

1 Joshua Koltun (Bar No. 173040)
Attorney
2 101 California Street
Suite 2450, No. 500
3 San Francisco, California 94111
Telephone: 415.680.3410
4 Facsimile: 866.462.5959
joshua@koltunattorney.com

5 Attorney for Defendants
6 Doe/Klim and Doe/Skywalker

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE

11 ART OF LIVING FOUNDATION, a)
12 California corporation,)

13 Plaintiff,)

14 v.)

15 DOES 1-10, inclusive,)

16 Defendants.)

Case No.: CV 10-5022 LHK HRL

**REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

Date: January 12, 2012
Time: 1:30 pm
Judge: Hon. Lucy H. Koh
Courtroom: 4

18) Filed herewith:
19) Declaration of Joshua Koltun

Joshua Koltun ATTORNEY

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Introduction

1 Plaintiff now admits that the BWSM was written by Shankar and various volunteers and
2 employees of AOL chapters, including foreign chapters. Plaintiff (apparently) now contends that it
3 owns the copyright either as a *co*-author or by assignment. But it has not shown by admissible
4 evidence that the contribution of its own employees is significant enough for it to be considered a
5 coauthor. Nor is there any evidence that the purported “assignment” was in writing, as required by
6 USC § 204(a), or that the assignment was from persons who were themselves valid copyright owners.

7 Plaintiff tries to defeat Skywalker’s fair use arguments by pretending that Skywalker posted
8 the BWSM without providing any context whatsoever. But as this Court has already recognized,
9 Skywalker posted the BWSM and the other Manuals as part of his larger argument that AOL is a cult.
10 Such a use is “transformative.” For that reason, this case is utterly unlike *Worldwide Church of God*
11 *v. Phila. Church of God, Inc.*, upon which Plaintiff so heavily relies. *Id.* 227 F.3d 1110, 1117 (9th
12 Cir. 2000). That case involved a breakaway church that was using plaintiff church’s work for
13 precisely the same religious purpose for which it was intended, so the use was not “transformative.”
14 Moreover, that religious use of the work enabled the breakaway church to raise funds, and for that
15 reason the use was “commercial.” Skywalker received no revenue from his Blogs.

16 Plaintiff argues that it need not provide evidence of its damages to defeat this motion, because
17 damages are not an “element” of copyright infringement. This is incorrect. Summary judgment
18 should be granted if the non-movant fails to present evidence on any material (*i.e.* dispositive) issue as
19 to which it bears the burden at trial. Plaintiff has provided no evidence -- let alone expert testimony --
20 that Skywalker’s posting of the BWSM caused it to suffer any actual damages. Nor is there evidence
21 of wrongful profits. Plaintiff’s speculation that Skywalker may be “using” the BWSM to teach
22 “breathing, yoga, or meditation” is unavailing. Even if he were, and even if such “use” constituted
23 copyright infringement, U.S. copyright law does not cover infringements occurring abroad.

24 Plaintiff, moreover, makes no effort to controvert the substantial evidence that this case was
25 pursued to leverage the subpoena powers of this Court to obtain Doe’s identities. Plaintiff claims it
26 has filed the case to protect its (alleged) copyright in the BWSM, but fails to explain why, if that were
27 so, it placed the BWSM in the public domain by attaching it to a pleading and filing it in open court.
28

1 ***I. Plaintiff Has Not Provided Any Competent Evidence that it Owns the Copyright to the BWSM***

2 Plaintiff's claim to own the copyright turns out to be considerably more complicated than it
3 initially represented to the Copyright Office and to this Court. Dhall Decl., ¶ 37. Plaintiff may be
4 arguing that it is a "coauthor" of the BWSM. In any event, it contends that "all copyrights to the
5 BWSM have been assigned to Plaintiff." Opp.MSJ at 6:21-23 (emphasis added). But Plaintiff has
6 not submitted admissible evidence showing that it owns the copyright in the BWSM, whether through
7 co-authorship or assignment.

8 ***A. Plaintiff Has Not Shown That it is a Co-Author of the BWSM***

9 Plaintiff assumes that if it was one among many who contributed to a work, that makes it an
10 "author" under the Copyright Act. That is incorrect.

11 In order for a person to be able to claim to be a co-author of a work for copyright purposes, it
12 is not enough that he is able to claim that he made "a substantial creative contribution" to the work.
13 *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000). At a minimum, the person's contribution
14 must be sufficiently original and creative to be "independently copyrightable material." *Id.* at 1233-
15 34; *accord Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990).

16 Assuming that the person can show that his contribution was sufficiently creative and original
17 to meet that threshold, he must also show that the

18 putative coauthors ma[de] objective manifestations of a shared intent to be coauthors,
19 as by denoting the authorship of *The Pirates of Penzance* as "Gilbert and Sullivan."
20 We say objective manifestations because, were the mutual intent to be determined by
21 subjective intent, it could become an instrument of fraud, were one coauthor to hide
22 from the other an intention to take sole credit for the work.

