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6  
7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
9

10 RIGHTHAVEN LLC, a Nevada limited-  
liability company,

11  
12 **Plaintiff,**

13 v.

14 PAHRUMP LIFE, an entity of unknown origin  
and nature; MAREN SCACCIA, an  
15 individual; and MICHAEL SCACCIA, an  
16 individual,

17 **Defendants.**  
18

Case No.: 2:10-cv-01575-JCM-PAL

**PLAINTIFF RIGHTHAVEN LLC'S  
RESPONSE TO MICHAEL SCACCIA'S  
MOTION FOR SUMMARY JUDGMENT**

19 Righthaven LLC (“Righthaven”) hereby responds to Defendant Michael Scaccia’s  
20 (“Defendant”) Motion for Summary Judgment (the “Motion,” Doc. # 12). This response is based  
21 on the pleadings and papers on file in this action, any oral argument this Court may allow, and  
22 any other matter upon which this Court takes notice.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 Defendant asks this Court to conclude, as a matter of law, that his unauthorized  
26 replication of the literary piece “Warden, other employees resign from prison in escape fallout”  
27 (the “Work”) was fair use. Defendant’s submission, however, fails to include any admissible  
28

1 evidence upon which the Court could rely to grant the relief requested. This fact, standing alone,  
2 strikes a fatal blow to Defendant's Motion.

3 Defendant's lack of evidentiary support for his Motion aside, his submission clearly fails  
4 to establish that he conduct is exempt from liability on fair use grounds. In this regard,  
5 Defendant has admitted crucial facts that unquestionably weigh in favor of finding against fair  
6 use. In fact, the evidence before the Court more appropriately supports a finding that Defendant  
7 should be barred from advancing a fair use defense in this case. While the Court may not be  
8 prepared to enter such relief at this stage of the proceedings and in view of Defendant's *pro se*  
9 status, at a minimum Defendant's Motion should be denied.

10 **II. STATEMENT OF FACTS**

11 Righthaven filed this copyright infringement action on September 14, 2010. (Doc. # 1.)  
12 Righthaven asserts that it is the owner of the copyrighted Righthaven is the owner of the  
13 copyright in the Work. (*Id.* at 2, Ex. 1.)

14 Righthaven contends that Defendant is, and has been at all times relevant to this lawsuit,  
15 identified by the current registrar, GoDaddy.com, Inc. ("GoDaddy"), as the registrant of the  
16 Internet domain found at <pahrumplife.org> (the "Domain" and the content available through the  
17 Internet at the Domain is referred to herein as the "Website"). (*Id.* at 2.) Defendant is, and has  
18 been at all times relevant to this lawsuit, identified by GoDaddy as an administrative contact and  
19 technical contact of the Domain. (*Id.*)

20 Righthaven contends that on or about August 15, 2010, the Defendant displayed an  
21 unauthorized reproduction of the Work as part of the content accessible on the Website. (*Id.* at  
22 3-4.) Righthaven further maintains that Defendant willfully copied the Work without  
23 authorization and displayed the unauthorized reproduction on the Domain. (*Id.* at 5.) Righthaven  
24 has, among other things, sought entry of a permanent injunction and an award of statutory  
25 damages against Defendant and others defending parties named in the action. (*Id.* at 5-6.)  
26 Righthaven has demanded a jury trial in this case. (*Id.* at 7.)

### 1 **III. APPLICABLE STANDARDS**

2 Entry of summary judgment under Federal Rule of Civil Procedure 56 (“Rule 56”) is only  
3 proper where “the pleadings, the discovery and disclosure materials on file, and any affidavits  
4 show there is no genuine issue as to any material fact and the movant is entitled to judgment as a  
5 matter of law.” FED.R.CIV.P. 56(c). The moving party has the burden of demonstrating the  
6 absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
7 242, 256 (1986). This burden is only discharged through the submission of admissible evidence  
8 in support of the claimed basis for relief. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325  
9 (1986); *see also Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). As required on a motion  
10 for summary judgment, the facts are construed “in the light most favorable to the party opposing  
11 the motion.” *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).  
12 Moreover, “at the summary judgment stage the judge’s function is not himself to weigh the  
13 evidence and determine the truth of the matter but to determine whether there is a genuine issue  
14 for trial. *Anderson*, 477 U.S. at 249. “Credibility determinations, the weighing of evidence, and  
15 the drawing of legitimate inferences from facts are jury functions, not those of a judge, whether  
16 he is ruling on a motion for summary judgment or for a directed verdict.” *Id.* at 256.

