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12 Media Bloggers Association

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 RIGHTHAVEN, LLC, a Nevada limited liability  
16 company,

17 Plaintiff,

18 vs.

19 BILL HYATT, an individual

20 Defendant.

Case No. 2:10-cv-01736-KJD-RJJ

**MOTION OF MEDIA BLOGGERS  
ASSOCIATION TO FILE *AMICUS  
CURIAE* BRIEF**

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22 **MOTION TO FILE *AMICUS CURIAE* BRIEF**

23 Non-party organization Media Bloggers Association hereby moves for leave to file the  
24 accompanying *amicus curiae* brief in the above-captioned matter, in response to Plaintiff  
25 Righthaven LLC’s (hereinafter, “Righthaven[’s]” or the “Plaintiff[’s]”) Amended Motion for  
26 Default Judgment (hereinafter, the “Motion”) (Doc. # 17). Amicus takes no position regarding  
27 the appropriateness of default judgment in this case, but seeks leave to file a brief to address the

1 legal issues concerning the amount of damages sought in Righthaven’s Motion. Neither  
2 Defendant nor Plaintiff has been contacted with regard to the filing of this brief; to the Media  
3 Bloggers Association’s (hereinafter, “*Amicus*[’]”) knowledge, neither party consents to the filing  
4 of this brief.

5 *Amicus* is a national organization founded by more than ten (10) prominent bloggers and  
6 supported by many more, including John Amato (of Crooks and Liars), Glenn Reynolds (of  
7 Pajamas Media/Instapundit), Jeralyn Merritt (of Talk Left) and many others. *Amicus* has no  
8 fiscal or direct interest in this litigation, but is concerned about its outcome by virtue of its  
9 organizational mission. The entire existence of *Amicus* is premised upon advancing grassroots  
10 media and citizen journalism through “blogging” – the creation of one’s own media outlet  
11 through a web log, or “blog” – and providing legal assistance to these bloggers. Since its  
12 inception in 2004, *Amicus* has defended dozens of bloggers in legal actions, and in 2008 helped  
13 developed the first-ever media liability insurance policy for bloggers.

14 District courts regularly consider *amicus* briefs. In a similar case involving this Plaintiff,  
15 this Court has already accepted *amicus* briefing from relevant parties without a direct stake in the  
16 litigation. *Righthaven LLC v. Ctr. For Intercultural Organizing*, Case No. 2:10-cv-01322, Doc. #  
17 19 (D. Nev., Filed Dec. 15, 2010). This acceptance of *amicus* briefs is not just limited to these  
18 cases, but is well-established both in this District and nationally. *U.S. v. Perelman*, Case No.  
19 2:09-CR-00443-KJD-LRL, 2010 WL 3312627 (D. Nev. Aug. 19, 2010) (accepting *amicus* brief  
20 from ACLU); *PEST Committee v. Miller*, 648 F. Supp. 2d 1202, 1214 (D. Nev. 2009) (treating a  
21 motions to intervene and submitted materials as *amicus* briefs); *Elektra Enter. Group. v. Barker*,  
22 551 F. Supp. 2d 234, 237 (S.D.N.Y. 2008). As this submission is legally permissible, *Amicus*  
23 submits that the attached brief will be useful to this Court in ruling on Righthaven’s Motion  
24 (Doc. # 17).

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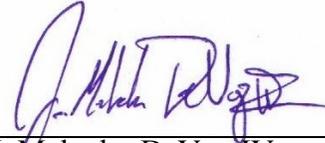
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1 For the foregoing reasons, *Amicus*, the Media Bloggers Association, requests that the  
2 Court grant the motion for leave to file the accompanying *amicus curiae* brief.

3  
4 Dated February 23, 2011

Respectfully Submitted,  
RANDAZZA LEGAL GROUP

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Marc J. Randazza

Co-Counsel:  
Ronald D. Coleman  
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*Attorneys for Amicus Curiae,  
Media Bloggers Association*

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**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Randazza Legal Group and that on this 23rd day of February, 2011, I caused documents entitled:

- MOTION OF MEDIA BLOGGERS ASSOCIATION TO FILE AMICUS CURIAE BRIEF

to be served as follows:

by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne Avenue, Suite 210, Las Vegas, Nevada, 89129-7701; and Bill Hyatt, 848 Luther Road, East Greenbush, NY, 12061; upon which first class postage was fully prepaid; and/or

by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Bill Hyatt, 848 Luther Road, East Greenbush, NY, 12061; upon which first class postage was fully prepaid; and/or

Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or

to be hand-delivered;

by the Court's CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy

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**BRIEF OF *AMICUS CURIAE***  
**MEDIA BLOGGERS ASSOCIATION**

21  
22 **AMICUS CURIAE BRIEF**

23 **I. Introduction**

24 Righthaven is a Nevada LLC (hereinafter, “Righthaven”) with the most questionable of  
25 business models. It was formed by an attorney who, instead of simply representing copyright  
26 plaintiffs in justifiable cases, chose to create an entirely champertous enterprise out of unsound  
27 copyright claims. Its “business model” is to seek out unwitting and, perhaps, careless bloggers

1 who have used portions of the *Las Vegas Review Journal* in online discussions. Once  
2 Righthaven finds these uses by conducting internet “sweeps,” it fallaciously “acquires” the rights  
3 to the articles in question, essentially as causes of action, solely for the purpose of filing a  
4 lawsuit.

5 The vast majority of the victims of this scheme are under the impression that by giving  
6 proper attribution to a source, they are within their rights to use such excerpts. Almost none of  
7 them could ever afford legal representation; flummoxed by the threat of a \$150,000 potential  
8 statutory damage award – an amount that it can safely be said none of them could dream of  
9 satisfying – and lacking even a clue as to whom to turn to for advice, many will simply default.

10 Righthaven now seeks to turn a default into a windfall by asking this Court to grant it a  
11 constitutionally impermissible and outrageous award of at least \$30,000 in statutory damages,  
12 ranging up to \$150,000.00 in this matter, in addition to \$1,850.00 in costs and attorney’s fees<sup>1</sup> –  
13 all based on specious infringement claims for forgotten newspaper articles whose economic  
14 value is surely orders of magnitude below these astronomical sums.

15 Righthaven’s assertion of itself as the plaintiff in these suits is dubious, abusive, and  
16 contrary to the Copyright Act’s intent. In order to sue for copyright infringement, one must own  
17 the copyright or be the owner, assignee or licensee of an “exclusive” copyright right found in 17  
18 U.S.C. § 106. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1145-46 (9th Cir. 2008);  
19 *Silvers v. Sony Pictures Entmt., Inc.*, 402 F.3d 881, 887 (9th Cir. 2005) (“only owners of an  
20 exclusive right in a copyright may sue”). The right to sue is not considered an exclusive and  
21 intrinsic right, and can only be asserted by a bona fide owner, assignee, or licensee of an  
22 exclusive copyright right. *Sybersound*, 517 F.3d at 1146. In short, contrary to the entire premise  
23 of the Righthaven enterprise, copyright owners are not permitted to assign their rights to sue  
24 independent of their ownership of the work sued upon. *Silvers*, 402 F.3d at 884 (holding that the  
25 right to sue is not an exclusive, assignable right under 17 U.S.C. § 106).

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<sup>1</sup> See 17 U.S.C. §§ 412, 504(c), 505.

1 If the *Las Vegas Review-Journal* (hereinafter, the “LVRJ”) or its parent company,  
2 Stephens Media LLC (hereinafter, “Stephens Media”), were the plaintiffs in these cases, this  
3 argument would not apply. But Righthaven’s exercise in champerty seeks to make an end-run  
4 around the rule of law limiting the right to sue for copyright infringement to creators and those  
5 legitimate enterprises that make creativity possible and protectable. Nobody can seriously  
6 believe that Righthaven, which publishes nothing anywhere, has acquired the full ownership of  
7 the articles it sues upon. The assignments it secures – only after finding “infringed” articles to  
8 sue over – contain mysterious (and heretofore unexamined) language about a “right of reversion”  
9 which, on frank consideration, demonstrates how transparently illegitimate these “assignments”  
10 are.