21 *Id.* at 1234.

22 Plaintiff now admits that starting at some point prior to 2002,
23 Shankar and employees and volunteers at the Art of Living Foundation in India, the Art
24 of Living Foundation in the U.S., and other Art of Living chapters began writing the
25 BWS Manual. . . . This work was done for the benefit of the Art of Living Foundation
26 in India with the understanding that the Art of Living Foundation in India would own
27 the all of the rights to this BWS Manual.

26 Fischman Decl. [DE 123], ¶¶ 5, 6.

27 Plaintiff, a corporation, may only claim *authorship* of a work under the "work made for hire
28 doctrine." 17 U.S.C. § 201 (b). "Works made for hire" include (1) works prepared by employees

1 under the scope of their employment and (2) certain categories of works, if the works are “specially
 2 ordered or commissioned ... *if the parties expressly agree in a written instrument signed by them*
 3 *that the work shall be considered a work made for hire.*” 17 USC §101. Here, there is no evidence
 4 that Shankar or any “volunteers” of AOL FUS or any other chapter of AOL ever expressly agreed in
 5 writing that the BWSM was a work made for hire for AOL FUS. Indeed, on the contrary, the evidence
 6 indicates that, if the work was “commissioned” at all, it was by the AOL in *India*, which
 7 commissioning, moreover, was by “understanding” rather than written instrument.¹

8 Thus any claim of *authorship* AOL FUS may have is entirely dependent on any work that was
 9 prepared by AOL FUS employees, as opposed to Shankar, volunteers, or employees of other AOL
 10 chapters. But there is no admissible evidence indicating *which portions*, if any, of the BWSM (a ten
 11 page document) were contributed by AOL FUS employees.

12 Here, Plaintiff has presented no admissible evidence of facts that would enable a reasonable
 13 factfinder to conclude (i) that AOL FUS employees contributed such original and creative material to
 14 the BWSM that the contribution would be independently copyrightable, or (ii) that Plaintiff’s
 15 employees, together with Shankar and the various volunteers and employees of other AOL entities
 16 objectively manifested an intention that AOL FUS would be a co-author of the BWSM. Since there is
 17 no such evidence, summary judgment must be granted. *Id.* at 1236.²

18 _____
 19 ¹ There is no testimony to the existence of any such written assignments. If there were such
 20 testimony, it would be inadmissible absent submission of “best evidence,” the documents themselves.
 21 FRE 1002-1004. The Fishman, Dhall, and Desai’s declarations are also inadmissible because they fail
 22 to set forth specific facts showing that they had personal knowledge of relevant matters. FRE 602.

23 ² One of the factors to be considered in determining which among many authors is entitled to be
 24 considered a co-author is whether a purported author had creative “control” in the creation of the
 25 work. *Aalmuhammed*, 202 F.3d at 1234. Plaintiff’s conclusory statement that “[i]n 2003, control
 26 over the work on the BWS Manuals was transferred from the Art of Living in India to Plaintiff,” is
 27 insufficient to establish that Plaintiff had such creative “control.” Fischman Decl., ¶ 7. First, it is
 28 conclusory; no explanation is provided as to what is meant by “control.” Second, the statement does
 not show any written instruments whereby such “control” was asserted. Thus the statement suffers
 from all the defects discussed in the text above. In *Almuhammed* that issue did not arise because the
 person with such creative “control,” (director Spike Lee) was a natural person, not a corporation.
 Third, the 2002 version of the BWSM already contained *all* of the material ultimately contained in the
 2003 BWSM. *Compare* 3d SW Decl., Exh. B, with Dhall Decl., Exh. E. There is no evidence that
 any “control” asserted in 2003 by AOL FUS played any significant role in the authorship of the
 BWSM.

1 **B. *There Is No Admissible Evidence that Any Ownership of Any Copyright in the***
 2 ***BWSM Was Validly Assigned to AOLFUL***

3 Plaintiff argues that it is the owner of the copyright by assignment.

4 In 2003, control over the work on the BWS Manual was transferred from the Art of
 5 Living in India to Plaintiff. All copyrights in the BWS Manual were also assigned to
 6 Plaintiff.

7 Fischman Decl., ¶ 7. It is unclear when the purported assignment took place.

8 The testimony fails to show a valid transfer of ownership to AOLFUL. “While the copyright
 9 owner can sell or license his rights to someone else, section 204 of the Copyright Act invalidates a
 10 purported transfer of ownership unless it is in writing.” *Effects Assocs. v. Cohen*, 908 F.2d 555, 556
 11 (9th Cir. 1990). The writing must be signed by the owner or its agent. 17 U.S.C. § 204(a). Here, there
 12 is no testimony that such a signed instrument exists, let alone submission of “best evidence” of such
 13 assignment, that is to say the written assignment itself. FRE 1002-1004.