17 Rule 56 must be construed “with due regard . . . for the rights of persons asserting claims  
18 and defenses that are adequately based in fact to have those claims and defenses tried to a jury.”  
19 *Celotex Corp.*, 477 U.S. at 327. Summary judgment is proper only after there is an adequate  
20 opportunity for discovery. *Id.* at 326. This is particularly true when evidence is presented by a  
21 moving party in support of summary judgment on matters exclusively within their possession or  
22 based on their knowledge and there has not been an adequate opportunity to conduct discovery  
23 on those matters. *See Anderson*, 477 U.S. at 257. In fact, “where the facts are in possession of  
24 the moving party a continuance of a motion for summary judgment for purposes of discovery  
25 should be granted as a matter of course.” *International Raw Materials, Ltd. v. Stauffer Chem.*  
26 *Co.*, 898 F.2d 946, 949 (3d 1990)(internal quotation marks omitted).

27 Application of the foregoing standards in view of the record before the Court  
28 demonstrates that summary judgment is unwarranted based on Defendant’s arguments that his

1 infringing conduct falls within the Fair Use exception. To begin with, Defendant has failed to  
2 support his request for summary judgment with admissible evidence, which standing along  
3 provides a basis for denying the Motion. The lack of any admissible evidence aside, summary  
4 judgment is substantively unwarranted under a proper four factor fair use analysis. Moreover,  
5 summary judgment is unwarranted given the fact discovery has yet to be conducted in this case  
6 by either party.

#### 7 **IV. ARGUMENT**

##### 8 **A. *The Court is Compelled to Deny Defendant's Motion Because He Has Failed to*** 9 ***Come Forth With Admissible Evidence.***

10 The Court is required to deny Defendant's summary judgment request because he has  
11 failed to support the Motion with admissible evidence.

12 As noted above, a party moving for summary judgment under Rule 56 has the burden of  
13 demonstrating the absence of a genuine issue of material fact for trial. *Anderson*, 477 U.S. at  
14 256. This burden is only discharged through the submission of admissible evidence in support of  
15 the claimed basis for relief. *See Celotex Corp.*, 477 U.S. at 325 (1986); *see also Musick*, 913  
16 F.2d at 1394. Moreover, the Court may only rely on declarations that contain facts within the  
17 declarant's personal knowledge and that would otherwise be admissible under the Federal Rules  
18 of Evidence. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 778 (9th Cir. 2002); *Bank*  
19 *Melli v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995).

20 Here, Defendant has supported the Motion with absolutely no admissible evidence, which  
21 he is obligated to provide in order to be entitled to entry of summary judgment. In this regard,  
22 Defendant has submitted a three paragraph declaration that merely states: (1) he is the  
23 Defendant; (2) "[a]ll statement of fact set forth in the FACTS section of the memorandum to  
24 which this Declaration is attached are true of [his] own personal knowledge, except those stated  
25 on information and belief;" and (3) an affirmation that his factual statements are made under  
26 penalty of perjury "except those matters stated on information and belief . . ." (Doc. # 12-1.)  
27 Defendant's declaration completely fails to set forth the basis for his alleged personal knowledge  
28 of any particular fact or assertion upon which he relies. (*Id.*) Moreover, Defendant's declaration

1 fails to delineate what the factual assertions are and how the factual assertions constitute  
2 admissible evidence. (*Id.*) Furthermore, Defendant’s declaration fails to identify what, if any,  
3 factual assertions are premised on “information and belief.” (*Id.*) As the Court is likely aware,  
4 declarations based on “information and belief” are entitled to no evidentiary weight where the  
5 declarant lacks personal knowledge. *See Bank Melli*, 58 F.3d at 1412. Granted, the Defendant is  
6 not a lawyer. This, however, does not justify departing from the requirements mandated by Rule  
7 56 and decisions interpreting Rule 56.

8 In short, Defendant is required to come forth with evidence and demonstrate its  
9 admissibility to be entitled to entry of summary judgment in his favor. Defendant has  
10 completely failed to demonstrate that the Motion is supported by admissible evidence.  
11 Accordingly, the Court is compelled to deny Defendant’s Motion.

