc.com/news/legal/righthaven/> (last visited Jan. 10, 2012). A key aspect of Righthaven's business model is finding those who have casually or inadvertently posted a news article (or just excerpts) or photo online. Righthaven then purchases the bare right to sue and sues the poster, seeking statutory damages of up to \$150,000 for the single post.

This model must scale to be profitable, so Righthaven endeavors to keep its costs extremely low, while running up the costs of defense. This means resisting all attempts at quick resolution, such as the early summary judgment ruling here by the District Court. Nonetheless, some defendants have persevered, and Righthaven has lost every single case that has been tested in court.<sup>4</sup> As a result, Righthaven is now in the hands of a receiver. This appeal, along with several others currently pending before the Ninth Circuit, represents Righthaven's forlorn hope to salvage its extortionist business model.

The District Court here recognized the danger of a cost of defense settlement and accelerated the summary judgment proceedings so that the appellees Center for Intercultural Organizing ("CIO") and Kayse Jama would not suffer long and expensive litigation. But it did not deny Righthaven its day in court. Quite the contrary: Righthaven had every chance to present evidence on the

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<sup>4</sup> *Righthaven v. Kelleher*, No. 2:10-cv-01184-KJD (D. Nev. Jan 13, 2012); *Righthaven v. Newsblaze*, No. 2:11-cv-00720-RCJ, 2011 WL 5373785 (D. Nev. Nov. 4, 2011); *Righthaven v. Realty One Group, Inc.*, No. 2:10-cv-01036-LRH, 2010 WL 4115413 (D. Nev. Oct. 19, 2010); *Righthaven v. Newman*, No. 2:10-cv-01762-JCM, 2011 WL 4762322 (D. Nev. Oct. 7, 2011); *Righthaven v. Wolf*, No. 1:11-cv-00830-JLK, 2011 WL 4469956 (D. Colo. Sept. 27, 2011); *Righthaven v. Hyatt*, No. 2:10-cv-01736-KJD, 2011 WL 3652532 (D. Nev. Aug. 19, 2011); *Righthaven v. Mostofi*, No. 2:10-cv-01066-KJD, 2011 WL 2746315 (D. Nev. July 13, 2011); *Righthaven v. Barham*, No. 2:10-cv-02150-RLH, 2011 WL 2473602 (D. Nev. June 22, 2011); *Righthaven v. DiBiase*, No. 2:10-cv-01343-RLH, 2011 WL 2473531 (D. Nev. June 22, 2011); *Righthaven v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. 2011); *Righthaven v. Democratic Underground*, 791 F. Supp. 2d 968 (D. Nev. 2011).

fair use factors and dispute the facts showing that CIO's use was non-commercial, transformative and not a substitute, the work was largely factual, the amount taken was reasonable, and there was no evidence of harm to the market for or value of the work.

Instead of presenting relevant evidence, Righthaven argued that summary judgment should be denied solely on the basis of two unsupportable presumptions: (1) that using 100% of a work could never be reasonable under the third fair use factor; and (2) that market harm under the fourth factor always exists until proven otherwise. Neither of these presumptions is supported by the Copyright Act or the cases interpreting it. Indeed, the Supreme Court and the Ninth Circuit have both found that the use of entire copyrighted works can be protected by the fair use doctrine and that, especially after *eBay v. MercExchange*, 547 U.S. 388 (2006), there is no presumption of harm in copyright cases.

Amici urge the court to reject Righthaven's skewed approach and, applying the time-honored fair use analysis, affirm the District Court's ruling in favor of CIO.

## **II. Background**

This appeal, one in a series of Righthaven appeals pending before this Court, should be considered in light of the lawsuit campaign from which it derives. As

early as 2006, Las Vegas attorney and Righthaven CEO Steven Gibson wrote about what he saw as an online gold mine untapped by copyright holders. Steven A. Gibson & J.D. Lowry, *The Need for Speed: The Path to Statutory Damages in Copyright* (2006), [http://www.lbbslaw.com/uploadedFiles/Attorneys/The Need For Speed\(2\).pdf](http://www.lbbslaw.com/uploadedFiles/Attorneys/The Need For Speed(2).pdf). Looking at estimates of online infringement, Mr. Gibson wrote, “[I]f each of those billions of infringements were multiplied by a reduced statutory damage award of merely \$100,000, the dollar value of infringements would exceed trillions of dollars, arguably into the quadrillions.” *Id.* at 4.