11 Phony “assignments” are not the only venal and manipulative aspects of the Righthaven  
12 scheme. By design, Righthaven sues mostly retirees who, terrified of losing their retirement  
13 savings, generally settle their cases quickly and without discovery. But this Court should not  
14 restrain its own duty to inquire into the underlying law and facts on which both Righthaven’s  
15 claims and Righthaven’s coerced settlements are based when considering its decision on  
16 damages in this case. This Court should hold serious doubts about the propriety of Righthaven  
17 bringing these suits with rights obtained from a third party that has no stated stake in this  
18 litigation or related cases. Either the LVRJ and Stephens Media are “selling lawsuits,” which is  
19 impermissible under *Silvers*, 402 F. 3d at 884-85, or Righthaven is simply a law firm in disguise,  
20 engaged in champerty, which is impermissible in Nevada, as it is almost everywhere legal ethics  
21 and fundamental justice are a concern of the law. *Schwartz v. Eliades*, 113 Nev. 586, 589 (Nev.  
22 1997); *Lum v. Stinnett*, 87 Nev. 402, 408 (Nev. 1971). Without revealing exactly what exclusive  
23 rights Righthaven has acquired in the works, if acquiring any at all, Righthaven essentially buys  
24 the bare right to sue for copyright infringement – which purchase is banned by copyright law –  
25 and uses it to sue small website operators by the hundreds. Left unchallenged, Righthaven’s  
26 practices create a secondary commodities market for copyrights, or exclusive subsidiary rights in  
27 copyrights, to be used only in suing others who may have valid defenses, but cannot afford to

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1 raise them – or engage counsel whatsoever, as is the situation in this case. This is inimical to the  
2 purpose of the Copyright Act, which was intended to protect the intellectual investments of  
3 creators, rather than creating lawsuit mills that use registered copyrights – only after their  
4 infringement was discovered – as a source of income, rather than a shield against others’  
5 misappropriation. *See Silvers*, 402 F.3d at 886.

6 In every Righthaven case, Righthaven discovered a small website or blogger’s use of an  
7 article – which very well may have been fair use – and then claimed to acquire the story’s rights,  
8 followed by a copyright registration and federal lawsuit. This case follows the same formula. A  
9 LVRJ article was published in print and on the LVRJ’s website. Thereafter, a blogger – Hyatt –  
10 posted a copy of it to his website. (*See* Doc. # 1.) Righthaven’s Complaint alleges that the  
11 LVRJ published “FX’s manly man shows hold outsider appeal” (hereinafter, the “Article”) on or  
12 about September 5, 2010, and Hyatt republished this article on his website, <1ce.org>, on or  
13 about September 8, 2010. (Doc. # 1 ¶¶ 6, 9, 18, 20; Doc. # 1. Exhs. 1, 2.) On October 6, 2010,  
14 approximately one month after discovering this infringement – but before filing suit –  
15 Righthaven registered the article’s Copyright. (Doc. # 1 ¶ 19; Doc. # 1 Exh. 3.)

16 Hyatt failed to respond to Righthaven’s Complaint (Doc. # 1), leading Righthaven to  
17 bring the Motion currently before this Court. (Doc. # 17.) While this Court determines the  
18 outcome of the Motion, the Media Bloggers Association (hereinafter the “*Amicus*”) seeks to  
19 provide additional information to the Court and assist it reach a reasonable, just conclusion in  
20 disposing of this case, as its membership frequently copies portions of newspaper articles in  
21 order to foster discussion on matters of public concern. *Amicus* closely follows these issues and  
22 its participation in cases such as this one is integral to its mission of protecting the legal rights of  
23 bloggers, writers and other citizen journalists. A constitutionally bizarre award in this case, such  
24 as that sought by the Righthaven enterprise, will create a chilling effect across the membership of  
25 *Amicus*, thus reducing the amount of discourse on matters of public concern generally.

1 **II. Argument**

2 Righthaven's business model belies its argument for a large damage award against Hyatt,  
3 as well as an award of attorney's fees and costs. The monetary relief Righthaven seeks from  
4 Hyatt is so astronomical and disproportionate that this Court should limit it under the Due  
5 Process clause of the Constitution. The other form of relief Righthaven seeks, a turnover of  
6 Hyatt's domain name, is not available in Copyright cases, and it is high time that a court tell  
7 Righthaven so. Righthaven's desired relief should be denied in all cases, except for money  
8 damages, in which case its desired award should be reduced to nominal damages in the smallest  
9 amount allowed by law. *Amicus'* experience and depth of information in working with and  
10 representing bloggers lends an especially useful perspective to analyzing how this Court's award  
11 of damages to Righthaven would be devastating not only to Hyatt, but the blogging community  
12 as a whole.

13 **A. Righthaven's Business Model Does Not Support a Significant Damage Award, or Award**  
14 **of Attorney's Fees, Against Hyatt.**

15 Righthaven's business model is simple, cynical, and ethically questionable. Righthaven  
16 finds instances of infringement relating to newspaper articles and pictures of essentially trivial  
17 economic value on blogs and other small websites without significant readership, advertising or  
18 other resources. After finding these instances of infringement, Righthaven purports to purchase  
19 the rights to the allegedly infringed work from Stephens Media, which for some reason does not  
20 have the confidence in its case to place its name on the complaints as a plaintiff.

21 These agreements between Stephens Media and Righthaven do not identify what Rights  
22 Righthaven has purchased. A true and correct copy of the assignment of rights from Stephens  
23 Media to Righthaven for the article "Marijuana as Medicine," is attached hereto as Exhibit 1.  
24 This is impermissible within the Ninth Circuit, as courts have held that the six rights inherent in  
25 an owner's valid copyright<sup>2</sup> cannot be unbundled from the right to sue for infringement.  
26 *Sybersound*, 517 F.3d at 1145-46; *Silvers*, 402 F.3d at 887. An exclusive ownership interest,  
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28 <sup>2</sup> 17 U.S.C. § 106.

1 assignment or license of an exclusive copyright right under 17 U.S.C. § 106 is required for  
2 Righthaven to be able to sue alleged copyright infringers. *Sybersound*, 517 F.3d at 1145-46;  
3 *Silvers*, 402 F.3d at 887. Without specifying what rights transfer from Stephens Media to  
4 Righthaven, Exhibit 1 shows that Righthaven acquires only the copyrights “requisite” to be  
5 recognized as the copyright owner of the work for the purposes of claiming ownership and  
6 seeking redress for past and future infringement. (Exh. 1 at 1.) No rights are identified or  
7 explained, and Righthaven impermissibly purchases only those rights necessary to give it  
8 standing to sue those who infringed on that article – without any mention of exclusivity. (*Id.*)  
9 Meanwhile, these very articles that Righthaven claims to have acquired the rights to are still  
10 available for sale in the LVRJ’s archives. Declaration of J. Malcolm DeVoy ¶¶ 2-7.

11 Righthaven’s agreements with Stephens Media include a mysterious “right of reversion”  
12 that allows whatever rights Righthaven does acquire to revert back to Stephens Media under  
13 circumstances unspecified in the parties’ written agreement.<sup>3</sup> (*Id.*) This raises serious questions  
14 as to whether Righthaven truly owns the copyright at all, as it can revert to Stephens Media  
15 under unexplained circumstances. To date, this is the only copyright assignment that *Amicus* has  
16 seen from Righthaven, and likely the only one seen by the Court, as no other Righthaven cases  
17 have advanced to the discovery phase of litigation. *Amicus* – and to the best of *Amicus*’  
18 knowledge, this Court – has no definitive knowledge as to what rights Stephens Media transfers  
19 to Righthaven in these agreements other than an attempt to impermissibly assign the bare right to  
20 sue. Based on Exhibit 1, there is serious doubt as to whether these rights are exclusive as  
21 required by copyright law in order to be enforceable, and whether these rights even permit  
22 Righthaven to sue others for alleged instances of copyright infringement.