12 **B. *Defendant’s Failure to Submit Admissible Evidence Aside, Entry of Summary***  
13 ***Judgment on Fair Use Grounds is Unwarranted.***

14 Defendant asks this Court to enter summary judgment in his favor by finding that his  
15 infringing conduct qualifies as fair use. Defendant’s own unsworn statements submitted in  
16 support of the Motion support its denial, either through the existence of genuine issues of  
17 material fact or due to Righthaven’s inability to explore these genuine issues of material fact  
18 through discovery.

19 Fair use is an affirmative defense upon which a defendant bears the burden of proof and  
20 the burden of persuasion. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th  
21 Cir. 2007). “In ruling on a motion for summary judgment, the judge must view the evidence  
22 presented through the prism of the substantive evidentiary burden.” *Anderson*, 477 U.S. at 254.  
23 As explained by the United States Court of Appeals for the Ninth Circuit (the “Ninth Circuit”):

24 “Fair use is a mixed question of law and fact. If there are no  
25 genuine issues of material fact, or if, even after resolving all issues  
26 in favor of the opposing party, a reasonable trier of fact can reach  
27 only one conclusion, a court may conclude as a matter of law  
28 whether the challenged use qualifies as a fair use of the  
copyrighted work.”

1 *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997)(quoting  
2 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986)).

3 Further complicating entry of summary judgment in fair use cases is that the Court's  
4 inquiry is not controlled by a bright line test. Specifically, when a copyright defendant asserts  
5 the affirmative defense of fair use, the district court must consider the following factors: "(1) the  
6 purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and  
7 substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use  
8 upon the potential market for the work or the value of the work." *A&M Records, Inc. v. Napster,*  
9 *Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (internal quotation marks omitted); *see also* 17 U.S.C.  
10 § 107. The fair use doctrine requires a "case-by-case analysis." *Campbell v. Acuff-Rose Music,*  
11 *Inc.*, 510 U.S. 569, 577 (1994). Courts are required to consider and weigh all four factors when  
12 conducting a fair use analysis. *Id.* Conducting such an analysis as a matter of law requires that  
13 controlling facts be presumed or admitted. *See Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir.  
14 1986). Here, Defendant's unsworn statements submitted in support of the Motion demonstrate  
15 that he is not entitled to entry of summary judgment on the issue of fair use.

16 ***a. The purpose and character of use weighs against a finding of***  
17 ***fair use raises genuine issues of material fact.***

18 Turning to the first factor in the fair use analysis, which calls for consideration of "the  
19 purpose and character of the use, including whether such use is of a commercial nature or is for  
20 nonprofit educational purposes." 17 U.S.C. § 107(1). In considering the purpose and character  
21 of the use, courts must determine whether the alleged infringing publication, when comparatively  
22 viewed with the copyrighted work, "merely replaces the object of the original creation or instead  
23 adds a further purpose or different character." *Napster, Inc.*, 239 F.3d at 1015. Stated differently,  
24 the "purpose and the character of use" factor involves resolving the question as to "whether the  
25 allegedly fair use was 'transformative,' *i.e.*, whether the second use 'adds something new, with a  
26 further purpose or different character, altering the first with new expression, meaning, or  
27 message.'" *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002)  
28 (*quoting Campbell*, 510 U.S. at 579). This inquiry has a wide-ranging impact on the fair use

1 analysis: “the more transformative the new work, the less will be the significance of the other  
2 factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at  
3 579.

4 To begin with, Defendant admits that he utilized the unauthorized copy of the Work for  
5 the exact same purpose as the source publication – “for the purpose of news reporting and  
6 comment.” (Doc. # 12 at 8.) Thus, Defendant’s use of the work was not “transformative,” but  
7 rather sought to replace information that could have rightfully been obtained from the Work in  
8 the source publication. These similar purposes – between that of the source publication’s  
9 dissemination of the Work and the Defendant’s display of the unauthorized version on the  
10 Website weighs against a finding of fair use as to the first analysis factor.

