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7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF NEVADA**  
9

10  
11 RIGHTHAVEN, LLC, a Nevada limited- )  
liability company, )

12 Plaintiff, )

13 vs. )

14 REALTY ONE GROUP, INC., a Nevada )  
15 corporation; DAVID TINA, an individual, )  
and MICHAEL J. NELSON, an individual, )

16 Defendants. )  
17

Civil Action No. 2:10-CV-01036 LRH-PAL

18 **DEFENDANT, MICHAEL J. NELSON'S MOTION TO DISMISS**

19 **POINTS AND AUTHORITIES**

20 **I. STATEMENT OF FACTS**

21 Defendant Michael Nelson hereby moves this Court for dismissal of the Complaint filed  
22 against him by Righthaven, LLC. (hereinafter "Righthaven"). The gravamen of the claims  
23 brought in that Complaint are for copyright infringement, arising out of Mr. Nelson's  
24 reproduction of a portion of one article that appeared in the online version of the Las Vegas  
25 Review Journal.

26 One of the articles in question was authored by Hubble Smith, the authors of the other  
27 two articles is not disclosed in the Complaint and its Exhibits. These persons are purportedly

1 employees of the Review Journal, which, purportedly, owned the copyrights in the intellectual  
2 property created by each. The ownership of the copyright in the Smith work has been  
3 transferred to Righthaven.<sup>1</sup> Plaintiff Righthaven has alleged that the inclusion of portions of the  
4 first article into Mr. Nelson's blog constitutes an infringement of the copyright in that work.

5 Michael Nelson is a realtor, duly licensed in Nevada. His practice is limited to  
6 representing purchasers and sellers of single family homes in Las Vegas, Nevada. Mr. Nelson  
7 provides a blog of information, accessible to the public, on issues related to his profession, to  
8 wit, the suitability and desirability of homeownership in Las Vegas. Information copied from  
9 the Hubble Smith Review Journal article was placed in this blog, As will be shown, the  
10 reproduction of the small portion of the Smith article, alleged in the Complaint, does not rise to  
11 the level of a copyright violation, therefore, the Complaint brought by Righthaven against  
12 Michael Nelson must be dismissed in its entirety.

13 **II. STANDARD OF REVIEW**

14 For a defendant to prevail on a motion to dismiss under Federal Rule of Civil Procedure  
15 12(b)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of his  
16 claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957);  
17 Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9<sup>th</sup> Cir. 1993). The purpose of a motion  
18 under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for  
19 relief in the complaint. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9<sup>th</sup> Cir.  
20 1987).

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27 <sup>1</sup> As the ownership of the copyright in the second and third articles is not asserted in  
the Complaint, Defendant Nelson is seeking dismissal of such claims, *infra*.

1 **III. ARGUMENT**

2 **A. DISMISSAL OF THE CLAIMS OF ALLEGED COPYRIGHT INFRINGEMENT**  
3 **OF ARTICLES FOR WHICH NO COPYRIGHT OWNERSHIP HAS BEEN**  
4 **DEMONSTRATED IS WARRANTED**

5 The Complaint alleges three instances of alleged copying, but asserts ownership of only  
6 one of the articles allegedly copied. The first article, authored by Hubble Smith, is entitled  
7 “Program May Level Housing Sale Odds” (hereinafter “Program Article”). It is attached as  
8 Exhibit “2” to the Complaint. Plaintiff Righthaven asserts ownership of the Program Article  
9 copyright at paragraph 16 of the Complaint.

10 The second work that Righthaven mentions is entitled “Las Vegas Property Values at  
11 2000 Levels,” by author unknown. The Complaint fails to demonstrate Righthaven’s ownership  
12 of the copyright in this work. The third work that Righthaven mentions is entitled “More Can  
13 Qualify for Homeownership in Las Vegas,” by author unknown. Similarly, the Complaint fails  
14 to demonstrate Righthaven’s ownership of the copyright in this work.