23 The logical inference from what is known of Righthaven’s acquisition of these copyright  
24 rights from Stephens Media and their conduct in litigation is that Righthaven uses these rights  
25 only to sue others. Righthaven has no interest in protecting Stephens Media’s content, and uses  
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27 <sup>3</sup> To date, Righthaven seems to have carefully chosen its victims in order to avoid litigating its cases against anyone  
28 with the resources to pursue discovery, including depositions of former LVRJ Publisher Sherman Frederick,  
Righthaven CEO Steve Gibson, and other officers of Stephens Media and Righthaven with relevant information.

1 these copyrights acquired – with a reversion to Stephens Media – simply to sue small site  
 2 operators for illusory damages. This is not to say the articles are worthless: In fact, while they  
 3 are available online for free, the LVRJ attempts to sell each article available on its website for  
 4 the handsome sum of \$2.95. A true and correct copy of the purchase screen for LVRJ articles,  
 5 including that for the Article at issue in this case, is attached as Exhibit 2; see DeVoy decl. ¶¶ 3-  
 6 5, 6-7. It is unknown what ratio of people who view these stories purchase them, or what the  
 7 LVRJ’s profit margin is from these article sales at \$2.95 each; to date, Righthaven has not  
 8 produced any evidence addressing either of these margins – nor would it likely be able to do so,  
 9 if any defendant had the resources to vindicate its rights in these cases.

10 These reversionary, vaguely worded agreements between Righthaven and Stephens  
 11 Media additionally suggest that the two are not engaged in an arm’s length relationship with  
 12 respect to Righthaven’s acquisition of Stephens Media’s copyright rights. (Exh 1 at 1.) These  
 13 agreements further evidence that damage-recovery litigation is the sole purpose of Righthaven’s  
 14 existence, rather than any anti-piracy enforcement of rights in content Righthaven produces or  
 15 owns. As such, Righthaven has no entitlement to damages, especially large damages, as the bare  
 16 right to sue cannot be acquired without other specific, exclusive rights in the copyrighted  
 17 material. *Sybersound*, 517 at 1143-44. Even if the litigated uses were infringing, Righthaven  
 18 acquired its rights to sue for infringement with knowledge that a possible infringement existed as  
 19 part of its business model, and should not be accorded the full rights of a copyright owner,  
 20 assignee or licensee using the content for expressive purposes. *Id.*

21 When Righthaven first began suing others for alleged infringements, Sherman Frederick,  
 22 then-Publisher of the LVRJ,<sup>4</sup> analogized the defendants’ use of the LVRJ’s content to driving  
 23 away with his Corvette.<sup>5</sup> Interestingly enough, Mr. Frederick’s company never sued to enforce  
 24 its rights, but rather decided to commoditize those rights, transferring them to Righthaven for

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 26 <sup>4</sup> J. Patrick Coolican, *Review-Journal Publisher Sherman Frederick, Editor Thomas Mitchell Out*, Las Vegas Sun  
 (Nov. 12, 2010), available at <http://www.lasvegassun.com/news/2010/nov/12/review-journal-publisher-sherman-frederick-editor/> (last accessed Feb. 22, 2011).

27 <sup>5</sup> Sherman Frederick, *Copyright theft: We’re Not Taking It Anymore*, Las Vegas Review-Journal (May 28, 2010),  
 28 available at [http://www.lvrj.com/blogs/sherm/Copyright\\_theft\\_Were\\_not\\_taking\\_it\\_anymore.html](http://www.lvrj.com/blogs/sherm/Copyright_theft_Were_not_taking_it_anymore.html) (last accessed  
 Feb. 20, 2011).

1 unexplained reasons. To continue the car analogy, Righthaven’s model is the equivalent of  
2 buying broken cars in order to sue whoever may have damaged them prior to the sale. In short,  
3 Righthaven is engaged in a callow use of the Copyright Act to create a litigation brokerage – not  
4 to vindicate rights envisioned by the Copyright Clause.

5 As Righthaven has no legitimate interest in whatever copyright rights it possesses in the  
6 Article, and other articles and photos it putatively acquires the rights to, Righthaven is entitled to  
7 no more than nominal damages – if that. Righthaven is not a content producer trying to preserve  
8 its relevant market from the unceasing raids of content pirates, but a dedicated litigation house  
9 that acquires rights from other entities solely to sue essentially defenseless “infringers” for their  
10 supposed infringement. If Stephens Media or the LVRJ had sued to protect content it produced  
11 and the market for it, an argument for more than nominal damages might be tenable.  
12 Righthaven, however, has not suffered any financial harm whatsoever from the infringement it  
13 alleges – for if any damages occurred, they occurred before Righthaven procured the copyright.  
14 Righthaven’s damages, if any, should be only enough to observe that infringement occurred.  
15 Righthaven does not suffer any harm from lost profits or a lost market for the work, as it does not  
16 produce or sell content, but merely acquires rights in it to file lawsuits such as this one, and if  
17 this Court awards Righthaven its outrageous demand, it will simply throw gasoline on the fire of  
18 Righthaven’s unethical copyright trolling and attorney-fee-generation scheme.

19 This model, if sustained by law and emboldened by this Court granting Righthaven the  
20 damages it seeks, poses a singular and unique threat to *Amicus*’ membership. The interests of  
21 bloggers acting under *Amicus*’ umbrella will be adversely affected by any award of damages  
22 granted to an entity that collects illusory copyright rights for the sole purpose of litigation.  
23 Those served by *Amicus* will have no idea how to protect themselves from costly litigation  
24 against a party they could not have foreseen acquiring copyright rights, and thus will limit their  
25 liability by taking the safest, least creative path of minimal resistance: The path of silence. Such  
26 an award would contract the marketplace of ideas, especially online, depriving the group served  
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1 by *Amicus* of expression and harming others' access to information about newsworthy and  
2 timely subjects.

3 Simultaneously, *Amicus*' membership possesses legitimate copyrights that they  
4 themselves have cultivated and may seek to protect from infringement in the future. These  
5 efforts will require litigation against infringers, which *Amicus* fears courts will meet with a  
6 jaundiced eye after witnessing the way in which Righthaven litigates its cases, including this one.  
7 Thus, content creators and other legitimate copyright holders fear that Righthaven's business  
8 practices and legal tactics will poison the well of judicial relief, making courts and the public  
9 skeptical of copyright infringement cases<sup>6</sup> – even where the original creators of copyrighted  
10 works sue in good faith to defend their creations and preserve the marketplace in which they are  
11 sold.

12 Moreover, as Righthaven is designed solely to acquire rights and litigate them, it does not  
13 deserve the attorneys' fees and costs awards granted to content producers who must undertake

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14 <sup>6</sup> For as long as Righthaven has existed, its lawsuits and tactics have received significant and sustained media  
15 criticism both locally and nationally. *See, e.g.*, Steve Green, *Flood of Righthaven Copyright Lawsuits Lifts Total to*  
16 *225*, Las Vegas Sun (Jan 28, 2011), available at [http://www.lasvegassun.com/news/2011/jan/28/flood-righthaven-](http://www.lasvegassun.com/news/2011/jan/28/flood-righthaven-copyright-lawsuits-lifts-total-22/)  
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25 Feb. 22, 2011); David Kravets, *Righthaven Expands Troll Operation with Newspaper Giant*, Wired (Dec. 7, 2010),  
26 available at <http://www.wired.com/threatlevel/2010/12/righthaven-expands-trolling/> (last accessed Feb. 22, 2011);  
27 Steve Green, *Judge to Righthaven: Show Why Lawsuit Shouldn't Be Dismissed*, Las Vegas Sun (Nov. 22, 2010),  
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<http://www.techdirt.com/articles/20100812/01454910601.shtml> (last accessed Feb. 22, 2011); Steve Green,  
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(July 23, 2010), <http://www.techdirt.com/articles/20100722/03152710320.shtml> (last accessed Feb. 22, 2011); Mike  
Masnick, *Newspaper Publisher Defends Filing 22 Copyright Lawsuits Against Sites Who Copied Text... With Links*  
*Back*, Techdirt (June 4, 2010), <http://www.techdirt.com/articles/20100604/0425069685.shtml> (last accessed Feb. 22,  
2011).