11 Defendant’s 100% unauthorized copying of the Work further demonstrates that the first  
12 factors weighs against a finding of fair use. As noted by the United States Court of Appeals for  
13 the Ninth Circuit (the “Ninth Circuit”), the copying a literary work “in its entirety bespeaks no  
14 ‘intellectual labor and judgment.’ It merely ‘supersedes the object’ of the original work.”  
15 *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir.  
16 2000) (“*Worldwide Church*”). The decision in *Worldwide Church* does not stand alone. Other  
17 courts faced with the issue of wholesale or verbatim copying have likewise concluded that such  
18 infringing conduct weighs against a finding of fair use. *See Campbell*, 510 U.S. at 587-88  
19 (whether “a substantial portion of the infringing work was copied verbatim from the copyrighted  
20 work is a relevant question . . . for it may reveal a dearth of transformative character or purpose  
21 under the first factor . . .”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978)  
22 (acknowledging that “near-verbatim copying” generally precludes a finding of fair use); *Los*  
23 *Angeles Time v. Free Republic*, No. 98-7840, 1999 WL 33644483, at \*10 (C.D. Cal. Nov. 8,  
24 1999) (“There is nothing transformative about copying the entirety or portions of a work  
25 verbatim.”) (“*Free Republic I*”).

26 Here, the infringement at-issue in this case contains an exact, 100%, duplication of the  
27 Work. (Compl. Exs. 1-2, Doc. #1, Exs. 1-2.) No modifications or revisions are contained in the  
28 infringing copy of the Work displayed on Defendant’s Website. (*Id.*) In fact, the infringing copy

1 of the work is nothing more than a cut-and-paste reprint of the Work. This form of mindless  
2 infringing conduct clearly contains absolutely no “transformative value” under the first fair use  
3 factor. As the *Worldwide Church* panel reasoned, to satisfy this requirement, “[t]here must be  
4 real, substantial condensation of the materials, and intellectual labor and judgment bestowed  
5 thereon; and *not merely the facile use of the scissors, or extracts of the essential parts,*  
6 *constituting the chief value of the original work.”* *Worldwide Church*, 227 F.3d at 1117  
7 (emphasis added).

8 It should be noted that Defendant claims “[t]he Pahrump Life blog is completely non-  
9 commercial. No revenues for it have been sought or received.” (Doc. # 12 at 9.) No evidence,  
10 competent or otherwise, has been submitted in support of this assertion. Thus, while a non-  
11 commercial use does have some bearing on the first fair use factor, there is an inadequate  
12 evidentiary basis for the Court to rely on this contention. Moreover, even if Defendant’s were  
13 accepted as true, the Ninth Circuit has nevertheless held that a “[d]irect economic benefit is not  
14 required to demonstrate a commercial use.” *See Napster, Inc.*, 239 F.3d at 1015. In other words,  
15 in the context of fair use, “monetary gain is not the sole criterion . . .” *Worldwide Church of God*  
16 *v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000) (“*Worldwide*  
17 *Church*”)(emphasis added). Instead, the threshold for commercial use can be satisfied if the  
18 defendant’s use of the infringed work generates good will for, and promotes, the defendant’s  
19 underlying operation. *See Free Republic I*, 1999 WL 33644483, at \*15-16 (finding of fair use is  
20 supported by “the fact that defendants’ web page is enhanced by use of the articles, and that [sic]  
21 fact that the copying assists in generating support, both financial and non-financial, for their  
22 operation”). This concept is directly applicable at present because Defendant is obviously  
23 publishing the Pahrump Life blog for some reason – be it for his own personal notoriety or  
24 otherwise. It is without question that such an inquiry will need to be examined during the  
25 discovery process, which has yet to commence in this case. This point aside, there is absolutely  
26 nothing of evidentiary value before the Court upon which it could properly conclude the first use  
27 factor weighs in favor of fair use given the Defendant’s wholesale, unauthorized replication of  
28



1 the Work. In fact, Defendant's infringement in this case weighs heavily against a finding of fair  
2 use under the first analysis factor.

3 ***b. The nature of the copyrighted work is not amenable to summary***  
4 ***judgment.***

5 The second factor in the fair use analysis calls for consideration of "the nature of the  
6 copyrighted work." 17 U.S.C. § 107(2). This factor "turns on whether the work is informational  
7 or creative." *Worldwide Church*, 227 F.3d at 1118. Righthaven asserts that this factor weighs  
8 against a finding of fair use, or at a minimum raises a genuine issue of material fact, because  
9 Defendant copied the Work without authorization and the subject matter was clearly subject to  
10 copyright protection.