Righthaven was an attempt to tap that ‘gold mine’ at the least possible cost, by filing cookie-cutter lawsuits seeking statutory damages against individual bloggers and websites that had allegedly infringed the copyright in various news articles. “On January 18, 2010, attorney Steven A. Gibson (through his company Net Sortie Systems LLC), along with the family of Warren Stephens (through their investment vehicle SI Content Monitor LLC), executed the Righthaven operating agreement [“RHOA”] creating Plaintiff, Righthaven LLC.” Order Dismissing Righthaven’s Complaint, *Righthaven v. Pahrump Life*, No. 10-cv-01575-JCM (D. Nev. Aug. 12, 2011), Dkt. 67 at 1.

The RHOA candidly describes Righthaven’s business objectives: “Righthaven was created solely to acquire a ‘limited, revocable assignment (with a license-back) of copyright from third Persons.’” *Id.* at 5 (quoting RHOA § 3.2(c)).

Righthaven would then ‘troll’ the internet looking for allegedly infringing postings of LVRJ articles and, once it found one, obtain a purported assignment, register the copyright and file a lawsuit. *Id.* Righthaven’s initial partner was Stephens Media (also part of the same Stephens family’s investments), the publisher of the *Las Vegas Review-Journal*, who signed a Strategic Alliance Agreement (“SAA”) with Righthaven. *Id.* at 1-2 (citing Gibson Decl. (Dkt. 26), Ex. 2 at 9).

In March 2010, Righthaven began filing copyright infringement suits against websites and bloggers, ultimately initiating over 200 lawsuits in the District of Nevada alone.<sup>5</sup> Each of the cases alleged “willful infringement” and demanded up to \$150,000 in statutory damages, seizures of each website’s domain name and attorneys’ fees. Despite the Rule 11 duty to investigate, it was clear that Righthaven did not bother to consider whether the fair use doctrine sheltered any of the uses in question. For example, in *Righthaven v. Gardner*, Righthaven sued a reporter who wrote an article *about* the Colorado Righthaven lawsuits, illustrated with a grainy excerpt *from the court record*. See Complaint Ex. 2 (Dkt. 1),

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<sup>5</sup> Righthaven also filed over 50 cases on behalf of the *Denver Post* in the District of Colorado. See e.g., *Wolf, supra*, 2011 WL 4469956. The *Denver Post* is no longer doing business with Righthaven. See David Kravets, *Newspaper Chain Drops Righthaven — ‘It Was a Dumb Idea’*, WIRED (Sept. 8, 2011), <http://www.wired.com/threatlevel/2011/09/medianews-righthaven-dumb-idea/>.



*Righthaven v. Gardner*, No. 1:11-cv-00777-JLK (D. Colo. Mar. 25, 2011).<sup>6</sup>

At the same time, Righthaven's litigation tactics included deceptive behavior that drove up the cost of defense. *See* Tr. of Order to Show Cause (Dkt. 137), *Democratic Underground*, No. 2:10-cv-01356-RLH (D. Nev. July 14, 2011) at 15-17 (sanctioning Righthaven \$5,000 for making "intentionally untrue" "misrepresentations.").

For most defendants, it made no economic sense to invest in defending the case – and Righthaven's business model relied on that calculus. Individual facts and the merits of defenses such as fair use would do little to help defendants reach a just resolution, because costs of defense would always exceed the nuisance settlement value.

### **III. Argument**

The District Court's summary judgment should be affirmed because (1) Righthaven has raised no genuine issues of material fact and (2) CIO's non-commercial transformative use of the highly factual news article, which did not harm any market, was a fair use as a matter of law.

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<sup>6</sup> After a public outcry, Righthaven dropped the suit, calling it a "clerical mistake." Nate Anderson, *Copyright troll Righthaven's epic blunder: a lawsuit targeting Ars*, ARS TECHNICA (Mar. 29, 2011), <http://arstechnica.com/tech-policy/news/2011/03/copyright-troll-righthavens-epic-blunder-a-lawsuit-targeting-ars.ars>. Amici suggest that the fact that a lawsuit could be launched based on a "clerical mistake," with the attendant expense and anxiety it must cause the defendant, reflects the dangers of Righthaven's mass litigation strategy.