1 legal action to arrest infringement. Righthaven's litigation-factory model accounts for, or should  
2 account for, the costs of litigation. Righthaven does nothing but find infringements (before  
3 acquiring and registering the relevant copyright) and sue on them. As the sole purpose of  
4 Righthaven is to incur the costs of costs litigation, recovering costs and attorneys' fees from a  
5 defendant in this and similar cases is unseemly. These are not the costs borne by a copyright  
6 holder seeking in good faith to stop rank infringement and widespread piracy of its content.  
7 Instead, any award of attorneys' fees or costs will turn Righthaven's damage award into pure  
8 profit, eliminating the costs of litigation inherent in its business model and effectively granting  
9 Righthaven an impermissible double recovery. *See, e.g., Gypsum Carrier, Inc. v. Handelsman,*  
10 *307 F.2d 525, 535 (9th Cir. 1962).*

11 **B. Righthaven is not Entitled to the Relief it Seeks.**

12 ***1. Due Process Limits Righthaven's Entitlement to Money Damages.***

13 The Due Process clause of the U.S. Constitution has long been a source of limitation on  
14 all forms of damages awarded in judicial proceedings. Damages beyond those actually suffered  
15 by a plaintiff, awarded as a deterrent against similar unlawful acts in the future – known as  
16 exemplary damages – have been tightly limited by the courts under the Due Process clause.  
17 *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1992); *State Farm Mut. Ins. Co. v.*  
18 *Campbell*, 538 U.S. 408, 417 (2003). Because these exemplary damages may become detached  
19 from the harm actually caused to the plaintiff by defendant, these awards may fail to serve any  
20 legitimate purpose, and instead hold a “devastating potential for harm.” *Campbell*, 538 U.S. at  
21 417.

22 This due process protection is both substantive and procedural in nature. *See Id.* Courts  
23 analyze three figures in relation to any award of exemplary damages to determine whether any  
24 such award is grossly excessive:

- 25 1) The degree of reprehensibility of the defendant's conduct;
- 26 2) The disparity between the actual or potential harm suffered by the plaintiff and  
the punitive damages award; and
- 27 3) The difference between the punitive damages awarded by the jury and the civil  
penalties authorized or imposed in similar cases.

1 *Id.* at 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *BMW*  
2 *of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). Though the Court has not yet awarded any  
3 damages in this case, the third factor, weighing the difference between awarded damages in this  
4 case and the penalties authorized in similar cases, should consider the damages sought by  
5 Righthaven in comparison to those authorized in other cases.

6 This analysis and scrutiny applies to the Copyright Act, just as it does to any federal law.  
7 Every act of Congress, including the enactment of the Copyright Act, is subject to due process  
8 limitations on account of the Fifth Amendment's limits on Congress' power. *Nebbia v. N.Y.*, 291  
9 U.S. 502, 510 (1934). These statutory damages allow by the Copyright Act serve the same  
10 purpose as punitive damages awarded by a jury (to punish and deter unlawful conduct) and  
11 therefore require the same level of constitutional scrutiny.

12 In determining the measure of statutory damages to be awarded, courts consider the  
13 following factors:

14 [E]xpenses saved and profits gained by the defendants in connection with the  
15 infringements; revenues lost by plaintiffs as a result of defendants' conduct; and the  
16 infringer's state of mind, that is, whether willful, knowing, or merely innocent.  
17 Moreover, the court should consider the purposes of the Copyright Act, including  
18 restitution to prevent unjust enrichment, reparation of injury, and deterrence of further  
19 wrongful conduct by the defendants and others.

20 *Walt Disney v. Video*, 47, 972 F. Supp. 595, 603 (S.D. Fla. 1996) (citations omitted). "Willful"  
21 refers to conduct that occurs with knowledge that the defendant's conduct constitutes copyright  
22 infringement.' . . . The determination of willfulness is a question of fact reserved for the jury."  
23 *Id.* Here there is no basis for the Court to find such willfulness, though. As explained in  
24 *Nintendo of Am. v. Ketchum*, 830 F. Supp. 1443, 1445 (M.D. Fla. 1993), even where willfulness  
25 has been established, this is not the end of the inquiry when evaluating the issue of statutory  
26 damages

1 [I]n exercising its discretion, the Court may consider several factors including the  
2 expenses saved and profits reaped by infringer, revenues lost by copyright holder as a  
3 result of infringement, and infringer's state of mind, whether willful, knowing or  
4 innocent. . .

5 Although Plaintiff has suggested in its motion that the "Defendants saved substantial  
6 license revenue expenses and reaped enormous profits," Plaintiff has offered no evidence  
7 of the expenses saved by Defendants for licensing fees, etc. Plaintiff has simply asked  
8 this Court for an arbitrary amount of \$50,000 per infringement based upon the finding of  
9 willful conduct.

10 The fact that the Defendants acted willfully and knowingly has been established by the  
11 evidence presented by Plaintiff. Defendant Ketchum has pled guilty to criminal charges  
12 in North Carolina of knowingly and intentionally disseminating counterfeit cartridges.  
13 Defendant Brinson, owner of Superior Video, has admitted his knowledge that Ketchum  
14 and Isom were selling and distributing counterfeit cartridges from his store. Thus the  
15 existence of culpable conduct is clear.

16 Taking all of these factors into consideration, along with the purposes of the Copyright  
17 Act, this Court finds that the copyright holders are entitled to statutory damages in the  
18 amount of \$2,000 for each of the twelve infringements, under 17 U.S.C. § 504(c)(2), for a  
19 total of \$ 24,000.

20 *Id.* at 1445 (citations omitted). *See also, Morley Music Co. v. Cafe Continental, Inc.*, 777 F.  
21 Supp. 1579, 1583 (S.D. Fla. 1991) (upon finding of willfulness and repeated infringement of  
22 seven works and defendants' avoidance of "\$ 2,582.91 in license fees, the court finds that  
23 statutory damages in the amount of \$ 1,500 per infringement appropriate").

24 A similar treatment of the matter can be seen in a case from the Southern District of New  
25 York, even in the face of the situation that obtains here – a defendant's default. The case  
26 involved pirated pay-per-view broadcasts, but the court was unwilling to bring down the wrath of  
27

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1 heaven in the form of statutory damages when considering the reality of the economic picture at  
2 bar:

3 Some courts . . . have concluded that a defendant's default itself could be viewed as  
4 evidence of willfulness [or make similar inferences based on profit motive to infringe]. . .  
5 [But] the plaintiff has failed to offer credible evidence that an enhanced damages award  
6 in the exorbitant amount of \$100,000, or something in that range, is necessary to  
7 accomplish the goals of the statute, i.e., the use of enhanced damages to alter the  
8 economic expectations of prospective violators. Regardless, even in the case of a default  
9 judgment, a plaintiff must do more than gesture at an inference to support its request for  
10 enhanced damages. *Garden City Boxing Club, Inc. v. Ayisah*, No. 02-CV-6673, 2004  
11 U.S. Dist. LEXIS 7867, at \*5 (S.D.N.Y. April 28, 2004) ("plaintiff must . . . substantiate  
12 a claim with evidence to prove the extent of damages").

13 In addition, the value of deterrence must be balanced against the inequity of imposing  
14 heavy financial burdens on small businesses. The sting of an enhanced award should not  
15 be greater than deterrence requires and fairness allows. Thus, I award Joe Hand an  
16 additional \$1,500 in enhanced damages from each defendant. This enhancement is not so  
17 large that it will spell financial ruin for the small businesses involved, especially if, as I  
18 suggest, Joe Hand allows installment payments over the course of a year or more, but it is  
19 large enough to raise the dollar amount of the penalty above the cost of obtaining a  
20 commercial license, and, for businesses of this size, should be a sufficient deterrent to  
21 avoid future violations.