15 As ownership of the copyright in a work is a prerequisite to bringing a lawsuit to enforce  
16 the copyright,<sup>2</sup> and as Righthaven has not demonstrated, in the Complaint, ownership of the  
17 copyright in either of the last two works mentioned, dismissal is warranted regarding these  
18 copyright claims.

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23 <sup>2</sup> 17 U.S.C. 411 (a) states, in pertinent part:

24 (a) Except for an action brought for a violation of the rights of the  
25 author under section 106A (a), and subject to the provisions of  
26 subsection (b), no civil action for infringement of the copyright in  
27 any United States work shall be instituted until preregistration or  
registration of the copyright claim has been made in accordance  
with this title.

1 **B. ANY ALLEGED INFRINGEMENT BY MICHAEL NELSON IS ALLOWED**  
2 **UNDER THE FAIR USE DOCTRINE**

3 Mr. Nelson believes that Plaintiff cannot make out a prima facie copyright infringement  
4 claim, as the amount copied of the Program Article was small.<sup>3</sup> Nevertheless, without waiving  
5 his assertion that regarding whether a prima facie case of copyright infringement can be  
6 presented, the doctrine of fair use provides a complete defense to such claim. Therefore, the  
7 infringement claim should be dismissed.

8 The doctrine of fair use is codified in the Copyright Act of 1976, 17 U.S.C. §107, which  
9 states, in part:

10 Notwithstanding the provisions of sections 106 and 106A, the fair use of a  
11 copyrighted work, including such use by reproduction in copies or phonorecords  
12 or by any other means specified by that section, for purposes such as criticism,  
13 comment, news reporting, teaching (including multiple copies for classroom  
use), scholarship, or research, is not an infringement of copyright. In determining  
whether the use made of a work in any particular case is a fair use the factors to  
be considered shall include——

14 (1) the purpose and character of the use, including whether such use is of a  
15 commercial nature or is for nonprofit educational purposes;

16 (2) the nature of the copyrighted work;

17 (3) the amount and substantiality of the portion used in relation to the  
copyrighted work as a whole; and

18 (4) the effect of the use upon the potential market for or value of the copyrighted  
19 work.

20 No one factor is conclusive, but all four factors must be weighed. Campbell v. Acuff-Rose  
21 Music, Inc., 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).<sup>4</sup>

22 \_\_\_\_\_  
23 <sup>3</sup> That Program Article, as it appears in Exhibit “2” to Plaintiff’s Complaint,  
24 consists of 18 paragraphs, of which, only 5 were copied.

25 <sup>4</sup> "The task is not to be simplified with bright-line rules, for the statute, like the  
26 doctrine it recognizes, calls for case-by-case analysis.... Nor may the four  
27 statutory factors be treated in isolation, one from another. All are to be explored,  
and the results weighed together, in light of the purposes of copyright." Campbell  
v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78, 114 S.Ct. 1164, 127 L.Ed.2d  
500 (1994).

1 The fair use doctrine is intended to balance the rights of authors against the creative  
2 efforts of others, and to promote the welfare of the public:

3 "From the infancy of copyright protection, some opportunity for fair use of  
4 copyrighted materials has been thought necessary to fulfill copyright's very  
5 purpose...." Campbell, 510 U.S. at 575, 114 S.Ct. 1164. "The fair use doctrine  
6 thus `permits [and requires] courts to avoid rigid application of the copyright  
7 statute when, on occasion, it would stifle the very creativity which that law is  
8 designed to foster.'" Id. at 577, 114 S.Ct. 1164 (quoting Stewart v. Abend, 495  
9 U.S. 207, 236, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990)) (alteration in original).

7 \* \* \*

8 The purpose of copyright law is "[t]o promote the Progress of Science and useful  
9 Arts," U.S. CONST. art. I, § 8, cl. 8, and to serve "the welfare of the public."  
10 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n. 10, 104  
11 S.Ct. 774, 78 L.Ed.2d 574 (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess. 7  
12 (1909)).