11 As a news article, the Work is admittedly based on fact. However, the manner in which  
12 the Work's content is structured and articulated demonstrates considerable creativity and effort  
13 undertaken by the author in bringing the material to print. Furthermore, regardless of the Work's  
14 arguably factual nature, the Defendant's wholesale copying of the Work is not somehow  
15 exempted from liability.

16 Contrary to the Defendant's contention, he is not permitted to commit blatant copyright  
17 infringement simply because the Work's highly expressive attributes are coupled with substantial  
18 factual content. The "[c]reation of a nonfiction work, even a compilation of pure fact, entails  
19 originality." *Harper & Row Publishers, Inc.*, 471 U.S. at 547. Moreover, written news articles  
20 reflect the reporter's creative endeavors in compiling a piece for dissemination. *Los Angeles*  
21 *Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000) ("*Free Republic II*").  
22 As noted by the court in *Free Republic II*, "a news reporter must determine which facts are  
23 significant and recount them in an interesting and appealing manner." *Id.*

24 Defendant's assertion that the Work "contains less than 300 words" is equally  
25 unpersuasive. (Doc. #12 at 9.) There is no bright line test for fair use. Rather, the fair use  
26 doctrine requires a "case-by-case analysis." *Campbell*, 510 U.S. at 577. Moreover, a work does  
27 not deserve less copyright protection based on its size, length or in view of it being a composite  
28 work. *Cf. Hustler Magazine, Inc.*, 796 F.2d at 1155. Accordingly, Righthaven submits that

1 Defendant has failed to establish that the second fair use factor weighs in favor of a fair use  
2 finding, which supports denying him the relief requested in the Motion.

3 ***c. The amount and substantiality of the Work taken does not***  
4 ***support a finding of fair use.***

5 The third factor examined under a fair use analysis requires the Court to consider “the  
6 amount and substantiality of the portion used in related to the copyrighted work as a whole.” *See*  
7 17 U.S.C. § 107(2). This factor clearly weighs against a finding of fair use.

8 Defendant admits that he misappropriated 100% of the Work. (Doc. # 12 at 10.) This  
9 wholesale theft of the Work clearly weighs against a finding of fair use. As noted by the Ninth  
10 Circuit in *Worldwide Church* with regard to the “amount and substantiality” third fair use factor,  
11 “[w]hile ‘wholesale copying does not preclude fair use per se,’ copying an entire work ‘militates  
12 against a finding of fair use.’” *Worldwide Church*, 227 F.3d at 1117 (*quoting Hustler Magazine,*  
13 *Inc.*, 796 F.2d at 1155). The *Worldwide Church* panel then explained, “the fact that a  
14 substantial portion of the infringing work was copied verbatim is evidence of the qualitative  
15 value of the copied material, both to the originator and to the plagiarist who seeks to profit from  
16 marketing someone else’s copyrighted expression.” *Id.* at 1118 (*quoting Harper & Row*  
17 *Publishers, Inc.*, 471 U.S. at 565)). Thus, while Defendant claims he “the whole of the Article  
18 essentially had to be reproduced” in order to facilitate his news reporting purpose, this fact  
19 clearly supports the qualitative value of the Work. In this regard, it should be noted that other  
20 viable options were available to Defendant for accomplishing his “news reporting” purpose  
21 without infringing the Work. For instance, Defendant could have used his own words to  
22 summarize the Work along with a link to the original source publication for Website viewers  
23 interested in reading the entire story. Instead of taking such an obvious and reasonable path,  
24 Defendant instead decided to take the easy road out by cutting and pasting a 100% copy of  
25 copyright protected content on the Website without authorization. Such acts are not entitled to  
26 fair use protection. As noted by the panel in *Worldwide Church*:

27 We have found no published case holding that fair use protected  
28 the verbatim copying, without criticism, of a written work in its  
entirety.

1 *Worldwide Church*, 27 F.3d 1110, 1120. Accordingly, Defendant’s unauthorized 100%  
2 replication of the Work weighs strongly against a finding of fair use with regard to the third  
3 analysis factor.