**A. Because Righthaven Failed To Raise Any Genuine Issues of Material Fact, *Sua Sponte* Summary Judgment Was Appropriate**

Righthaven first argues that the Court erred in granting summary judgment because it refused to allow further discovery. However, when pressed by the District Court, Righthaven was unable to identify a single material fact in dispute. Righthaven's Opening Brief suffers the same flaw.

Aside from vague assertions about possible discovery and irrelevant curiosities, nothing in Righthaven's brief suggests any genuine factual issues. *See* Opening Brief at 9-12. *See Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 365 Fed.Appx. 830, 833 (9th Cir. 2010) ("vague references to 'discovery disputes' and the need to 'accumulate evidence' were insufficient to satisfy Rule 56(f)'s specificity requirement"); *Cal. Dep't. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 781 (9th Cir. 1998) (noting that case did "not arise in the abstract" when investigating whether a disputed fact *may* exist).

Even Righthaven concedes that "[t]he party opposing summary judgment bears the burden of showing what facts must be identified in order to raise a material issue of fact." Plaintiff's Identification of Genuine Issues of Material Fact ("Plaintiff Ident.") (Dkt. 28) at 4 (citing *Hancock v. Montgomery Ward*, 787 F.2d 1302, 1306 n.1 (9th Cir. 1986)). To accomplish that, however, Righthaven "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Specifically, Righthaven must show “(1) that [it has] set forth in affidavit form the specific facts that [it] hope[s] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are ‘essential’ to resist the summary judgment motion.” *Toxic Substances*, 138 F.3d at 779.

Righthaven wholly failed to meet the *Toxic Substances* test. For example, Righthaven argued at the District Court that three fact disputes prevented a judgment on market harm: (1) whether anyone who would have otherwise purchased a paper copy of the Article or viewed it online did not because of the CIO post; (2) whether CIO’s use expanded public knowledge surrounding its subject matter without harming the market for the original work; and (3) whether CIO actually increased the market for the work. Plaintiff Ident. at 7-10.

None of these purported “disputes” must be resolved in order to reach summary judgment, and Righthaven failed to introduce or identify any “particular parts of materials in the record,” Fed. R. Civ. P. 56(c)(1), to show a dispute over these facts.

**B. The District Court Correctly Concluded that CIO’s Non-Commercial Transformative Educational Use of a Factual Newspaper Article For Which Righthaven Had No Market Was a Fair Use**

Fair use is “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.” *Harper & Row*

*Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (citation omitted). When evaluating fair use, courts examine four statutory factors and equitably balance them to determine whether the challenged use is compatible with the purposes of the Copyright Act. 17 U.S.C. § 107.

Righthaven offers the same flawed theory for each factor: that use of an entire work precludes fair use. Opening Brief at 13 *et seq.* In Righthaven’s view, “[t]he 100% duplication at-issue in *Worldwide Church of God* [*v. Philadelphia Church of God (WWCG)*, 227 F.3d 1110 (9th Cir. 2000)] transcended this Court’s Ninth [*sic*] four-factor analysis . . . .” *Id.* at 18. Relying exclusively on *WWCG*, Righthaven argues for an “almost *per se* pronouncement against a finding of fair use in cases of 100% unauthorized replication.” *Id.* at 19.

Righthaven is wrong for at least three reasons. First, *WWCG* itself does not stand for the broad proposition that use of an entire work precludes a fair use finding. *WWCG*, 227 F.3d at 1118 (recognizing that “wholesale copying does not preclude fair use *per se*”) (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984))).

Second, giving undue weight to any single factor undermines the crucial balancing of the fair use analysis. Courts have overwhelmingly held that a minimum of all *four* fair use factors must be properly weighed and considered. *See*

*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (all four statutory factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”). Indeed, courts must generally avoid bright-line tests. *Id.* at 577 (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”); *Sony*, 464 U.S. at 448-49 (the fair use doctrine “enable[s] a court to apply an ‘equitable rule of reason’” to copyright infringement claims) (internal quotations and citations omitted); *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1163 (9th Cir. 2007) (“We must be flexible in applying a fair use analysis . . .”). “The ultimate test of fair use is whether the copyright law’s goal of promoting the Progress of Science and the useful Arts would be better served by allowing the use than by preventing it.” *United States v. Am. Soc. of Composers, Authors, and Publishers*, 599 F. Supp. 2d 415, 423-24 (S.D.N.Y. 2009) (citations omitted).