14 Moreover, there is no evidence as to *who* purported to assign the copyright. If it is the Art of
 15 Living - India, there is no evidence establishing that Art of Living-India had any ownership rights in
 16 the BWSM, for precisely the same reasons discussed above with respect to AOLFUL – that is to say,
 17 it is not clear what, if any, portions were written by AOLFUL-India employees, and there is no evidence
 18 of written instruments commissioning such works on behalf of AOLFUL-India. On the contrary, the
 19 declaration simply states that the work was performed on an “understanding” that ownership would be
 20 in Art of Living India. And there is no evidence that Shankar or the individual contributors to the
 21 BWSM ever made a written assignment of their own contributions to AOLFUL-India or to AOLFUL.
 22 Absent an express transfer of ownership, a contributor who is not an employee retains ownership of
 23 his copyright.” *Effects Assocs.*, 908 F.2d at 558.

24 Of course, it is impossible based on the evidence submitted to tell who, if anyone, contributed
 25 enough creative and original material to warrant authorship of the BWSM in the first place. Further
 26 complicating matters is the fact (unaddressed in the Opposition) that portions of the BWSM are
 27 derivative of earlier documents such as the 1996 teacher’s manual. MSJ at 4:21-5:1; 3d SW Decl.,
 28 Exh. C. These facts only further compound the inadequacy of Plaintiff’s evidence to show that it
 owns the copyright in the BWSM.

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C. Plaintiff's Misrepresentations Were Not Inadvertent

Since Plaintiff here did not obtain its copyright registration until more than five years after publication of the BWSM, the registration does not create a presumption of valid copyright ownership. 17 USC § 410(c). So the question of whether the registration was fraudulently obtained is not essential to the ownership issue.

Nevertheless, the Court is not obligated to accept the suggestion here that the misrepresentations to the Copyright Office were simply inadvertent mistakes. *Morgan, Inc. v White Rock Distilleries, Inc.*, 230 F. Supp. 2d 104, 108 (D. Me 2002). The matters which Plaintiff here omitted and misrepresented include (i) the multiple foreign authors of the BWSM, **including Ravi Shankar**, (ii) the putative assignments and/or work made for hire arrangements whereby ownership of the BWSM was purportedly to be owned by Art of Living-India, (iii) that AOLFUS, to the extent it had any claim in the work, was by way of putative assignment, not work made for hire, and (iv) that preexisting works existed containing the same material, such as the 1996 Teacher's Manual and the 2002 BWSM. *See* 17 USC § 409.

This case is not like *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, in which affirmative evidence was presented explaining the reasons for the misstatements. *Id.* 345 F.3d 1140, 1145 (9th Cir. 2003). Here, there is no evidence in the record explaining these omissions and misrepresentations, which were made by Kronenberger Burgoyne, which applied for copyright registration in conjunction with the filing of this litigation. Koltun Decl., ¶ 2, Ex. A (Copyright Application). Thus the case is quite similar to *Qad. Inc v. v. ALN Assocs., Inc.*, 770 F. Supp. 1261, 1266 & n.14 (N.D. Ill. 1991) in which the lawyers filed a defective copyright registration precisely in order to be able to pursue litigation, which was copyright misuse. See section IV below.

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II. Skywalker's Posting of the BWSM was "Fair Use"

A. Since The Posting Was Noncommercial, the Burden Shifts to Plaintiff

In the "fair use" analysis, where the use of the work was noncommercial, the burden is on plaintiff to show "some meaningful likelihood of future harm" from the use. MSJ at 8:9-17 (citing *Sony Corp. v. Universal City Studios, Inc.* 464 US 417, 451 (1984). Plaintiff does not discuss *Sony Corp.*, but nevertheless insists that the burden is on Defendant to prove fair use. Opp.MSJ at 7:27-8:2.

1 Plaintiff cites *Campbell v. Acuff-Rose Music, Inc.* for this proposition. *Id.*, 510 US 569, 590 (1994).
 2 But *Campbell* involved a commercial use of the work, and did not purport to overrule *Sony Corp.* on
 3 this point.³

4 **B. Skywalker’s Posting of the BWSM was For the Purpose of Criticism on A Public**
 5 **Issue and Therefore Transformative**

6 Plaintiff ignores the context in which Skywalker posted the BWSM, repeatedly insisting that
 7 Skywalker posted it “without commentary.” Opp.MSJ at 9:9-10; *see also* 12:24-25. This is the same
 8 approach Plaintiff took with regard to the posting of the alleged trade secrets, pretending that there
 9 was no context. Opp.MTD [DE 38] at 19:27-20:2 (“Defendants did not publish any additional speech
 10 when they disclosed Plaintiffs’ trade secrets. ...Rather the disclosures consisted only of Plaintiff’s
 11 trade secrets without additional content.”). But this Court should take judicial notice of the text of the
 12 Blog itself, which shows that the BWSM, as with the other manuals, was posted as corroboration of a
 13 larger argument seeking to debunk the notion that AOL and Shankar were in possession of
 14 secret/sacred higher knowledge. RJN, §5, Exh. E10; 6.15 Order at 16:25-27.