4 ***d. The fourth fair use factor is not amenable to summary judgment.***

5 The fourth factor examined under a fair use analysis requires the Court to consider “the  
6 use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This  
7 factor does not weigh in favor of a fair use finding.

8 To begin with, Righthaven is entitled to a presumption of market harm if it is  
9 demonstrated that there are commercial elements associated with the Defendant’s infringement.  
10 *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)(“*Sony Corp.*”).  
11 At this stage of this proceedings, Righthaven has not been permitted to engage in any discovery  
12 efforts directed toward Defendant’s potential commercial use with regard to the Website and its  
13 unauthorized display of the Work. As such, Righthaven is unable to assess whether it is entitled  
14 to a presumption of mark harm. This raises a genuine issue of material fact concerning the four  
15 fair use factor, thereby justifying denial of summary judgment.

16 Even without considering the possible presumption of market harm to which Righthaven  
17 may be entitled, Defendant’s unauthorized 100% copying of the Work, the record in this case in  
18 view of the applicable case law tips the fourth factor against a fair use finding. First, as opposed  
19 to a transformative work, “a work that merely supplants or supersedes another is likely to cause a  
20 substantially adverse impact on the potential market of the original.” *Sony Computer Entm’t, Inc.*  
21 *v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000). The law is clear that “a work composed  
22 primarily of an original, particularly its heart, with little added or changed, is more likely to be a  
23 merely superseding use, fulfilling the demand for the original.” *Campbell*, 510 U.S. at 587-88.  
24 In the *Campbell* decision, the Supreme Court explained that whether a work is copied verbatim is  
25 a relevant inquiry under the fourth fair use factor, as this may reveal “a greater likelihood of  
26 market harm . . .” *Id.* at 587. “[W]here the [defendant’s] use is for the same intrinsic purpose as  
27 the copyright holder’s . . . such use seriously weakens a claimed fair use.” *Worldwide Church*,

1 227 F.3d at 1117 (emphasis added) (*quoting Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d  
2 Cir. 1989)).

3 Here, the Defendant cannot escape the fact that they engaged in the cyberspace  
4 equivalent of making a Xerox copy of the Work and then used the Xerox copy to advance his  
5 admitted news reporting purpose. Defendant did nothing to alter the content of the Work. Such  
6 circumstances warrant the conclusion that Defendant's infringement has likely caused a  
7 substantial impairment on the potential market for the Work and that Defendants' infringing  
8 copy of the Work fulfilled the demand for the original. *See Campbell*, 510 U.S. at 587-88; *Sony*  
9 *Computer Entm't, Inc.*, 203 F.3d at 607.

10 Additionally, the Court's analysis of the fourth fair use factor must consider "whether  
11 unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a  
12 substantially adverse impact on the potential market for the original." *See Campbell*, 510 U.S. at  
13 590 (internal quotation marks omitted). In this regard, the appropriate inquiry "must take  
14 account not only of harm to the original but also of harm to the market for derivative works." *Id.*  
15 (*quoting Harper & Row Publishing, Inc.*, 471 U.S. at 568).<sup>1</sup> Such reasoning, when applied to the  
16 instant case, clearly reflects the presence of potential market harm.

17 If numerous, additional Internet users were to replicate the Defendant's wholesale,  
18 cyberspace Xerox copy of the Work, the market for both the Work and derivatives of the Work  
19 would be inevitably diminished regardless of the intentions of each individual infringer. The  
20 Ninth Circuit has held that the fourth fair use factor is not limited to market impairment; this  
21 analysis also includes "the effect of the use on the *value* of the copyrighted work." *Worldwide*  
22 *Church of God*, 227 F.3d at 1119 (*quoting* 17 U.S.C. § 107(4)) (emphasis in original). Thus,  
23 "even copying for noncommercial purposes may impair the copyright holder's ability to obtain  
24 the rewards that Congress intended him to have . . . [t]hose rewards need not be limited to  
25 monetary rewards; compensation may take a variety of forms." *Id.* (*quoting Sony Corp.*, 464 U.S.  
26 at 450).

27  
28 <sup>1</sup> Similarly, in this analysis, "[a]ctual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage." *Sony Corp.*, 464 U.S. at 451.