22 *Joe Hand Promotions, Inc. v. Hernandez*, 2004 U.S. Dist. LEXIS 12159 (S.D.N.Y. June 30,  
23 2004) (some citations omitted). In so ruling, the court cited *Doehrer v. Caldwell*, 1980 U.S.  
24 Dist. LEXIS 10713 (N.D. Ill. 1980), which taught as follows:

25 A mechanical application of the statutory damage provision of the Copyright Act leads to  
26 absurd results. While Section 504's compensatory purpose should not be minimized, its  
27 deterrent provisions should not be converted into a windfall where, as a practical matter,

28

1 the plaintiff has suffered only nominal damages. It is clear from the legislative history of  
 2 the Copyright Revision Act of 1976 that Section 504 was designed, in part, “to provide  
 3 the courts with reasonable latitude to adjust recovery to the circumstances of the case,  
 4 thus avoiding some of the artificial or overly technical awards resulting from the  
 5 language of the existing statute.” S. Rep. No. 94-473, 94th Cong., 2d Sess., reprinted in  
 6 CCH Copyright Revision Act of 1976 P2042. . . .

7 The fact that statutory damages are not to be regarded as penalties, and that their purpose  
 8 is to permit a wronged plaintiff to recover where there is insufficient proof of actual damages or  
 9 profits, has been recognized as rising to the level of due process limitations in numerous other  
 10 recent copyright cases. Predicated by other courts’ expectations that constitutional due process  
 11 protections would apply to statutory damages copyright infringement,<sup>7</sup> two courts have used the  
 12 due process clause to limit the damages available in copyright infringement cases based on users  
 13 uploading songs on peer-to-peer networks. In *Capitol Records v. Thomas-Rassett*, 680 F. Supp.  
 14 2d 1045, 1048 (D. Minn. 2010), the court limited the infringer’s damages to \$2,250 per  
 15 infringement – three times the statutory minimum of \$750. While the court noted that this was a  
 16 “significant and harsh” punishment, due process required “some” relationship between the  
 17 damages suffered by the plaintiff and the damages imposed on the defendant. *Id.* at 1049, 1053.  
 18 The *Thomas-Rassett* court even noted that the \$2,250 cap on damages for infringement was  
 19 higher than the court would have imposed, but was an appropriate remittitur of the jury’s  
 20 \$2,000,000 damages award based on plaintiff’s sharing of 24 songs. *Id.* at 1049.

21 By a similar decision, the District of Massachusetts reaffirmed this \$2,250 limitation for  
 22 instances of willful song sharing in *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp.  
 23 2d 85, 117 (D. Mass. 2010). In her opinion, Judge Gertner held that \$2,250 – three times the  
 24 statutory minimum damages allowed in 17 U.S.C. § 504(c) – was the “outer limit” of damages

25 \_\_\_\_\_  
 26 <sup>7</sup> *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 n.6 (N.D. Ill. 2008) (suggesting that  
 27 *State Farm* might provide grounds for reducing statutory damages awarded under the Telephone Consumer  
 28 Protection Act); *Leiber v. Bertelsmann AG (In re Napster, Inc. Copyright Litigation)*, No. C MDL-00-1369 MHP, C  
 04-1671 MHP, 2005 WL 1287611, at \*10-11 (N.D. Cal. June 1, 2005) (suggesting in dictum that the court would  
 apply *Gore* and *State Farm* in considering whether statutory damages for copyright infringement were  
 unconstitutionally excessive).

1 that could constitutionally be imposed in such a case. 721 F. Supp. 2d at 117. The opinion went  
 2 on to note that while drawing a line in the sand of \$2,250 in song-sharing cases may be  
 3 controversial, any line-drawing is controversial, even when required by due process and the  
 4 Constitution. *Id.* This limitation was based on the evidence adduced at trial regarding the  
 5 recording studio plaintiffs' actual damages from the defendant's file-sharing, which revealed a  
 6 damages-to-lost profits ratio between 22,000 and 32,000 to 1, far higher than the 114:1 ratio of  
 7 punitive to compensatory damages permitted in *Williams*. *Id.* at 112-14.

8 In this case, no evidence of Righthaven's actual damages has been introduced to the  
 9 court, though it would have to be at least \$263.16<sup>8</sup> from Hyatt's infringement alone to remain  
 10 within *Williams*' constitutional threshold, reinforced by *Tenenbaum*. This evidence has not been  
 11 presented to the Court, and to *Amicus*' knowledge does not exist, and thus any award of damages  
 12 in the range sought by Righthaven would be speculative and based wholly on conjecture.  
 13 Indeed, it strains the imagination to conceive how Righthaven could show *any* damages,  
 14 considering that Righthaven acquired the copyright in question only *after* determining that it the  
 15 work been used by the defendant. If copyright infringement makes the original work "damaged  
 16 goods," thus entitling the author to compensation, then damages are appropriate. But, when a  
 17 get-rich-quick scheme is premised on buying damaged goods after the damage occurs, the get-  
 18 rich-quick scheme itself should not be compensated for specious "losses" to an "asset" it would  
 19 never have bought but for the supposed infringement. In fact, it is far from clear that the LVRJ  
 20 and Stephens Media effectively sold the rights to the work at all. The entire enterprise is so  
 21 unseemly and questionable that it is not clear that this Court, as a due process matter, should  
 22 even award the *minimum* statutory minimum of \$750.

23 It is instructive to consider the one case where the amount Righthaven received to  
 24 conclude its lawsuit is known, *Righthaven LLC v. National Organization for the Reform of*  
 25 *Marijuana Laws ("NORML")*, in which the defendant filed a Rule 68 offer of judgment for

26 \_\_\_\_\_  
 27 <sup>8</sup> This number was achieved by dividing \$30,000 – Righthaven's minimum sought damages – by 114, the factor  
 28 identified in *Williams* and *Tenenbaum* as the threshold for due process to be preserved.  $30,000/114 = 263.157$ ,  
 which was rounded up to 16, the smallest sum accounted for by U.S. currency, which would remain under the  
*Williams* factor of 114.

1 \$2,185.00. Case No. 2:10-cv-0351, Offer of Judgment, Doc. # 30-1 at 2 (D. Nev. filed Jun. 4,  
 2 2010). To arrive at this amount, NORML multiplied the total resale cost of the infringing article  
 3 – \$2.95 – by the 247 people who *possibly* could have viewed it as a result of NORML’s  
 4 infringement. *Id.* NORML did not identify what portion would have been the copyright holder’s  
 5 profits, but determined the total amount of revenue that could have *possibly* been lost due to  
 6 NORML’s actions was \$728.65<sup>9</sup>. NORML then tripled this amount, arriving at the amount it  
 7 offered as judgment: \$2,185. *Id.* at 2. Righthaven accepted this offer of judgment. Case No.  
 8 2:10-cv-0351, Acceptance of Offer of Judgment, Doc. # 30 (D. Nev. filed Jun. 4, 2010).

9 This amount, accepted by Righthaven less than nine months ago as sufficient value for  
 10 copyright claims virtually identical to those made here, is a mere 7.3%<sup>10</sup> of what Righthaven  
 11 seeks from Hyatt in damages – by virtue of a default judgment. At the same time, publicly  
 12 available information reports that the settlement amounts for these Righthaven cases has steadily  
 13 increased since they began, from \$2,000-\$3,000, then to \$3,000-\$5,000, to now, inexplicably,  
 14 \$6,000.<sup>11</sup> Righthaven has not presented a single piece of evidence as to the market damage  
 15 suffered by it, the LVRJ or Stephens Media due to the allegedly infringing republication of the  
 16 articles and photos in the cases it has brought before this Court. All of these settlements  
 17 Righthaven has secured to date are likely to be factors greater than the LVRJ’s or Stephens  
 18 Media’s lost revenues. These settlements are bound to be an even larger multiple of the LVRJ’s  
 19 or Stephens Media’s lost *profits*, which are the copyright holder’s ultimate monetary gain  
 20 derived from the article’s sale.

21 Large or small, however, the amounts both procured by Righthaven in other cases and  
 22 sought by Righthaven in this matter ultimately violate due process. In *Tenenbaum* and *Thomas-*  
 23 *Rassett*, the courts in those cases found that \$2,250 was the outer constitutional limit of damages  
 24 for knowingly and intentionally sharing *songs* on a peer-to-peer network, and this intentional  
 25

26 <sup>9</sup> \$2.95 multiplied by 247 is \$728.65.

27 <sup>10</sup> 2,185 divided by 30,000 is 7.28333; this amount was rounded to the closest tenth.