15 Plaintiff contends that the posting of the BWSM cannot have been “transformative,” because
 16 Plaintiff did not “condense” the BWSM. But Plaintiff’s reliance on *Worldwide Church of God* for this
 17 proposition is unavailing. Opp.MSJ at 8:22-27. The “transformative” inquiry asks “whether the new
 18 work merely ‘supersedes the objects’ of the original creation or instead adds something new, **with a**
 19 **further purpose or different character**, altering the first with **new expression, meaning, or message.**”
 20 *Worldwide Church of God*, 227 F.3d at 1117 (emphasis added)(citing *Campbell* 510 US at 579).

21 Applying the “new expression, meaning, or message,” test, the Court of Appeals for the Ninth
 22 Circuit has held, for example, that a search engine which presents **exact copies** of copyrighted
 23 photographs in their entirety nevertheless is “transformative,” because the copyrighted work is
 24 presented “in a different context such that the plaintiff’s work is transformed into a new creation.”

25 _____
 26 ³ Plaintiff tries to evade *Sony* by arguing that “it is unclear that Defendants’ use of the BWS Manual
 27 was non-commercial, and Plaintiff has not had an opportunity to conduct discovery about that issue.”
 28 Opp.MSJ at 9:21-22. For purposes of the fair use discussion, we will consider only the posting of the
 BWSM on the Blog, which was the subject of the FAC. Plaintiff’s speculation concerning
 Skywalker’s “wrongful profits” from imagined infringements other than those in the FAC, are
 discussed below in section III.B.

1 *Perfect 10, Inc. v. Amazon*, 508 F.3d 1146 1165 (9th Cir. 2007); accord *Bill Graham Archives v.*
 2 *Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use of copyrighted artwork in biography
 3 was a different purpose than use in rock posters and therefore transformative).

4 In *Perfect 10*, the court distinguished *Worldwide Church of God*, on the grounds that
 5 “duplicating a church’s religious book for use by a different church was not transformative” *Perfect*
 6 *10*, 508 F.3d at 1065. *Worldwide Church*, upon which Plaintiff so heavily relies, involved unusual
 7 facts. In that case, the copyright owner (Worldwide Church of God) had decided to suppress the work
 8 by its deceased founder, and withdraw it from circulation, because the Church’s doctrinal beliefs had
 9 changed and it no longer wished to promote the doctrines contained in the work. *Id.* at 1013.
 10 Defendants were a breakaway church that continued to adhere to the original doctrines of the founder.
 11 *Id.* Thus Defendants were in no way criticizing or commenting on the work. Oddly, they were less
 12 critical of the work than the copyright owner, who wished to bring out an annotated, critical edition of
 13 the work. *Id.* Thus the Court held that defendant’s use of the work “merely ‘supersedes the object’ of
 14 the original MOA, to serve religious practice and education,” and the “use [was] for *the same*
 15 *intrinsic purpose* as [the copyright holder’s].” *Id.* at 1117-18 (emphasis added).

16 Here, by contrast, Skywalker’s purpose in publishing the BWSM was not to promote its use
 17 but rather to denigrate the “Guru’s insane ramblings,” corroborating his argument that neither AOL or
 18 Shankar were fonts of esoteric sacred knowledge and enlightenment. RJN, Exh. E10 [DE 29-4] at
 19 rjn325. The “new work” is the Blog, which contains not only that immediate comment on the BWSM
 20 but also the larger overall argument, including all of the other comments and criticisms, to the general
 21 effect that AOL is a cult and Shankar a charlatan. That context is transformative.⁴

22 Similarly, the peculiar factual context of *Worldwide Church* was essential to the Court’s
 23 conclusion there that its “free” distribution of the work was “commercial.” In that case, although the
 24 “work” was distributed for free, the work was a “the core text essential to its members’ religious
 25 observance,” and thus by distributing the work through its services, Defendant was able to attract

26 _____
 27 ⁴ Indeed, Plaintiff concedes that Skywalker’s purpose in posting the BWSM was different from its
 28 own purpose. Opp.MSJ at 10:2-4 (Skywalker posted the BWSM for “unclear reasons (*e.g.* to spark
 discussion about the Manual, to attract users to their Blog, to advocate for competing ideologies, or
 for some other reason).”

1 “new members who tithed ten percent of their income to [Defendant].” *Worldwide Church*, 227 F.3d at
 2 1118. It is this circumstance that led the Court to conclude that Defendant should have to “account to
 3 the copyright holder” for the financial benefit it had derived from the use of the work. *Id.* Here, by
 4 contrast, Skywalker derived no revenue from the posting of the BWSM.