1 The potential reduction of a literary work's present and future market value resulting  
2 from Internet-based copyright infringement is exemplified by the district court's holding in *Free*  
3 *Republic II*. In *Free Republic II*, the defendants asserted a fair use defense to justify the posting  
4 of the plaintiff's newspaper articles on the defendants' website. *Free Republic II*, 54 U.S.P.Q.2d  
5 at 1455-59. In finding against fair use, the United States District Court for the Central District of  
6 California explained that "[d]efendants use 'substitutes' for the originals, and has the potential of  
7 lessening the frequency with which individuals visit plaintiffs' websites, of diminishing the  
8 market for the sale of archived articles, and decreasing the interest in licensing the articles." *Id.*  
9 at 1471.

10 The reasoning employed by the court in *Free Republic II* should be applied by this Court.  
11 As the Defendant's infringement arguably substitutes for and supersedes the purpose of the  
12 original Work given that it consists of a 100% replication of the Work, it takes very little, if any,  
13 leap in deductive reasoning to conclude that readers of the Work on the Website may be diverted  
14 from, or elect not to read, the Work's original source publication. Stated differently, there is  
15 simply no intuitive motivation for someone reading the wholesale, 100% replication of the Work  
16 on the Website to seek out and read the original version of the Work in any format – such as an  
17 Internet website copy or a hard copy. Simply put, the reader has digested the content and is in all  
18 likelihood through with the Work, thereby depriving the source publication of other tangible and  
19 intangible benefits of increased readership, viewership and/or subscribership. These virtually  
20 required logical inferences in view of Defendant's infringement clearly support a finding of  
21 diminished value of the Work and of derivatively associated literary works available from the  
22 source publication. Such a finding weighs against fair use under factor four of the Court's  
23 analysis.

24 Defendant argues that the market value for the Work could not have been adversely  
25 affected because the Work is available for free on source publication's website. (Doc. # 10 at  
26 10.) The Defendant is clearly missing the point here. While the Work was certainly made freely  
27 available for *viewing* via the LVRJ website, the Work was not made freely available in order to  
28 permit third parties to *republish* it for their benefit. An extension of the Defendant's logic would

1 mean that anyone would be free to set up a competitive Internet news site, stock said site full of  
2 content published by the LVRJ, yet escape liability for infringement by claiming that the LVRJ  
3 permitted this infringing practice.

4 Furthermore, the fact that copyrightable material is often published, and thus, *made*  
5 *available to the public*, is not a new concept. Apparently, the Defendant is unaware that the  
6 USCO requires copyright registrants to deposit a specimen of each work with the Copyright  
7 Office “for the use or disposition of the Library of Congress.” *See* 17 U.S.C. § 407(b). Once  
8 registered, each protected work deposited with the USCO enters the Library of Congress and is  
9 made accessible to the public. *See id.* However, the fact that a protected work is made publicly  
10 available does not mean that the work can be freely copied and distributed amongst the public  
11 without repercussion. In effect, the Defendant is arguing that he reasonably assumed that the  
12 infringed Work could be copied and publicly distributed simply because it was made available  
13 on the Las Vegas Review Journal’s (“LVRJ”) website. This proposition is highly illogical and  
14 essentially ignores hundreds of years of established copyright law.

15 Moreover, by stating that the LVRJ website encouraged users to share its articles via e-  
16 mail and through other means, the Defendant conveniently ignores the fact that the LVRJ  
17 website only permits users to save a hyperlink leading to the articles published on the LVRJ  
18 website, or to e-mail a hyperlink leading to the LVRJ website. Importantly, both of these  
19 options ultimately require the user (or the user’s e-mail recipient) to access the LVRJ articles  
20 directly through the LVRJ website. In other words, the option to save or e-mail a hyperlink to  
21 the LVRJ articles rightfully ensures that Internet users will only view said articles as they are  
22 displayed by the LVRJ website, rather than by viewing unauthorized copies of the articles  
23 displayed on an infringing website. This use of hyperlinks, prudently employed by the LVRJ  
24 website, is seemingly intended to both ensure copyright protection and invite user traffic to view  
25 LVRJ articles online. As such, the Defendant cannot reasonably argue that he properly inferred  
26 the LVRJ’s consent to wholesale reproduce the Work. By no means is the LVRJ’s use of  
27 hyperlinks intended to encourage users to commit copyright infringement without any possible  
28 repercussion, and the Defendant’s contention to the contrary is entirely unreasonable.