28 <sup>11</sup> “Fairuser,” *Price Increase: Righthaven Now Asking Bloggers for \$6,000 to Avoid Trial*, Righthaven Victims (Feb. 15, 2011), <http://righthavenvictims.blogspot.com/2011/02/price-increase-righthaven-now-asking.html> (*last accessed* Feb. 20, 2011).

1 sharing of complex media like songs takes place on a network where republication is rampant,  
 2 thus exacerbating the damages. This case, as the other Righthaven cases like it, compels a lower  
 3 range of damages because of the social function achieved by sharing otherwise stale news stories  
 4 of trivial economic value and minimal creative content, especially when buttressed by the  
 5 doctrine of fair use. *See Las Angeles News Svc. v. Reuters Tv Int'l*, 149 F.3d 987, 994 (9th Cir.  
 6 1998) (holding that facts are not subject to copyright). Notwithstanding the presumptions  
 7 permitted in a default, as a public policy matter and a matter of judicial integrity, this Court is  
 8 obliged to consider the underlying merits of the claim and the propriety of the application of  
 9 statutory damages to this situation. *See Joe Hand Promotions, Inc.*, 2004 U.S. Dist. LEXIS  
 10 12159, *supra*. Here, Hyatt's use of the Article in this case is arguably a non-infringing fair use,  
 11 as has been true of other cases before this Court. *Righthaven LLC v. Realty One Group, Inc.*, 38  
 12 Med. L. Rptr. 2441 (D. Nev. 2010) (finding the defendant's use of a LVRJ article to be non-  
 13 infringing fair use).

14 Moreover, a finding that Hyatt was an innocent infringer – entirely appropriate on this  
 15 record – would limit his damages to only \$200,<sup>12</sup> less than 1% of the baseline \$30,000  
 16 Righthaven seeks in its Motion (Doc. # 17),<sup>13</sup> or even nothing at all<sup>14</sup>. An innocent infringer is  
 17 entitled to a significant reduction in damages, even below the statutory minimum set forth in 17  
 18 U.S.C. § 504(c). *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978). In this case, Hyatt may  
 19 have believed he had an implied license to share the Article, as there was a link encouraging  
 20 viewers to e-mail the Article to others on the page where it appeared. (Doc. # 1 Exh. 1.) In other  
 21 cases, this Court has considered the fact that the defendants were not aware of the content at  
 22 issue's original source, or that they did not have any notice that it was a third party's intellectual  
 23 property. *See, e.g., Righthaven LLC v. Wilcox*, Case No. 2:10-cv-01192, Def.'s Mtn. to Dismiss  
 24 at 3:3-4:6 (D. Nev. filed Sept. 10, 2010) (explaining how content of unknown origin could  
 25 appear on a defendant's website without his or her action or knowledge).

26  
 27 <sup>12</sup> 17 U.S.C. § 504(c)(2).

<sup>13</sup> 200 divided by 30,000 is .00666, rounded to .007 – the equivalent of 0.7%.

<sup>14</sup> 17 U.S.C. § 406.

1 For the sake of other bloggers and even other defendants in pending Righthaven lawsuits,  
 2 this Court's demarcation of a clear line in the sand will return a level of certainty to the emerging  
 3 social and cultural force that is internet journalism. Left unchecked, the inexplicably steep  
 4 upward trend in Righthaven's settlement demands, now reaching a crescendo with the Motion  
 5 before this court for at least \$30,000 in damages, is certain to chill internet users from expressing  
 6 themselves where, as is common enough, they do not understand the far-from-intuitive limits of  
 7 fair use of copyright-protected materials. Righthaven's copyright trolling will continue to have  
 8 this effect until some kind of cap or limiting guideline is placed upon what Righthaven may  
 9 recover for the alleged infringements of works with which it has essentially nothing to do and  
 10 which it has pursued for almost a year. Such a constitutionally compelled limitation on damages  
 11 will serve the important purpose of protecting expression and guarding the flow of information,  
 12 commentary and expression of issues of public interest, consistent with *Amicus'* goals and the  
 13 objectives of its constituency and with the First Amendment.

14 ***2. This Court Does Not Have Jurisdiction to Order a Domain Name Turnover in This***  
 15 ***Case.***

16 Righthaven's request for this Court to order the turnover of Hyatt's domain name where  
 17 the copyright infringement allegedly occurred – <1ce.org> – cannot be granted. Domain names  
 18 are tremendously valuable assets to bloggers, and can accrue value because of their intrinsically  
 19 high visibility (e.g., <news.com>), or acquired worth through the awareness and visits earned by  
 20 high-quality or unique content, or some other selling proposition (e.g., <drudgereport.com>).  
 21 Thus, a domain name is an important commodity to bloggers and one that must be protected, a  
 22 blog's loss of its unique domain name would cripple it, if not destroy it outright. Thus, within  
 23 the Ninth Circuit, domain names are regarded as intangible personal property that cannot be  
 24 subject to turnover orders in copyright cases.<sup>15</sup> *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138,  
 25 1143-44 (9th Cir. 2010); *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003). Like California's  
 26

27 <sup>15</sup> Personal intangible property, including domain names, can be seized to satisfy an unpaid judgment. *See Kremen*,  
 28 337 F.3d at 1024. It is improper, however, for the Court to order a turnover of the property, especially when the  
 Defendant has the option to pay (or not pay) and avoid a judgment in which the domain name may be seized. *Id.*

1 approach to intangible personal property, articulated in *Kremen*, Nevada recognizes it as  
2 something that embodies “every intangible benefit and prerogative susceptible of possession or  
3 disposition.” *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 543 (Nev.  
4 2008), citing *Kremen*, 337 F.3d at 1030. Therefore, just as California’s property laws extend this  
5 protection to domain names, the rule of *Crestdale* compels the conclusion that Nevada, too,  
6 would extend the same protections to website domain names.

7 Indeed, the identicalness of Nevada’s and California’s law in this respect compels  
8 identical results. The remedy sought by Righthaven is only allowed in trademark cases, pursuant  
9 to 15 U.S.C. §§ 1125(d)(1)(C) and (d)(2)(D), where cybersquatting has occurred – a breach of  
10 trademark law that is utterly unrelated to copyright infringement, the only claim alleged in this  
11 case. *See Caesar’s World, Inc. v. Milanian*, 247 F. Supp. 2d 1171, 1206 (D. Nev. 2003)  
12 (recognizing domain transfer as a valid remedy solely for trademark infringement). Righthaven  
13 has not alleged trademark infringement here, nor could it do so on the facts presented. Thus,  
14 there is no legal basis for the Court to order Hyatt to transfer its <1ce.org> domain to  
15 Righthaven.

### 16 **C. Attorney’s Fees May be Proper in Copyright Cases, But Not For Righthaven.**

17 Righthaven should not be awarded attorneys’ fees or costs in this action. The Ninth  
18 Circuit allows its courts to authorize attorneys’ fees and costs to be awarded *at their discretion* in  
19 copyright cases, pursuant to 17 U.S.C. § 505. *Love v. Associated Newspapers, Ltd.*, 611 F.3d  
20 601, 614-15 (9th Cir. 2010). Such awards are not automatic. *See Fogerty v. Fantasy, Inc.*, 510  
21 U.S. 517, 534 (1994) (finding that attorneys’ fees and costs are not awarded as a matter of course  
22 under 17 U.S.C. § 505); *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1230-  
23 31 (9th Cir. 2008) (affirming the lower court’s refusal to award attorneys’ fees and costs under  
24 18 U.S.C. § 505).