12 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9<sup>th</sup> Cir. 2007).

13 The alleged infringement by Michael Nelson qualifies as fair use under the four factors  
14 of the fair use doctrine.

15 **1) Purpose and Character of the Use**

16 The most important component of the inquiry into the purpose and character of the use is  
17 the question whether the allegedly fair use was "transformative," in other words, whether the  
18 second use adds something new, with a further purpose or different character, altering the first  
19 with new expression, meaning, or message. Los Angeles News Service v. CBS Broadcasting,  
20 Inc., 305 F.3d 924 (9<sup>th</sup> Cir. 2002).<sup>5</sup>

21 The form in which Mr. Nelson chose to republish the material with other material  
22 regarding the state of the housing market in his blog is transformative. Mr. Nelson aggregated  
23 the section of the Hubble article into his blog with snippets of other information regarding the  
24 state of the Southern Nevada housing market, thereby transforming the nature of the individual  
25 article into a montage of information.

26 \_\_\_\_\_  
27 <sup>5</sup> Opinion amended by Los Angeles News Service v. CBS Broadcasting, Inc., 313  
F.3d 1093 (9<sup>th</sup> Cir. 2002).

1           Indeed, the use of the copied material here is similar to the use of thumbnail pictures in  
2 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9<sup>th</sup> Cir. 2007). In that case, Perfect 10  
3 sued Amazon and Google as a result of Google’s search engine reproducing thumbnail (reduced  
4 size) images of Perfect 10’s copyrighted images. In finding that the thumbnail reproduction was  
5 “transformative,” the court stated:

6           Google’s use of thumbnails is highly transformative. In *Kelly*, we concluded that  
7 Arriba’s use of thumbnails was transformative because “Arriba’s use of the  
8 images serve[d] a different function than Kelly’s use—improving access to  
9 information on the [I]nternet versus artistic expression.” Although an image may  
10 have been created originally to serve an entertainment, aesthetic, or informative  
11 function, a search engine transforms the image into a pointer directing a user to a  
12 source of information.<sup>6</sup>

13           Similar to the Google thumbnails, the materials presented in Mr. Nelson’s blog serve not only  
14 the purpose of gathering varied materials on the state of the Las Vegas housing market, it also  
15 acted as a pointer to the source of the information, the Review Journal website.<sup>7</sup>

16           As the use of the copied material is in a transformative context, and acted as a pointer to  
17 the source material itself, this factor weighs in favor of a finding of fair use.

18           **2) *Nature of the Copyrighted Work***

19           The nature of the allegedly copied work is factual news reporting. Such information,  
20 which is less endowed with the creative activity than works of fiction, makes it easier to find  
21 fair use. “Works that are creative in nature are closer to the core of intended copyright  
22 protection than are more fact-based works.”<sup>8</sup> “The law generally recognizes a greater need to

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23           <sup>6</sup> Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9<sup>th</sup> Cir. 2007)  
24 citations omitted.

25           <sup>7</sup> See Exhibit “3” to the Complaint, fourth page, at bottom, where it states “Click  
26 here to read the full article.” Mr. Nelson’s posts all provided access to the origin  
27 of the article, and therefore, would have served as a feeder or pointer to the  
original source material, not unlike a search engine.

<sup>8</sup> A & M Records v. Napster, 239 F.3d 1004, 1016 (9<sup>th</sup> Cir. 2001) (citing Campbell,  
510 U.S. at 586, 114 S.Ct. 1164) (internal quotation marks omitted).