Third, Righthaven’s proposed one-factor test is belied by holdings from courts at all levels finding fair use when an entire copyrighted work has been used.<sup>7</sup> In *Sony*, for example, the Supreme Court found fair use in the wholesale reproduction of television programs. *See Sony*, 464 U.S. at 454-55. The Ninth Circuit, for its part, has twice found fair use when search engines used entire

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<sup>7</sup> Righthaven cites to a statement in *WWCG* saying the court was unable to find such cases. Opening Brief at 14. As shown here, there are plenty.

photographs for commercial purposes. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815, 820-21 (9th Cir. 2003); *Amazon.com*, 508 F.3d at 1165 (copying the entire work in that circumstance is reasonable given the socially valuable purpose of allowing consumers to find information on the Internet).

The Supreme Court and the Ninth Circuit are not alone in these conclusions. *See, e.g., A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630, 642 (4th Cir. 2009) (use of student papers protected by fair use); *Bond v. Blum*, 317 F.3d 385, 393 (4th Cir. 2003) (use of an entire book protected by fair use); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (use of an entire photograph “of little consequence to our [fair use] analysis”); *Triangle Publ’ns, Inc. v. Knight–Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 n.15 (5th Cir. 1980) (“[T]he idea that the copying of an entire copyrighted work can never be fair use ‘is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice.’”); *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (fair use protected Google’s commercial copying of 51 copyrighted writings in their entirety). “[T]here is no general rule barring fair use of entire works....” William Patry, *PATRY ON FAIR USE* § 5:3 (2010); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549, 616 (2008) (27.3% of cases involving whole copies were found to be fair use).

Thus, as a threshold matter, the Court should reject Righthaven's rigid rule precluding a fair use finding where an entire work is used.

**C. The Record Supports A Fair Use Finding.**

Moving beyond Righthaven's ill-conceived approach, an equitable balancing of the four statutory factors supports a fair use finding in this case.

**1. Purpose and Character of the Use**

In assessing the "purpose and character of a use," courts evaluate the extent to which the use "transforms" the original work, *Campbell*, 510 U.S. at 579, that is, whether the use "does not 'merely supersede the objects of the original creation' but rather 'adds something new, with a further purpose or different character . . . .'" *Amazon.com*, 508 F.3d at 1164 (quoting *Campbell*, 510 U.S. at 579). As the Ninth Circuit recognized in *Amazon.com*, where the use is made to "serve a different purpose," that use can be "highly transformative." *Id.* at 1165, 1168 (exact replicas of images, reduced in size to thumbnails, found transformative); *see also Núñez, supra* (modeling photo taken for portfolio purpose was transformed into news when published in newspaper).

Here CIO, a non-profit group, used the Article for the transformative purpose of educating those concerned with immigrant and refugee rights about

evolving issues in that area and to create an archive of related information.<sup>8</sup> “Noncommercial uses to broaden a person’s understanding of an issue can be fair use.” *Newport-Mesa Unified School Dist. v. State of Calif. Dep’t of Educ.*, 371 F. Supp. 2d 1170, 1177 (C.D. Cal. 2005).

Readers of CIO’s “Immigrant and Refugee Issues in the News” blog are most likely Oregon residents interested in the non-profit’s mission. See <http://www.interculturalorganizing.org/what-we-do/civic-engagement> (“Our civic engagement program empowers immigrants and refugees *throughout the Portland Tri-County region*”) (emphasis added) (last visited Jan. 10, 2012).