5 **C. Plaintiff Has Not Shown That Its “Informational Booklet” Was Creative, and Does**
 6 **Not Controvert Evidence That It Is Derivative**

7 With regard to the second factor, Plaintiff contends that this Court should find that the BWSM
 8 is a “creative approach to the teaching of personal energy, breathing, and meditation.” Opp.MSJ at
 9 10:26-28. But Plaintiff does not explain on what basis this Court should make such a finding. The
 10 only evidence Plaintiff has put in the record indicates that the work is an “informational booklet.”
 11 Dhall Decl., ¶ 37. Plaintiff has not rebutted Skywalker’s showing that the BWSM -- which is only 10
 12 pages long -- is derivative of preexisting works of Ravi Shankar, including the 1996 Teacher’s
 13 Manual. 3rd SW Decl., ¶ 4, Exh. C.

14 **D. Posting the BWSM In Its Entirety Was Necessary to Skywalker’s Critical Purpose**

15 Plaintiff’s argument concerning Skywalker’s posting of the BWSM is related to the issue of
 16 whether his posting is transformative. Here, the posting of the entire BWSM, as well as the other
 17 Manuals, served Skywalker’s purpose of exposing Shankar as a charlatan, not the font of sacred
 18 esoteric “knowledge.” In such circumstances, “wholesale copying does not preclude fair use per se,”
 19 *Worldwide Church*, 227 F.3d at 1118-1119 (9th Cir. 2000)(citing *Hustler Magazine v. Moral*
 20 *Majority, Inc.* 796 F.2d 1148, 1150-51 (9th Cir. 1986); see *Perfect 10, Inc.*, 508 F.3d at 1165.

21 **E. Plaintiff Does Not, As it Must, Show Harm to the “Market” for the BWSM**

22 Plaintiff insists that it is Skywalker’s burden to show that the market for the BWSM was *not*
 23 harmed by his brief posting of the BWSM. Opp.MSJ. at 11:18-22. This is incorrect. The Supreme
 24 Court has specifically stated that once Defendant has shown that the complained-of use was
 25 noncommercial, the burden is on Plaintiff to show harm to the market for the work. *Sony Corp.* 464
 26 US at 451, see discussion above in section II.A.⁵

27 ⁵ *Henley v. Devore*, relied upon by Plaintiff, is not to the contrary. In that case, the defendant
 28 politician had used the copyrighted work in political advertisements designed to solicit donations, a
 use that the Court analogized to that of the defendant in *Worldwide Church*, which had used the

1 Plaintiff insists that the Manuals were published “without any criticism, parody, or annotation
2 that would discourage viewers.” Opp.MSJ at 12:24-25. As noted, this Court has already rejected that
3 assertion in identical circumstances as to the other Manuals. Plaintiff’s reliance on *Worldwide Church*
4 is misplaced, for in that case the Court had found that the breakaway church was using the
5 copyrighted work for precisely the intended purpose of the original work, a use that enabled the
6 breakaway church to attract parishioners who would tithe a portion of their incomes to the church,
7 thus supporting it financially. It was only on the basis of such facts that the Court reasoned that “a
8 reasonable person would expect [defendant] to pay [plaintiff] for the right to copy and distribute MOA
9 created by WCG with its resources.” *Worldwide Church*, 227 F.3d at 1118-1119. Here, Skywalker
10 derived no income from his brief posting of the BWSM.

11 Plaintiff further insists that it has “demonstrated through competent evidence that a percentage
12 of people who take Plaintiff’s Breath Water Sound course enroll in Plaintiff’s fee based course,” and it
13 cites the evidence it purportedly relies upon for that assertion. Opp.MSJ at 12:26-28.

14 But plaintiff cites *no evidence whatsoever* to support its next assertion, that “Defendant’s use
15 of the BWS Manual directly affected Plaintiff’s conversion of students from the Breath Water Sound
16 course to its fee based course.” Opp.MSJ at 13:1-3. As explained below in section III.C, it has
17 submitted absolutely no evidence, expert or otherwise, even purporting to support that assertion, nor
18 has it introduced any evidence showing (as it must for the fair use inquiry) any damage to the market
19 for the BWSM or its derivatives.

20 **III. Plaintiff Has Not Shown That It Is Entitled to A Monetary Remedy**

21 **A. Plaintiff Must Present Admissible Evidence that It Is Entitled to a Remedy In Order**
22 **to Survive This Motion**

23 Plaintiff argues that it need not show “quantifiable damages” to survive summary judgment
24 because damages are not an element of a claim for copyright infringement. Opp.MSJ at 13:12-18.
25 Plaintiff is wrong.

26 “The court shall grant summary judgment if the movant shows that there is no genuine dispute

27
28 copyrighted work to obtain parishioners who financially support defendant. *Id.*, 733 F. Supp. 2d
1144, 1159 (C.D. Cal. 2010)(citing *Worldwide Church*, 227 F.3d at 1118.)