1 disseminate factual works than works of fiction or fantasy.”<sup>9</sup> As explained further in Los  
2 Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9<sup>th</sup> Cir. 2002):

3 We have analyzed the "nature of the copyrighted work" factor extensively in  
4 prior LANS litigation. "The Denny beating tape is informational and factual and  
5 news; each characteristic strongly favors [the user]. Likewise the fact that the  
6 videotape is not without creative aspect in that it is the result of [Marika] Tur's  
skills with a camera, still this factor makes it a great deal easier to find fair use."  
This factor clearly points toward fair use.<sup>10</sup>

7 Moreover, since the article by the Review Journal appeared on the internet before it was copied  
8 to the internet by Mr. Nelson, this factor weighs in favor of fair use. “Published works are more  
9 likely to qualify as fair use because the first appearance of the artist's expression has already  
10 occurred.”<sup>11</sup> Thus, the “nature of the copyright work” factor, when taken as a whole, mitigates  
11 in favor of a finding of fair use.

12 **3) Amount of the Copyrighted Work**

13 This factor also favors a finding of fair use, since only the portions of the article in  
14 question that were needed were copied. “While wholesale copying does not preclude fair use  
15 per se, copying an entire work militates against a finding of fair use.”<sup>12</sup>

16 Case law interpreting this factor, though of course faithful to the statute's  
17 direction that we are to consider the substantiality of the portion used "in relation  
18 to the copyrighted work as a whole," has also noted that the purpose and

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21 <sup>9</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563, 105 S.Ct.  
22 2218, 85 L.Ed.2d 588 (1985)

23 <sup>10</sup> 305 F.3d at 940; opinion amended by Los Angeles News Service v. CBS  
Broadcasting, Inc., 313 F.3d 1093 (9<sup>th</sup> Cir. 2002)..

24 <sup>11</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564, 105 S.Ct.  
25 2218, 85 L.Ed.2d 588 (1985) (noting that the scope of fair use is narrower with  
26 respect to unpublished works because the author's right to control the first public  
appearance of his work weighs against the use of his work before its release).

27 <sup>12</sup> Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9<sup>th</sup>  
Cir. 2000).

1 character of the use are relevant in evaluating the denominator. See, e.g., *Kelly v.*  
2 *Arriba Soft Corp.*, 280 F.3d 934, 943 (9th Cir. 2002) ("If the secondary user only  
3 copies as much as is necessary for his or her intended use, then this factor will  
not weigh against him or her.").<sup>13</sup>

4 As stated *supra*, the article in question, entitled "Program May Level Housing Sale  
5 Odds" consists of 29 sentences in 18 paragraphs. Mr. Nelson copied 8 of the 29 sentences, 5 of  
6 the 18 paragraphs. By either measure, Mr. Nelson copied less than 28% of the article.

7 More importantly, the portion copied of the article was only the amount needed to  
8 introduce the information regarding the program being offered by Fannie-Mae. Mr. Nelson  
9 avoided copying the balance of the article, which analyzed the potential effects that this program  
10 might have in Las Vegas. This factor does not weigh against a finding of fair use.

#### 11 **4) *Effect of the Use Upon the Potential Market***

12 Because the use of the copied material was transformative, it will likely have no effect  
13 on the market for internet news articles. A transformative work is less likely to have an adverse  
14 impact on the market of the original than a work that merely supersedes the copyrighted work.  
15 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591, 114 S.Ct. 1164, 127 L.Ed.2d 500  
16 (1994) (stating that a work that supersedes the object of the original serves as a market  
17 replacement for it, making it likely that market harm will occur, but when the second use is  
18 transformative, market substitution is less certain).

19 Mr. Nelson did not profit from the advertising on the website where the copied materials  
20 were displayed, unlike the alleged infringers in both the *Google*<sup>14</sup> and *Arriba*<sup>15</sup> cases. Blogs, by  
21 their very nature, are informative, and are not written for commercial gain. Mr. Nelson did not  
22 place the advertising on the blog website, was not in control of such advertising, and was not  
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24 <sup>13</sup> *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 941 (9th Cir.  
25 2002); opinion amended by *Los Angeles News Service v. CBS Broadcasting, Inc.*,  
26 313 F.3d 1093 (9th Cir. 2002).