In contrast, even looking at its original context, the LVRJ published the Article to provide timely, generalized information to Las Vegas residents about events in their local community. See Compl., Ex. 1; see also <http://www.lvrj.com/about/work.html>: “The Las Vegas Review-Journal is a 167,000-circulation morning daily serving the Las Vegas valley...” (last visited Jan. 10, 2012). This is a completely different audience from CIO’s, which expanded public knowledge about immigration enforcement without cannibalizing the market for the original work. That use strongly supports a fair use finding. *Sony*, 464 U.S. at 454 (“to the extent time-shifting expands public

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<sup>8</sup> Righthaven has admitted that an archiving use is transformative. Righthaven’s Identification of Genuine Issues of Material Fact (Dkt. 28) at 8 (“Undoubtedly, that use would be different than the purpose of the use intended by the LVRJ.”).



access to freely broadcast television programs, it yields societal benefits”); *Field*, 412 F. Supp. 2d at 1119 (finding fair use where Google’s cache of works served “different and socially important purposes” than the original works).

Righthaven’s vigorous reliance on the Ninth Circuit’s *WWCG* decision betrays the weakness of its position on the first factor. In that case, a church owned the copyright in a 380-page book written by its founder entitled “Mystery of the Ages.” *WWCG*, 227 F.3d at 1112. The church stopped distributing the book when certain of its doctrines changed. *Id.* at 1113. A splinter group countermanded that directive by printing and distributing 30,000 copies of “Mystery of the Ages.” *Id.* When the new group ignored the church’s cease-and-desist letter, the main church filed a copyright infringement action. *Id.* The splinter group made no attempt to claim that its use was transformative or served some different purpose than the original work, relying entirely on its non-profit status as a defense. That, of course, was not enough, particularly given that group used the distribution the original “Mystery of the Ages” in bulk to draw thousands of members to its congregation, and those members tithed 10% of their income to the new church. *Id.* at 1118.

Unlike *WWCG*, any connection between CIO’s donations and the Article is far-fetched. The CIO’s website lists the reasons that people donate, and they do not relate to the content on the website. *See*

<http://www.interculturalorganizing.org/get-involved/donate/donate-to-cio/> (last visited Jan. 10, 2012). Regardless, even indulging Righthaven's speculation that someone, somewhere gave money to CIO because of the article, that would not overtake the obvious transformative, educational, and non-profit characteristics of the use. *See Campbell*, 510 U.S. at 585 (rejecting bright-line rules concerning the first factor and urging courts to look at the context of the use); *Hustler*, 796 F.2d at 1152-53 (finding fair use "[e]ven assuming that the use had a purely commercial purpose"); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1992) ("Accolade copied Sega's code for a legitimate, essentially non-exploitative purpose, and that the commercial aspect of its use can best be described as of minimal significance."); *Sony Computer Entertainment America v. Bleem*, 214 F.3d 1022, 1028 (9th Cir. 2000) (copying for commercial purpose fair use where "such comparative advertising redounds greatly to the purchasing publics benefit with very little corresponding loss to the integrity of Sony's copyrighted material"); *Kelly*, 336 F.3d at 820 (fair use for commercial use of photographs "due to the public benefit of the search engine and the minimal loss of integrity to Kelly's images").

There is no meaningful factual dispute about the purpose and character of the CIO's use. By Righthaven's own admission, the CIO is a non-profit entity based in Oregon. Compl. ¶ 4 ("CIO is ... a not-for-profit Oregon entity."). And

there is no dispute that CIO's website states that it "is a diverse, grassroots membership organization working to build a multi-racial, multicultural movement for immigrant and refugee rights." Compl. Ex. 2; *see generally* <http://www.interculturalorganizing.org/> (last visited Jan. 10, 2012). The CIO focuses on "education, civic engagement, community organizing and mobilization, and intergenerational leadership development." *See* <http://www.interculturalorganizing.org/who-we-are/mission-values/> (last visited Jan. 10, 2012). Indeed, Righthaven does not dispute that CIO did not profit in any way from the Article appeared on its blog—it merely claims that it would be error to have a *per se* rule allowing non-commercial entities to infringe. Opening Brief at 21.

The best that Righthaven could muster is an assertion that the CIO is involved in "solicitation of donations and membership" elsewhere on its website. *Id.* To even begin to dispute the evidence that CIO made a non-commercial use of the Article, however, Righthaven would at least need to show that some user gave money to CIO *because* the article was available on the CIO website. "To be considered 'commercial' use, the use must 'exploit[] the copyright for commercial gain—as opposed to incidental use as part of a commercial enterprise.'" *Stern v. Does*, No. 2:09-cv-01986-DMG-PLA, 2011 WL 997230, at \*10 (C.D. Cal. February 10, 2011) (quoting *Elvis Presley Enters., Inc. v. Passport*

*Video*, 349 F.3d 622, 627 (9th Cir. 2003)). Righthaven would never be able to make that showing for a single person, let alone a substantial group. It cannot demonstrate that CIO “profited” by using the Article under any rational understanding of that term.

