

2011 FEB 24 A 11:36

1 Daniel Barham
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4 514-777-7102
5 Private individual

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

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

13 v.)

14 DANIEL BARHAM, an individual; and URBAN)
15 NEIGHBOURHOOD, an entity that exists solely)
16 as Mr. Barham's internet based blog.)
17 *Defendant*)

Civil Action No. 2:10-cv-02150
DEFENDANT DANIEL
BARHAM'S ANSWER TO
PLAINTIFF'S OPPOSITION TO
DISMISS

18 _____)
19 DANIEL BARHAM, an individual)
20 Counterclaimant)

21 v.)

22 RIGHTHAVEN LLC, a Nevada limited-liability)
23 company,)
24 Counter-defendant)

25 _____)

26
27

DEFENDANT'S ANSWER TO OPPOSITION TO DISMISS

As the Pro Se Defendant I would beg the Court's pardon for my procedural errors in the order by which I have submitted my arguments, notice of defense, and authentication of the materials presented to the Court. As a Pro Se Defendant I do not have access to Righthaven's 'Lawsuit Factory'¹ and must learn as I go while providing a defense.

For most of the counter arguments supplied in the Plaintiff's opposition to the Defendants motion to dismiss, the relevant points and issues of the Defendants position were covered in the original motion and as such the Defendant will not require the Court to read them for a second time. Contrary to the Plaintiff's assertion that because of the fact that the image was a 100% reproduction, the doctrine of Fair Use still applies, "wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use."² The argument laid out in the Defendants Answer and Counterclaim and the Plaintiffs own admission that the work was at all times cited as the Las Vegas Review Journal³ can only serve to show that the Defendant gave proper academic citation to the work.

The Defendant would also like it to be noted that on page 12 of the Plaintiff's Opposition to the Defendant's Motion to Dismiss, the Plaintiff is citing case law that is relevant to the copying of newspaper articles and the contents therein, and not case law relevant to the cited reproduction of graphic works, these cases argue that the verbatim copying of an article is a major point against fair use, however as the Plaintiff is filing suit only for an Image, it should be noted that there is no such thing as a verbatim copying of an image. When an image is sourced from another party for academic purposes the image must be a faithful reproduction or be

¹ To date Righthaven has submitted approximately 230 cookie cutter infringement lawsuits.

² Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000).

³ See Complaint paragraph 13.

1 considered forgery and academic misconduct. The Plaintiff's change of tactic to sue only for the
2 images that are themselves part of articles from the LVRJ is simply a dubious attempt to try to
3 side step the fair use defense.

4 The argument laid out by the Plaintiff on page 16 line 7-12 which asserts that the Las
5 Vegas Review Journal website only permits users to save a hyperlink is a misrepresentation of
6 fact. At the time of the alleged copyright infringement the Las Vegas Review Journal ("LVRJ")
7 had a number of share and save links⁴, at least two of which; Facebook and Google Share,
8 provide clips of an image from the originating article which are then shared on the third party
9 website belonging to Facebook and Google.⁵ This clip and share capability continues to be
10 available on the LVRJ website. As these quick share links were what was visible at the time of
11 the alleged infringement and the LVRJ did not add links specific to blogging platforms until after
12 Righthaven had brought its suit against Mr. Barham, the basis of implied license must be
13 considered in light of these examples available at the time the alleged infringement took place.
14 These clip and share options, much like the article that Mr. Barham created on Urban
15 Neighbourhood both provide/provided a summary of text and an image followed up with a
16 hyperlink and suggestions that the reader view the full article on the LVRJ website. It is on this
17 basis that the Defendant could reasonably assume in light of the options which were available at
18 the time of the alleged infringement that the LVRJ was granting an implied license to reproduce
19 a small portion of the article and include a single image with a citation and hyperlink back to the
20 originating article. For the Plaintiff to assert that none of quick share options provide anything
21 other than a hyperlink is a misrepresentation of fact.

⁴ See Exhibit 1 of Defendants Motion to Dismiss.

⁵ See Exhibit 5 attached to this document

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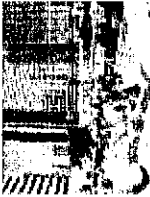
CONCLUSION

To conclude, on the basis of the Defendants Motion to Dismiss, the Answer and Counterclaim, as well as the Defendants Answer to Plaintiff's Opposition to Dismiss, and the evidence contained therein, the Defendant renews his Motion to Dismiss and by extension the Motion for Summary Judgment created by the Court.

EXHIBIT 5

EXHIBIT 5

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1 of 1

No Thumbnail

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Daniel Barham

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