1 as to **any material fact** and the movant **is entitled to judgment** as a matter of law.” Rule 56(a)
 2 (emphasis added). “A material issue is one which may affect the outcome of the litigation.” *Mutual*
 3 *Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). “A material fact”
 4 does not have to be one of the elements of the movant’s prima facie case [, but rather,] can be any fact
 5 that might affect the outcome of the action under governing law. *Stoeco Dev., Ltd. v. Dept. Army*
 6 *Corps Engineers*, 792 F. Supp. 339, 345 (D.N.J. 1992)

7 Thus, for example, in *Soriano v. Countrywide Home Loans, Inc.*, the relevant statute (RESPA)
 8 provided that a plaintiff is only entitled to statutory damages on certain conditions, and to actual
 9 damages that are caused by the failure to comply with the statute. *Id.* 2011 U.S. Dist. LEXIS 39131,
 10 *14-20. Plaintiff in that case failed to show either that it was entitled to statutory damages or that any
 11 actual damages it claimed were caused by the failure to comply with the statute. *Id.* As a result this
 12 Court granted summary judgment to defendants. *Id.*

13 Here, Plaintiff is not seeking any remedy other than monetary damages. Plaintiff has dropped
 14 the contention that it can show “hypothetical lost license fees.” *Compare* Opp.MFR at 9:9-12, 12:7-9
 15 with MSJ at 15:19-16:17 (hypothetical lost license fees unavailable here). Thus, if it cannot show that
 16 it is entitled to either actual damages or “wrongful profits,” Defendants are entitled to summary
 17 judgment. *Soriano, supra.*

18 **B. Plaintiff has not Shown That Skywalker Received Wrongful Profits**

19 Plaintiff has dropped its contention that it is entitled to wrongful profits from Klim, but
 20 contends that it may be able to claim “wrongful profits” from Skywalker concerning his publication of
 21 the BWSM on fora **other than** the Blogs. MSJ at 18:23-28. But Plaintiff has not been denied
 22 discovery on that issue. Skywalker responded to the only relevant discovery request,⁶ and has,
 23 moreover, testified under oath that he has “not posted or published the BWSM in any other manner or
 24 on any other occasion” other than the brief posting that was placed at issue in the FAC. *See* Rosenfeld

25 _____
 26 ⁶ Plaintiff contends that Skywalker’s discovery response on this issue is “ambiguous,” without
 27 explaining what the purported ambiguity is. Rosenfeld Decl., ¶ 10. Moreover, plaintiff’s counsel has
 28 made no effort to clarify any putative ambiguities or otherwise resolve any purported “deficiencies” in
 Skywalker’s discovery responses by meeting and conferring with Skywalker’s counsel. Koltun Decl.,
 ¶ 4.

1 Declaration, Exh. C, at 7-8 (Response 12); 3rd SW Decl., ¶ 2.

2 Plaintiff seeks to exclude Skywalker's declaration on the ground that it is anonymous,
3 Opp.MSJ at 16:17-19. But if Skywalker's testimony is excluded, Plaintiff's entire claim must fail, for
4 Plaintiff relies solely on his testimony to show that infringement occurred. Opp.MSJ at 9:6-7. Nor
5 can Plaintiff defeat summary judgment by stating that it wishes to depose Skywalker. Opp.MSJ at
6 16:22-25. "[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his
7 or her credibility suffices to avert summary judgment." *National Union Fire Ins. Co. v. Argonaut Ins.*
8 *Co.*, 701 F.2d 95, 97 (9th Cir. 1983); *accord Triton Energy Corp., Triton Energy Corp. v. Square D*
9 *Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995).

10 Nevertheless, Plaintiff seeks to defeat summary judgment by arguing that it has been denied
11 discovery of Skywalker's sources of income from the "teaching of breathing, meditation, or yoga, and
12 any in which he may have used Plaintiff's BWS Manual." Opp.MSJ at 19:7-11. Even assuming,
13 however, that Skywalker were a teacher of "breathing, meditation, or yoga," and that any "use" of the
14 BWSM in his teaching would constitute *copyright infringement* (there is no claim that the BWSM
15 contains trade secrets), the "wrongful profits claim" would necessarily fail.

16 This is because Skywalker resides *abroad*. SW Decl. [DE 15], ¶ 2. "The copyright laws do not
17 apply extraterritorially." *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1094
18 (9th Cir. 1994). Plaintiff cannot obtain monetary damages for any "use" of the BWSM by Skywalker
19 that did not involve an infringement occurring in the United States. *L.A. News Serv. v. Reuters TV*
20 *Int'l*, 149 F.3d 987, 992 (9th Cir. 1998); *accord Robert Stigwood Group v. O'Reilly*, 530 F.2d 1096,
21 1101 (2d Cir. 1976).

22 **C. Plaintiff Has Not Shown That It Suffered Any Actual Damages**

23 It is plaintiff's burden to show that the infringement was the proximate cause of any actual
24 damages. *Data Gen. Corp v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1170-71 (1st Cir. 1994),
25 *accord Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509 (2d Cir. 1977).

26 Plaintiff contends that it has submitted evidence that "a percentage of students of Plaintiff's
27 free Breath Water Sound course later enroll in Plaintiff's fee-based courses – this percentage is
28 referred to as a 'conversion rate.'" OppMSJ at 13:20-22. Plaintiff does not state what this percentage

1 is, or even claim that it knows what this percentage is.