1 Defendant's contention that his unauthorized display of the Work may have increased  
2 traffic to the LVRJ's source website is without merit. (Doc. # 10 at 10.) Courts in jurisdictions  
3 nationwide have repeatedly rejected the proposition that the use of a copyrighted work is fair  
4 because said use might somehow increase the demand for the plaintiff's work. *See, e.g.,*  
5 *Campbell*, 510 U.S. at 591 n. 21 (even if a "film producer's appropriation of a composer's  
6 previously unknown song . . . turns the song into a commercial success[,] the boon to the song  
7 does not make the film's simple copying fair"); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d  
8 24, 28 (2d Cir. 1985) ("Since one of the benefits of ownership of copyrighted material is the  
9 right to license its use for a fee, even a speculated increase in DC's comic book sales as a  
10 consequence of RFI's infringement would not call the fair use defense into play as a matter of  
11 law. The owner of the copyright is in the best position to balance the prospect of increased sales  
12 against revenue from a license"); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70,  
13 81 n. 16 (2d Cir. 1997) ("Even if the unauthorized use of plaintiff's work in the televised  
14 program might increase poster sales, that would not preclude her entitlement to a licensing fee").  
15 Furthermore, the Defendant's wishful contention in this regard also fails to account for the  
16 possibility that readers may be diverted from the Work's original source publication as a result of  
17 the unauthorized copy's availability on the Defendant's Website. Ultimately, this wholly  
18 speculative theory has no bearing on the Court's analysis and does nothing to bolster the  
19 Defendant's assertion of fair use.

20 In sum, there is ample reason for the Court to conclude that Defendant's 100%  
21 unauthorized copying of the Work for the same purpose, to provide a news report, resulted in  
22 market harm. Defendant's arguments to the contrary are unpersuasive. As such, the fourth fair  
23 use factor supports a finding against fair use. At a minimum, the market harm issues raise  
24 genuine issues of material fact that support denying Defendant's Motion.

25 **C. Defendant's "Other Issues" Do Not Warrant Dismissal.**

26 The remaining material portions of Defendant's Motion relate the Work not containing  
27 protectable content and speculative allegations concerning an invalid assignment of rights. (Doc.  
28 # 10 at 11-12.) These "other issues" do not warrant dismissal of Righthaven's Complaint.

1 To begin with, Defendant claims that the Work is not subject to copyright protection  
2 because is it 300 words of facts. Defendant is wrong. Copyright protection is not based upon the  
3 amount of content, but the expressions conveyed in said content. As noted above, the “[c]reation  
4 of a nonfiction work, even a compilation of pure fact, entails originality.” *Harper & Row*  
5 *Publishers, Inc.*, 471 U.S. at 547. Moreover, written news articles reflect the reporter’s creative  
6 endeavors in compiling a piece for dissemination. *Los Angeles Times v. Free Republic*, 54  
7 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000) (“*Free Republic IP*”). As noted by the court in  
8 *Free Republic II*, “a news reporter must determine which facts are significant and recount them  
9 in an interesting and appealing manner.” *Id.* Defendant offers no credible arguments to traverse  
10 these decisions. In short, his argument is without merit and should be rejected.

11 Defendant’s speculative rant about the validity of Righthaven’s assignment must also be  
12 rejected. Quite simply, this portion of the Motion reads like a recitation of genuine issues of  
13 material fact that need to be resolved during the discovery process. That said, Righthaven has  
14 alleged ownership of the Work and that Defendant has committed copyright infringement of the  
15 Work. Righthaven is under no obligation at this stage of the proceedings to defend its  
16 assignment of the Work. Accordingly, Defendant’s speculative innuendo cannot support  
17 dismissal of Righthaven’s Complaint.

18 **V. CONCLUSION**

19 For the foregoing reasons, Righthaven respectfully requests the Court deny Defendant’s  
20 Motion and grant such other relief as it deems appropriate and just.

21 Dated this 28<sup>th</sup> day of February, 2011.

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**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 28<sup>th</sup> day of February, 2011, I caused the foregoing document to be served by the Court's CM/ECF system and to be served via U.S. Mail to:

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Pahrump, Nevada 89060

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