Even if CIO had so profited, that would not suffice to tip the first factor in Righthaven’s favor. The defendant in every fair use case benefits from using the original work. That was true of the photographs in *Kelly* and *Amazon.com*, the computer software in *Sega*, the ad parody in *Hustler*, and the poems in *Field*. Nor does the record reflect any “repeated and exploitative unauthorized copies of copyrighted works [that] were made to save the expense of purchasing authorized copies.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

Moreover, CIO’s good faith effort to benefit the public (evident from the text of its site) weighs in favor of fair use. *See Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); *Lish v. Harper’s Magazine Found.*, 807 F. Supp. 1090 (S.D.N.Y. 1992); *Field*, 412 F. Supp. 2d at 1122. The court may consider “whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.” *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (citation omitted). Likewise, “[c]ourts are more

willing to find a secondary use fair when it produces a value that benefits the broader public interest.” *Id.*

## 2. Nature of the Work

In assessing the “nature of the work” used, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U.S. at 563 (also noting greater fair use rights for works of a published nature). Accordingly, where the original work is largely composed of factual material, a finding of fair use is more likely. *See, e.g., L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002) (republishing of a video depicting a news report was a fair use because it was informational rather than creative).

Here, the Article is short and largely reports facts. As such, it merits only thin protection. *Sony*, 464 U.S. at 496-97 (“informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment”); *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy”); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997) (video of the Reginald Denny beating was “informational and factual and news,” weighing “substantially” in favor of fair use).

Righthaven's position is hardly saved by *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. 2000), which it cites for the proposition that "a news reporter must determine which facts are significant and recount them in an interesting and appealing manner." Opening Brief at 22. *Free Republic* found that the second factor *avored* fair use, precisely *because* the work was a piece of news reporting: "[T]he more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense." *Free Republic*, 54 U.S.P.Q.2d at 1467 (quoting NIMMER ON COPYRIGHT § 13.05[A][4] (2010)). Here, as in *Free Republic*, the "second factor weighs in favor of a finding of fair use of the news articles." 54 U.S.P.Q.2d at 1467. Indeed, the Ninth Circuit has regularly found that the second factor favors fair use when the original work is news reporting. See *L.A. News Serv. v. Reuters Television, Int'l.*, 149 F.3d 987, 994 (9th Cir. 1998); *KCAL-TV*, 108 F.3d at 1122; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

### **3. Amount and Substantiality**

While the entire work was used here, as was necessary to fulfill CIO's mission: to educate its stakeholders about a wide range of immigrant-rights issues and to archive that information in one place. As discussed above, *supra* Section II.B, use of an entire work may be fair. Given the short length of the highly factual article, it would have been impractical to select one of the facts contained

in the Article over another when reporting the article's findings. *See* Compl., Ex. 2. “[Plaintiff] places great emphasis on the fact that [defendant] copied [the work] in its entirety. This emphasis is misplaced. In considering the amount copied under this factor, courts do not focus solely on the quantum of material copied; instead, courts must determine whether the amount copied is ‘reasonable in relation to the purpose of the copying.’” *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 678 (D. Minn. 1995) (quoting *Campbell*, 510 U.S. at 588).

As explained above, *WWCG* does not compel a different result. In finding that use of an entire book weighed against fair use, *WWCG* distinguished *Sony*'s finding that copying an entire work was appropriate because viewers had been invited to watch television programs “in [their] entirety free of charge.” *WWCG*, 227 F.3d at 1118 (quoting *Sony*, 464 U.S. at 449-50). Here, the entire Article was and remains available to viewers free of charge.<sup>9</sup>

#### **4. Effect on the Value and Market**

This factor balances the benefit that the public will derive if the use is permitted and the personal gain that the copyright owner will receive if the use is denied. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981). The public benefits from CIO's use by gaining knowledge about immigrant-rights issues. *See*

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<sup>9</sup> A toolbar on the *lvvj.com* website invites consumers to read the article free of charge *and without any advertising* by clicking on the “print this” icon. *See* <http://www.lvrj.com/news/questions-generated-by-287-g--97289294.html>.