2 Plaintiff then states that its damages are an “amount equal to the conversion rate multiplied by
3 the number of people to whom Defendants improperly showed the BWS Manual.” Opp.MSJ at
4 13:22-25. However, Plaintiff has introduced absolutely no evidence, expert or non-expert, that even
5 purports to show that this equation constitutes a proper measure of any actual damages suffered by
6 Plaintiff. Plaintiff’s entire theory of damages is based on a staggering series of implicit unfounded
7 inferences – first, that **100 percent** of the persons who looked at the BWSM posted by Skywalker
8 were planning to take the BWS course, and second, that **100 percent** of those persons, having seen the
9 teacher’s manual to the BWS course, decided not to take the BWS course, and third, that the decision
10 by such persons was based solely on having looked at the BWSM, not on any criticism of Shankar or
11 AOL on the Blogs. Nor has Plaintiff introduced any evidence that would suggest that any different
12 percentages can be appropriately plugged into that equation. There is a complete failure of proof on
13 the issue of causation.

14 Plaintiff has been working with a damages expert at least since August. Koltun Decl. in
15 Supp.MSJ [DE 112] Exh. A at 4:5-6 (initial disclosures). But rather than actually submit expert
16 testimony to support the extraordinary inferences upon which it relies, Plaintiff asks the court to
17 assume that it will be able to supply such testimony at a later date. Opp.MSJ at 13:8-9; 14:5-8. There
18 is no authority to support the proposition that this is sufficient to defeat summary judgment. On any
19 issue on which Plaintiff bears the burden at trial, it must proffer any expert testimony in support
20 thereof. *Triton Energy Corp.*, 68 F.3d at 1222. If that Expert testimony lacks proper foundation, it
21 must be excluded, and summary judgment granted. *Id.* Plaintiff cannot defeat Skywalker’s motion
22 for summary judgment by “showing that it will discredit the moving party’s evidence at trial and
23 proceed in the hope that something can be developed at trial in the way of evidence to support its
24 claim.” *Id.*

25 As Plaintiff’s own authority shows, the Court can only admit expert testimony concerning
26 copyright damages that “is properly grounded, well-reasoned, and not speculative.” *Masterson Mktg.*
27 *v. KSL Rec. Corp.*, 495 F. Supp. 2d 1044, 1050-1051 (S.D. Cal. 2007). The expert’s testimony must
28 be grounded in an accepted body of learning or experience in the expert’s field, and the expert must

1 explain how the conclusion is so grounded. *Id.* In that case, where a theory of lost profits was
 2 supported by expert testimony deemed by the Court to be speculative, summary judgment was granted
 3 to defendants. *Id.* at 1051.

4 Moreover, Plaintiff proffers no explanation as to how it would determine the number of *United*
 5 *States residents* who viewed the BWSM.⁷ This is a defect not only because copyright damages do
 6 not apply extraterritorially (see discussion above in section III.B), but also because, purely as a matter
 7 of causation, Plaintiff has the burden of showing that the posting caused a loss of income *to AOL/FUS*,
 8 as opposed to losses suffered by foreign AOL entities who have not appeared in this action.

9 ***IV. Plaintiffs Do Not Controvert The Substantial Evidence That They Have Leveraged the***
 10 ***Putative Copyright for Purpose of Identifying a Critic of Shankar and AOL***

11 Plaintiff cites a number of cases in which the copyright misuse defense was asserted by
 12 competitors claiming that the copyright was being used for anti-competitive purposes. Opp.MSJ at
 13 15:6-18. Although it is certainly true that one strand of the misuse cases involve anticompetitive
 14 behavior, there is another line of cases in which the copyright misuse defense has been asserted by
 15 persons claiming that the copyright was being unfairly leveraged to stifle freedom of expression. *See*
 16 MSJ at 17:1-12 (citing *Rosemont Enterprises*, 366 F.2d 303, 311 (2d Cir. 1966); *Qad. Inc. v. ALN*
 17 *Assocs., Inc.*, 770 F. Supp. 1261, 1265 (N.D. Ill. 1991)). Plaintiff's authorities do not stand for the
 18 proposition that copyright misuse is a defense limited to anticompetitive behavior. *Cf. In re Napster,*
 19 *Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002) ("The scope of the defense of
 20 copyright misuse has not been significantly tested in the Ninth Circuit.")

21 To prevail on this motion on this affirmative defense, Defendants need only submit *prima*
 22 *facie* evidence which, if uncontroverted, sustains the defense. *UA Local 343 of the United Ass'n of*
 23 *Journeyman v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1995).⁸

24 ⁷ Plaintiff's purported expert testimony (Cohen Declaration) concerning the number of persons who
 25 viewed the Blogs in the United States fails this test, for the reasons stated when it was first submitted.
 26 Reply MTD [DE 66] at 2 n.2. In any event, this testimony does not even purport to determine what
 number of persons (or US residents) viewed the BWSM.