25 The facts weigh heavily against any award of attorneys’ fees or costs to Righthaven under  
26 17 U.S.C. § 505. Righthaven’s success in this case is premised on an overmatched party’s total  
27 failure to appear, rather than the strength or cogency of its legal position or the sympathetic

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1 factual nature of its dubious claims of harm. Because Hyatt could have asserted the fair use  
2 defense and prevailed, particularly in light of this Court’s *Realty One Group* decision, the Court  
3 should be mindful of how a monstrous award here – even if only “symbolic” – would chill free  
4 speech in other fair use cases. Righthaven’s entire “business model” is premised on cheap,  
5 exploitative litigation against mainly unschooled and defenseless individuals, described in  
6 Sections I and II A hereof. It should bear the costs of litigating its cases as part of that business  
7 model, as it was conceived to do. This factor weighs particularly heavily against Righthaven, as  
8 it is not protecting content it created or invested in during its “useful life,” but bought  
9 unspecified rights in works solely so it could sue Hyatt and others after trawling the Internet for  
10 possible instances of infringement – a fee-generating litigation business. The needs of  
11 compensation and deterrence weigh *against* Righthaven receiving any attorneys’ fees or costs  
12 award, for, if anything, it is Righthaven’s conduct that should be deterred. Any compensation  
13 for losses it never suffered should be derived solely in any damages award by this Court, which  
14 should reflect the minimal-to-nonexistent harm Hyatt’s conduct inflicted on Righthaven.

15 Indeed, it is not the intent of bloggers to “rip off” or damage the markets for the  
16 publications that supply them with reporting and other facts that are used as the foundation for  
17 commentary and other analysis. The “blogosphere” and traditional media exist in a symbiotic  
18 relationship, in which blogs generate significant traffic to the sources they credit for works  
19 created by the latter and give new life to what would otherwise be essentially dormant online  
20 archives. Such traditional outlets recognize the benefit of bloggers to their online presences and  
21 are in the best position, in their own right, to correct and manage bloggers who may overstep the  
22 bounds of fair use – ideally in advance of initiating scorched-earth litigation. In  
23 contradistinction, Righthaven, having never produced any content, is an outsider to this  
24 relationship. Righthaven has no interest in protecting the market for content – only the market  
25 for dubious copyright litigation conducive to shakedowns of individuals who have become  
26 citizen journalists or commentators but will never be copyright experts.

28

1 To award attorneys' fees to Righthaven, which has premised its existence on acquiring  
2 rights in order to sue others for infringement and whose primary source of revenue is settlements  
3 and judgments generated by needless and completely avoidable litigation, would be a slap in the  
4 face of the Copyright Act and would mock its very purpose. *Amicus* represents copyright  
5 holders and supports the exercise of discretion by courts to award attorneys' fees and costs under  
6 17 U.S.C. § 505 in appropriate cases. But *Amicus* opposes the award of fees and costs in this  
7 case – and similar cases – because of the obvious dissimilarities between content creators and  
8 Righthaven's exploitative use of intellectual property as litigation fodder. Copyrights exist to  
9 protect creators and publishers – not create a secondary market for lawsuits.

### 10 **Conclusion**

11 Hyatt's damages in this case should be minimal, and Hyatt should not be required to pay  
12 Righthaven's attorneys' fees or costs. Righthaven's entire model for existence is highly suspect  
13 under prevailing copyright law in this District, especially with respect to the rights it acquires, if  
14 any, from Stephens Media, and what right they give Righthaven to sue alleged infringers.  
15 Righthaven protects nothing but itself and serves no purpose but to sue others who may have  
16 valid defenses to infringement but, as in this case, cannot afford to raise them. It has no interest  
17 in producing or protecting the market for original content. Righthaven is so divorced from the  
18 original works that its actual damages are so minimal that even nominal damages will be far out  
19 of proportion with Righthaven's actual harm. Similarly, as a litigation-creating machine, an  
20 award of attorneys' fees to Righthaven would effectively be a double recovery.

21 Because of the complete and utter lack of harm experienced by Righthaven in such cases,  
22 the damages it seeks via settlement and now by the pending Motion (Doc. # 17) are far out of  
23 proportion to its actual financial harm. The proportions of Righthaven's desired recovery  
24 compared to its actual harm are beyond those that have been authorized by the Supreme Court,  
25 and due process compels their reduction. As in *Tenenbaum* and *Thomas-Rassett*, willful  
26 infringer cases that did not have the compelling First Amendment defenses available to Hyatt  
27 and similarly situated defendants, this Court should set a defined limit as to what due process

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1 will allow for recovery, and that limit should be as close as possible to the Copyright Act's  
2 statutory minimum damages of \$750. As for Righthaven's request to have the Court order  
3 <1ce.org>'s turnover from Hyatt to Righthaven, such a remedy is not available in this case.

4 While individual courts within the Ninth Circuit have discretion to authorize awards of  
5 attorneys' fees and costs under 17 U.S.C. § 505, this case does not warrant such an award in  
6 Righthaven's favor. All of the factors for determining whether an award should be given to a  
7 prevailing party weigh against Righthaven in Hyatt's favor. While this decision is ultimately the  
8 Court's, it is consistent with precedent to deny this relief to Righthaven.

9  
10 Dated February 23, 2011

Respectfully Submitted,  
RANDAZZA LEGAL GROUP

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J. Malcolm DeVoy IV  
Marc J. Randazza

Co-Counsel:  
Ronald D. Coleman  
GOETZ FITZPATRICK LLP

*Attorneys for Amicus Curiae,  
Media Bloggers Association*

---

# EXHIBIT 1

**COPYRIGHT ASSIGNMENT**

This Copyright Assignment is made effective as of February 28, 2010 by Stephens Media LLC, a Nevada limited-liability company (“Assignor”).

In consideration of monetary commitments and commitments to services to be provided and/or already provided by *Righthaven* LLC, a Nevada limited-liability company (“*Righthaven*”), to Assignor and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor hereby transfers, vests and assigns the work described in Exhibit A, attached hereto and incorporated herein by this reference (the “Work”), to *Righthaven*, subject to Assignor’s rights of reversion, all copyrights requisite to have *Righthaven* recognized as the copyright owner of the Work for purposes of *Righthaven* being able to claim ownership as well as the right to seek redress for past, present and future infringements of the copyright in and to the Work.

**IN WITNESS WHEREOF**, Assignor hereby executes this Assignment on this 28 day of February, 2010.

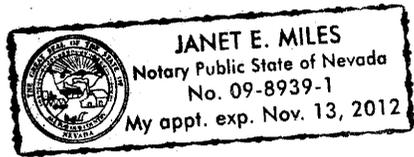
STEPHENS MEDIA LLC

By: [Signature]  
Name: Mark Hinueber, Esq.  
Title: Vice-President/General Counsel

STATE OF NEVADA  
COUNTY OF CLARK

Subscribed and sworn to before me by Mark Hinueber, Esq. this 1st day of ~~February~~ MARCH, 2010.

[Signature]  
Notary Public



**EXHIBIT A**

Marijuana as medicine. Work made for hire by Corey Levitan. Original publication: August 30, 2009, *Las Vegas Review-Journal* and [www.lvrj.com](http://www.lvrj.com).



August 30, 2009  
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## Marijuana as Medicine

Corey Levitan

By COREY LEVITAN

LAS VEGAS REVIEW-JOURNAL

The debate over the legalization of **marijuana** in Nevada overlooks one significant detail: It's already legal.

An estimated 1,530 Nevadans have obtained permission to lawfully possess and use pot since NRS-453A was signed into law in 2001, according to the Nevada State Health Division. (Nevada is one of 13 states with **a** medical **marijuana** program.)

But **a** medical **marijuana** card does not read: "Get Out of Jail Free." Medical **marijuana** can never legally be purchased, or smoked in **a** public place. It must be grown and inhaled (or ingested via baked goods) at the cardholder's residence.

The process begins with **a** written request and \$50 check sent to the state Health Division in Carson City. This gets prospective patients an application and **a** physician's statement that must be taken to **a** doctor willing to recommend **marijuana**. (According to FDA guidelines, it's **a** Schedule 1 drug, which makes it illegal to prescribe.)

The legal conditions recognized by Nevada to medicate with **marijuana** are restricted to AIDS, cancer, glaucoma, weight loss, severe nausea, severe pain, seizures and persistent muscle spasms. (Each has **a** box on the form for the physician to check.)

If the application is approved by the Health Division, patients then pay **a** further \$150 processing fee, which covers **a** background check for the one crime that will get them rejected: selling, or intending to sell, **a** controlled substance.

After fingerprinting, notary public and Department of Motor Vehicles fees of about \$20 each, the DMV issues **a** card good for one year. (The card must be renewed annually for another \$150 fee and signed physician's statement.)