*Sony*, 464 U.S. at 451 (accepting fair use because a contrary result would “inhibit access to ideas without any countervailing benefit.”).

And the market for the Article is not harmed by CIO’s use. In fact, Righthaven has no licensing market for the work: Righthaven does not publish news stories, but files copyright infringement lawsuits, as part of a business model of “encouraging and exacting settlements from Defendants cowed by the potential costs of litigation and liability.” Order, *Righthaven v. Hill*, No. 1:11-cv-00211-JLK (Dkt. 16) (D. Colo. Apr. 7, 2011). Righthaven endeavors “to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar.” Order on Mot. for Recons., *Democratic Underground, supra* (Dkt. 94) at 2. Litigation use does not make a market harm. See *Video-Cinema Films v. CNN*, No. 98 CIV. 7128IBSJ, 2001 WL 1518264, at \*9 (S.D.N.Y. Nov. 28, 2001) (finding no market harm when only payments were settlements to avoid litigation).

Small wonder that Righthaven provided no evidence or even alleged any actual harm in the district court proceedings. *Righthaven v. CIO*, No. 2:10-cv-01322-JCM-LRL, 2011 WL 1541613, at \*5 (D.Nev. 2011) (noting that “plaintiff has failed to allege that a ‘market’ exists for its copyright at all”). At the December 28, 2010 OSC hearing, the District Court asked Righthaven directly whether or not it had a licensing market for the work. Tr. of Hr’g on Order to



Show Cause re Fair Use, (Dkt. 27) at 24:11-24. Righthaven's counsel said he would have to check, but that this was a subject for discovery. *Id.* However, in its subsequent brief (Dkt. 28), Righthaven did not identify this as a disputed fact, or suggest that it needed discovery on this issue.

Indeed, in a related case, Righthaven admitted that "Righthaven has not engaged in the commercial exploitation of news articles." Righthaven's Response to DiBiase's Motion to Compel, *DiBiase, supra* (Dkt. 68) at 5.<sup>10</sup> "Materials from a proceeding in another tribunal are appropriate for judicial notice." *Biggs v. Terhune*, 334 F.3d 910, 915 n. 3 (9th Cir. 2003).

Thus, by any measure, Righthaven has failed to meet its burden. *See Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (fourth factor "greatly favors" fair use where the copyright holder was not commercially exploiting photograph); *Field*, 412 F. Supp. 2d at 1121 (fourth factor favored defendant where there was "no evidence of any market for [the copyright holder's] works."); NIMMER, § 13.05[A][4] ("On occasion, the lack of market harm is apparent").<sup>11</sup>

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<sup>10</sup> Righthaven did briefly contract for a \$1/year license fee in Righthaven's May 2011 amendment to its Strategic Alliance Agreement with Stephens Media, whereby the original publisher would start to pay to license its own articles. *Pahrump* Dkt. 26, Exh. 3. The May 2011 amendment was superseded by a July 2011 amendment, which removed this nominal license fee provision. *Pahrump* Dkt. 57, Exh. 1.

<sup>11</sup> Numerous courts have determined that Righthaven is not in fact the owner of copyrighted works purportedly assigned by Stephens Media. *See, e.g., Democratic*

Grasping at straws, Righthaven asks the Court to adopt a false “presumption” of harm based on CIO’s alleged commercial use of the Article. In support, Righthaven cites in *Sony*, 464 U.S. at 451, but ignores actually dispositive Supreme Court jurisprudence. Opening Brief at 23-24. Specifically, in its 1994 *Campbell* decision, the Supreme Court clarified that no presumption applies absent “verbatim copying of the original in its entirety for commercial purposes,” since absent such “mere duplication” there was no basis to presume that the copy “serves as a market replacement” for the original. *Campbell*, 510 U.S. at 591 (emphasis added). When, “on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.” *Id.*

Accordingly, *Campbell* reversed the Court of Appeals’ presumption of market harm, in a decision that decisively rejects Righthaven’s assertion of a presumption here. As the Supreme Court stated, “[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of

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*Underground*, 791 F. Supp. 2d 968, *Hoehn*, 792 F. Supp. 2d 1138. Even if one considered the publisher’s market, CIO did not harm the LVRJ’s market for the work. The LVRJ elected to give the Article away for free on the Internet and continues to do so to this day. It is undisputed that the LVRJ operates in Las Vegas and CIO is in Portland, Oregon. Both focus on a local market that does not overlap. Because LVRJ does not compete in the Oregon market, it is difficult to fathom a scenario in which CIO’s use harmed the LVRJ.