27 <sup>14</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>15</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).



1 profiting from the advertising on the blog website. His blog, in contrast, was created to be  
2 informative, not as a source of revenue. The material was placed into Mr. Nelson's blog  
3 primarily to educating the general public regarding the suitability of Las Vegas as a location for  
4 the purchase of real estate.

5 Moreover, because Mr. Nelson's blog was acting as a feeder or pointer to the Review  
6 Journal website, it would likely benefit, not harm the Review Journal's market.

7 Arriba's use of Kelly's images in its thumbnails does not harm the market for  
8 Kelly's images or the value of his images. By showing the thumbnails on its  
9 results page when users entered terms related to Kelly's images, the search engine  
would guide users to Kelly's web site rather than away from it.<sup>16</sup>

10 It is unclear as to whether Righthaven has purchased any right, other than the right to initiate  
11 litigation, from the Review Journal with regards to the Program Article. If it is demonstrated  
12 that the Plaintiff cannot derive any commercial benefit or royalties from the internet publishing  
13 of the article, considerations of effect upon the potential market should automatically be found  
14 in favor of Mr. Nelson.

15 **C. DISMISSAL IS WARRANTED BECAUSE PLAINTIFF BRINGS THE CLAIMS**  
16 **WITH UNCLEAN HANDS**

17 Plaintiff brings these claims with unclean hands, which mandates dismissal of this  
18 action. The defense of unclean hands can be invoked as a defense in a copyright infringement  
19 action.<sup>17</sup>

20 The actions of Plaintiff Righthaven in pursuing the instant action for copyright  
21 infringement smack of barratry.<sup>18</sup> Righthaven was created by its counsel, Steven Gibson,  
22 apparently to pursue violations of the copyrights it purchased from the Review Journal.  
23 Righthaven is not the author of the work that was alleged to have been copied. In fact,

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24  
25 <sup>16</sup> Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9<sup>th</sup> Cir. 2003).

26 <sup>17</sup> See 4 Nimmer on Copyright § 13.09[B].

27 <sup>18</sup> Barratry is defined in Black's Law Dictionary (6<sup>th</sup> Ed.) as "the offense of frequently exciting and stirring up quarrels and suits."

1 Righthaven purchased the copyright in the Program Article sometime after the alleged  
2 infringement occurred, and likely purchased the copyright with the specific intention of pursuing  
3 this action against Mr. Nelson.

4 Thus, it appears that Mr. Gibson, upon discovering these infringements, purchased the  
5 copyrights so as to pursue the infringement actions against the allegedly liable parties. Neither  
6 the Review Journal, nor Righthaven, sent a cease and desist letter, nor any other request to  
7 discontinue the alleged infringement, prior to initiating this action. Instead, Righthaven has  
8 brought this lawsuit (and apparently 80 others) against alleged infringers, further adding to this  
9 Court's overloaded docket. Righthaven's motivation for avoiding the simple act of sending a  
10 letter requesting that Mr. Nelson cease and desist is simple, it is using these lawsuits as a source  
11 of revenue. Such abuse of legal process should be rejected.

12 **CONCLUSION**

13 In this case, Michael Nelson has operated a blog for the purpose of educating the general  
14 public regarding the state of the housing market in Southern Nevada. His actions in copying a  
15 portion of a Review Journal article, consonant with this purpose, fall within the fair use  
16 doctrine. The nature of a blog is to be informative, and such uses for the internet should be  
17 encouraged by copyright law, especially where the author of the blog, as Mr. Nelson herein,  
18 does not derive commercial benefit directly from the webpage that displays the blog. Defendant  
19 Michael Nelson asks this Court to dismiss the allegations of copyright infringement based upon  
20 Plaintiff's lack of ownership of the copyright, fair use of copied materials and unclean hands.

21 DATED this 29th day of July, 2010.

22 LYNCH, HOPPER & SALZANO, LLP

23 /s/ Sergio Salzano

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