The trickiest part is finding **a** doctor. Most will not sign off on the card, according to Bruce Mirken, spokesman for the Washington, D.C.-based **Marijuana** Policy Project advocacy group.

Las Vegas ophthalmologist Dr. Kent Wellish, director of the Wellish Vision Institute, and oncologist Dr. Paul Michaels of the Comprehensive Cancer Centers of Nevada have never signed off - although both are occasionally asked.

Wellish said laser treatment and the eyedrops Xalatan, Lumigan and Travatan are much more effective for glaucoma.

"For **marijuana** to work, the patient would have to be stoned around the clock," he said. "When you're not stoned, the pressure goes back up, and that's when damage occurs to the optic nerve."

Michaels prefers Zofran and Compazine for the short-term nausea associated with chemotherapy. (He said that **marijuana** has "no effect whatsoever" on cancer pain.)

Michaels has prescribed **marijuana** to five of his chemo patients with long-term nausea, but only in the form of Marinol pills, which concentrate the drug's active ingredient, THC, and do not require a medical **marijuana** card.

"**Marijuana** inhalation or baking is not a good idea," Michaels said. "Funguses and bacteria grow on plants very easily, and sometimes you don't kill them with heat. And the immune system of chemo patients is shot, so they're more susceptible."

Difficulty finding a doctor is why advertisements for medical **marijuana** appear in the back of Nevada's alternative weeklies.

"We stand behind you and your right to choose alternative **medicine**," read a recent CityLife ad from the Hemp and Cannabis Foundation. An ad on the same page from DrReefer.com announced: "Get legal today!"

These companies - which charge \$200 to \$300 on top of the required fees - promise to refer patients to sympathetic physicians such as Dr. Rabia Ahmed, who practices at the Hemp and Cannabis Foundation's clinic at 10161 Park Run Drive. (Ahmed would not respond to the Review-Journal's request for an interview.)

Ivan Goldsmith, an internal **medicine** physician who operates three valley medical centers, said he has recommended **marijuana** for all six of the customers referred to him by DrReefer.com.

"They all qualified and have appropriate radiographic or medical records to justify the recommendation," he said.

Goldsmith calls **marijuana** "highly effective" and said that studies back him up.

"The research is now catching up that the cannabinoid system is very important in a lot of body functions," he said. "They're finding that if you stimulate the cannabinoid system, you can block neuropathic pain."

When asked to respond to the opinions of Drs. Wellish and Michaels, Goldsmith said doctors frequently disagree on diagnoses, and that all safe options should always be available for them to try.

Once Nevadans receive their cards, one step remains. Unlike California, Colorado, New Mexico and Rhode Island - which permit convenient medical **marijuana** dispensaries - Nevada requires that patients grow their own. The law limits each cardholder to seven plants on his or her own property: three mature and four immature. Another Nevada resident can be designated to grow for a **marijuana** cardholder, but that grower must obtain a card, too.

The difficulty of growing one's own **marijuana** transcends the plant's finicky light, heat and moisture requirements. It happens to be illegal to sell seeds in the United States. (Not even DrReefer.com or the Hemp and Cannabis Foundation offer to help with this problem.)

The only legal ways for cardholders in Nevada to begin growing, according to Metropolitan Police Department public information officer Barbara Morgan, are to purchase an ounce or less of seeds from another country via the Internet, or to obtain seeds or a cutting from another plant, for free, from another cardholder.

Once cardholders meet all the above requirements, police officers cannot detain them for any suspicious green baggie found during a routine traffic stop - as long as that baggie weighs less

than an ounce and the motorist doesn't appear under its influence.

"I wouldn't be surprised if it happens quite often," Morgan said.

Even if patients don't have their cards on them, they're not arrested, because the DMV notes their existence in its computer record.

This begs the question of how many, if any, medical **marijuana** patients are actually illegal drug users who exaggerate or fake medical symptoms to get impunity for their habit.

"Every medication has potential for abuse," Goldsmith said. "But a patient can easily go on the street, buy the **marijuana** and not seek medical evaluation. So if he has enough moxie to come in and want to do it through legal channels, you have to respect that."

When asked for her take, officer Morgan replied: "All we do is enforce the law. We can't personally have our opinions."

Contact reporter Corey Levitan at [clevitan@reviewjournal.com](mailto:clevitan@reviewjournal.com) or 702-383-0456.

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13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF NEVADA**

15 RIGHTHAVEN, LLC, a Nevada limited liability  
16 company,

17 Plaintiff,

18 vs.

19 BILL HYATT, an individual

20 Defendant.

Case No. 2:10-cv-01736-KJD-RJJ

**DECLARATION OF J. MALCOLM  
DEVOY IN SUPPORT OF *AMICUS  
CURIAE* BRIEF IN  
RIGHTHAVEN LLC v. BILL HYATT**

21  
22 **DECLARATION OF J. MALCOLM DEVOY IN SUPORT**  
23 **OF *AMICUS CURIAE* BRIEF IN RIGHTHAVEN LLC v. BILL HYATT**

24 I, J. MALCOLM DEVOY, hereby declare as follows:

- 25 1. I am a duly licensed attorney in Nevada and a member of the Nevada bar in good  
26 standing, attorney for the Randazza Legal Group law firm, and counsel of record for  
27 *Amicus*, Media Bloggers Association, in this matter.  
28 2. On February 21, 2011, I searched the archives of the Las Vegas Review-Journal

1 (hereinafter, the "LVRJ") on its website, <lvj.com> for the article "FX's manly man  
2 shows hold outsider appeal," which was originally published on September 5, 2010.

3 3. The LVRJ's online archives contained this article ("FX's manly man shows hold  
4 outsider appeal"), available to registered members of the site. In order to access it,  
5 however, a user was required to purchase a subscription to purchase the article's rights.  
6 This payment screen appeared after clicking the link to register for an account,  
7 necessary to view the LVRJ's archived content.

8 4. The payment page requested credit card and payment information in order to view  
9 the LVRJ's article. The least expensive option to view the article was \$2.95, enabling  
10 the user to purchase the article directly from the LVRJ.

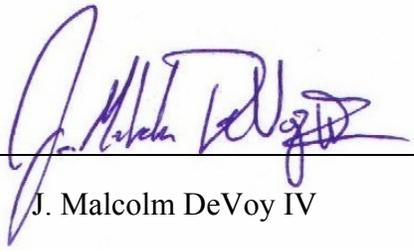
11 5. A true and correct copy of this online purchase screen for "FX's manly man shows  
12 hold outsider appeal," as it appeared on February 21, 2011, is attached to this Amicus  
13 Curiae brief as Exhibit 2.

14 6. The above observations, culminating in the required-payment registration screen  
15 found in Exhibit 2, were replicated with a number of articles, including Francis  
16 McCabe, *Four Indicted in Slaying*, Las Vegas Review-Journal at 2B (Dec. 22, 2010);  
17 John Pryzbys, *Strange Job*, Las Vegas Review-Journal at 6J (Dec. 5, 2010); Doug  
18 Elfman, *A Hate List of Directors Who Act*, Las Vegas Review-Journal at 1SS (Nov. 5,  
19 2010).

20 7. On this basis, I believe that the payment screen depicted in Exhibit 2 is displayed for  
21 all users of the LVRJ website without accounts, and those with accounts who are not  
22 logged in, charging \$2.95 to purchase a single article from the LVRJ's online archives.

23 I declare under penalty of perjury that the foregoing is true and correct.

24 Dated: February 21, 2011

25  
26 By: 

J. Malcolm DeVoy IV

# EXHIBIT 2



Your #1 source for news in Las Vegas from Nevada's largest newspaper



To protect your account information, we automatically use our secure server.



The Las Vegas Review Journal Archive contains no photos, charts, or graphics.

### Payment Information

- One year pass, 1000 articles (1995.00)
- One year pass, 500 articles (995.00)
- One month pass, 40 articles (79.95)
- One month pass, 25 articles (49.95)
- One month pass, 10 articles (21.95)
- One week pass, 3 articles (6.95)
- Single article (2.95)



Number:

Expiration:

**Please Note:** For maximum security, we do not store your credit card information beyond this online session.