27 ⁸ *Accord Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1177 (9th Cir.
 28 2006)(affirmative defense fails on summary judgment where not supported by prima facie evidence).
Stuart v. Radioshack Corp is not to the contrary. *See id.*, 259 FRD 200, 202 (ND Cal 2009)(citing
Clark for summary judgment standard).

1 Plaintiff makes no attempt to controvert the considerable evidence in the record that it has
 2 pursued this copyright claim solely to learn the identities of Does. Plaintiff claims that it has pursued
 3 the claim “seeking only to protect Plaintiff’s rights under the Copyright Act,” but offers no
 4 explanation as to why, if it was concerned with those rights at all, it chose to place the BWSM into the
 5 public domain. MSJ at 18:2-14.

6 Moreover, as discussed in section I.C, Plaintiff’s new contentions as to how it purports to have
 7 obtained copyright ownership is utterly at odds with its representations to the Copyright Office.
 8 Those misrepresentations were generated by plaintiff’s counsel in conjunction with the filing of this
 9 litigation. The registration was manufactured to to leverage this Court’s subpoena powers.

10 **V. Plaintiff Has Not Shown That It Is Entitled to Forestall Summary Judgment**

11 Plaintiff has not shown that it is entitled to continue consideration of this Summary Judgment
 12 motion, let alone defeat this motion, because of its claim that it has “not had a meaningful opportunity
 13 to pursue discovery relating to its theory of the case.” Opp. MSJ at 18:9-11.

14 In order to obtain a continuance, plaintiff must explain why discovery of such facts would
 15 preclude summary judgment. *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1100 (9th
 16 Cir. 2006); accord *California ex rel. California Dep’t of Toxic Substances Control v. Campbell*, 138
 17 F.3d 772, 779 n. 8 (9th Cir. 1998).

18 Thus, for example, if this Court rules that Plaintiff has not shown that it is the owner of the
 19 copyright in the BWSM, the summary judgment motion should be granted forthwith, as Defendants
 20 would be entitled to judgment as a matter of law even if Plaintiff were to obtain the proposed
 21 discovery.

22 By the same token, Plaintiff has failed to produce any admissible evidence of causation as part
 23 of its “conversion rate” theory of actual damages. Thus, even if it were true that it were missing one
 24 of the variables that it wishes to plug into that damages “equation,” the missing variable is not a
 25 reason to defer granting summary judgment. Thus Plaintiff’s contention that it has been stymied from
 26 taking discovery of analytic data concerning the number of viewers of the BWSM is irrelevant.

27 In any event, there is no merit to the contention. Any analytic information is generated by, and
 28 in the possession of Automatic. Skywalker has never objected to Plaintiff obtaining purely statistical

1 information concerning viewers of the BWSM. Koltun Decl., ¶ 3. Skywalker has simply attached a
 2 printout of the complete statistical information that is available to him with regard to the BWSM –
 3 available to him as it would be to anyone who creates a blog on the Wordpress platform. 3rd SW
 4 Decl., Exh. D; Koltun Decl., ¶ 3. It was Skywalker’s counsel’s understanding that Automattic would
 5 produce precisely the same information in response to the “analytics” subpoena. *Id.*

6 What Plaintiff is really complaining about are the intrinsic limitations on the ability of the
 7 Automattic software to generate detailed information Plaintiff would need if it were even to being to
 8 assemble an admissible foundation to try to prove actual damage. The absence of such data – first
 9 brought to Plaintiff’s attention in January (SW Decl. [DE15], ¶12)—is simply another insurmountable
 10 obstacle to Plaintiff’s ability to show that it suffered actual damages.

11 Plaintiff cannot be allowed to avoid summary judgment by relying on its own willful stalling
 12 on discovery, which is obviously designed to avoid confronting the defects in its own damages case.
 13 Plaintiff chose not to take any discovery until after Defendants brought to the Court’s attention on
 14 August 24 (with regard to the Motion for Relief) that Plaintiff had shown no interest in discovering
 15 anything other than Doe’s identities. Plaintiff now indicates that it regards the discovery responses it
 16 has received as “deficient” but has not moved to compel further responses in order to “save ... costs”
 17 pending Defendants’ other dispositive motions. Opp.MSJ at 19:16-20. But Plaintiff has not even met
 18 and conferred with Defendants on any purported inadequacies in their discovery responses. Koltun
 19 Decl, ¶ 4; Fed.R.Civ.P. 37(a)(1)(obligation to meet and confer in good faith).

20 Plaintiff cannot escape summary judgment by this circular argument that it need not conduct
 21 discovery until the dispositive motions are resolved, but that it is entitled to defeat the dispositive
 22 motions because it hasn’t obtained discovery.

23 ***Conclusion***

24 The motion for summary judgment should be granted forthwith.

25 Dated: October 24, 2011

26 _____\s\
 27 Joshua Koltun
 28 Attorney for Defendants
 Doe/Klim and Doe/Skywalker