§ 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country.’” *Campbell*, 510 U.S. at 584 (citations omitted).

Moreover, presumptions of harm are now heavily disfavored in intellectual property cases, including copyright litigation. In *eBay Inc.*, *supra*, the Supreme Court rejected a long-standing Federal Circuit rule that courts should nearly always issue injunctions when a patent right is violated. Instead, the Court held that there is no presumption of irreparable harm, and where patent holders do not make products but instead do nothing but file lawsuits, the burden is squarely on the patent holder to prove harm.

Since *eBay*, both this Court and other Circuits have applied this rule to deny the presumption of harm for copyright injunctions. *See Salinger v. Colting*, 607 F.3d 68, 75, 79 (2d Cir. 2010) (applying *eBay* to copyright case); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 980-81 (9th Cir. 2011) (agreeing with *Salinger*); *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998-99 (9th Cir. 2011) (same); *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008); *Christopher Phelps & Assocs. v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007). Even courts prior to the *eBay* line of cases expressed skepticism toward presumptions of harm for the fourth factor when the copyright holder failed to demonstrate the existence of a commercial market for its work. *Am.*

*Geophysical Union*, 60 F.3d at 930 (fair use favored where potential harm “would be to a potential market or value that the copyright holder has not typically sought to, or reasonably been able to, obtain or capture”); *see also Koons*, 467 F.3d at 258; *Field*, 412 F. Supp. 2d at 1121-22.

Here, Righthaven argues that it is entitled to a presumption of harm that directly contradicts the rule in *eBay*, *Salinger*, and *Google*. Under those precedents, the mere ownership of a copyright does not entitle a plaintiff to any presumptions of harm, even when infringement is beyond dispute. Copyright plaintiffs must independently prove harm with admissible evidence, an opportunity Righthaven was repeatedly offered and failed to take up.

Without any presumptions and without any showing that there was either a market for the work or harm to said market, Righthaven cannot justify overturning the District Court’s finding on the fourth factor.

##### **5. The Public Interest Favors A Fair Use Finding**

Finally, the fair use analysis must consider the public interest and the purposes of copyright law. The “Supreme Court ... has ... directed [courts] to be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public.” *Amazon.com*, 508 F.3d at 1166 (citations omitted). The central purpose of copyright, of course, is “[t]o promote the Progress of Science and useful Arts,” U.S. CONST. art. I, §8, cl. 8, and to serve

“the welfare of the public.” *Sony*, 464 U.S. at 429 n.10 (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909)). Indeed, the doctrine of fair use was developed to provide a “means of balancing the need to provide individuals with sufficient incentives to create public works with the public’s interest in the dissemination of information.” *Hustler*, 796 F.2d at 1151. Thus, fair use serves to ensure that courts “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (*en banc*), *cert. denied*, 520 U.S. 1156 (1997) (citation omitted).

The CIO’s use serves the public welfare by providing factual information on an important issue, enhancing in turn its members’ ability to advocate more effectively for immigrant and refugee rights. Righthaven’s use, by contrast, subverts the Copyright Act. As the District Court correctly noted, “Plaintiff’s litigation strategy has a chilling effect on potential fair uses of Righthaven-owned articles, diminishes public access to the facts contained therein, and does nothing to advance the Copyright Act’s purpose of promoting artistic creation.” *CIO*, 2011 WL 1541613 at \*5. Moreover, given that Righthaven neither creates nor distributes actual creative expression, it is ill-placed to invoke the public interest in encouraging the progress of science and the useful arts.

#### **IV. Conclusion**

For the reasons stated above, the District Court's judgment should be affirmed.

Dated: January 13, 2012

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amici Curiae In Support Of Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 13, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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