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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

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

21 **AMICUS CURIAE BRIEF**

22 **I. Introduction**

23 Righthaven is a Nevada LLC (hereinafter “Righthaven”) with the most questionable of
24 business models. It is a champertous enterprise championing unsound copyright claims in order
25 to bully authors into large financial settlements, despite the fact that most are likely engaged in
26 fair use. The Righthaven “business model” is to seek out unwitting and, perhaps, careless
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1 bloggers who have used portions of the *Las Vegas Review-Journal* and *Denver Post* in online
2 discussions. Once Righthaven finds these uses by the use of Internet “sweeps,” it dubiously
3 “acquires” the rights to the articles in question, essentially as causes of action, solely for the
4 purpose of filing a 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 defense; flummoxed by the threat of a \$150,000 potential statutory
8 damage award – an amount that it can safely be said none of them could dream of satisfying –
9 and lacking even a clue as to whom to turn to for advice, many 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 fees¹ –
13 all based on specious claims of infringement of 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 bare right to sue for infringement is not an exclusive, assignable right under 17 U.S.C. § 106).

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28 ¹ See 17 U.S.C. §§ 412, 504(c).

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, show that these “assignments” are transparently illegitimate.

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

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

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

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

25 **II. Argument**

26 Righthaven’s business model belies its argument for a large damage award against Hyatt,
27 as well as an award of attorney’s fees and costs. The monetary relief Righthaven seeks from

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1 Hyatt is so astronomical and disproportionate that this Court should recognize that the Due
2 Process clause of the Constitution compels a degree of restraint in an award of damages. Even if
3 it did not, the facts of the case cry out for someone to speak for the victim of Righthaven's
4 unethical champerty. The other form of relief Righthaven seeks, a turnover of Hyatt's domain
5 name, is not available in Copyright cases, and it is high time that a court tell Righthaven so.
6 Righthaven's desired relief should be denied in all cases, except for money damages, in which
7 case its desired award should be reduced to nominal damages in the smallest amount allowed by
8 law. *Amicus'* experience and depth of information in working with and representing bloggers
9 lends an especially useful perspective to analyzing how this Court's award of damages to
10 Righthaven would be devastating not only to Hyatt, but the blogging community as a whole.

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

13 Righthaven's business model is simple, cynical, and ethically questionable. Righthaven
14 finds instances of infringement relating to newspaper articles of essentially trivial economic
15 value on blogs and other small websites without significant readership, advertising or other
16 resources. After finding these instances of infringement, Righthaven purports to purchase the
17 rights to the allegedly infringed work from Stephens Media, which for some reason does not
18 have the confidence in its case to place its name on the complaints as a plaintiff. Rather than
19 mitigating its "damages," Righthaven makes sure to leave its blogger victims in the dark,
20 surprising them with lawsuits that they often first learn about from news reporters calling them
21 for comment.

22 The assignment agreements between Stephens Media and Righthaven do not identify
23 which Rights Righthaven has purchased. A true and correct copy of the assignment of rights
24 from Stephens Media to Righthaven for the article "Marijuana as Medicine," is attached hereto
25 as Exhibit 1. An identical assignment for the article "Florida woman suing over Monte Carlo
26 fire" was filed with this Court by Righthaven in *Righthaven LLC v. Doctor Shezad Malik Law*
27 *Firm P.C.*, Case No. 2:10-cv-00636-RLH-RJJ, Plaintiff's Response to Defendant's Motion to

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1 Dismiss for Lack of Subject Matter Jurisdiction and Lack of Personal Jurisdiction, Doc. # 11
 2 Exh. 1 (D. Nev., filed June 21, 2010). This is impermissible within the Ninth Circuit, as courts
 3 have held that the six rights inherent in an owner's valid copyright² cannot be unbundled from
 4 the right to sue for infringement. *Sybersound*, 517 F.3d at 1145-46; *Silvers*, 402 F.3d at 887. An
 5 exclusive ownership interest, assignment or license of an exclusive copyright right under 17
 6 U.S.C. § 106 is required for Righthaven to be able to sue alleged copyright infringers.
 7 *Sybersound*, 517 F.3d at 1145-46; *Silvers*, 402 F.3d at 887. Without specifying what rights
 8 transfer from Stephens Media to Righthaven, Exhibit 1 shows that Righthaven acquires only the
 9 copyrights "requisite" to be recognized as the copyright owner of the work for the purposes of
 10 claiming ownership and seeking redress for past and future infringement. (Exh. 1 at 1.) No
 11 rights are identified or explained, and Righthaven impermissibly purchases only those rights it
 12 believes likely to give it standing to sue those who infringed on that article – without any
 13 mention of exclusivity. (*Id.*) Meanwhile, these very articles that Righthaven claims to have
 14 acquired the rights to are still available for sale in the LVRJ's archives. Declaration of J.
 15 Malcolm DeVoy ¶¶ 2-7.

16 Righthaven's agreements with Stephens Media include a mysterious "right of reversion"
 17 that allows whatever rights Righthaven does acquire to revert back to Stephens Media under
 18 circumstances unspecified in the parties' written agreement.³ (*Id.*) This raises serious questions
 19 as to whether Righthaven truly owns the copyright at all, as it can revert to Stephens Media
 20 under unexplained circumstances. To date, this is the only copyright assignment *Amicus* has
 21 seen from Righthaven, and likely the only one seen by the Court, as no other Righthaven cases
 22 have advanced to the discovery phase of litigation. *Amicus* – and to the best of *Amicus*'
 23 knowledge, this Court – has no definitive knowledge as to what rights Stephens Media transfers
 24 to Righthaven in these agreements other than an attempt to impermissibly assign the bare right to
 25 sue. Based on Exhibit 1, there is serious doubt as to whether these rights are exclusive as

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 27 ² 17 U.S.C. § 106.

28 ³ To date, Righthaven seems to have carefully chosen its victims in order to avoid litigating its cases against anyone
 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 required by copyright law in order to be enforceable, and whether these rights even permit
2 Righthaven to sue others for alleged instances of copyright infringement.

3 The logical inference from what is known of Righthaven’s acquisition of these copyright
4 rights from Stephens Media and their conduct in litigation is that Righthaven uses these rights
5 only to sue others. Righthaven has no interest in protecting Stephens Media’s content, and uses
6 these copyrights acquired – with a reversion to Stephens Media – simply to sue small site
7 operators for illusory damages. This is not to say the articles are worthless: In fact, while they
8 are available online for free, the LVRJ attempts to sell each article available on its website for a
9 mere \$2.95. A true and correct copy of the purchase screen for LVRJ articles, including that for
10 the Article at issue in this case, is attached as Exhibit 2; see DeVoy decl. ¶¶ 3-5, 6-7. It is
11 unknown what ratio of people who view these stories purchase them, or what the LVRJ’s profit
12 margin is from these article sales at \$2.95 each; to date, Righthaven has not produced any
13 evidence addressing either of these margins – nor would it likely be able to do so, if any
14 defendant had the resources to vindicate its rights in these cases.

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

1 When Righthaven first began suing others for alleged infringements, Sherman Frederick,
2 then-Publisher of the LVRJ,⁴ analogized their use of the LVRJ's content to driving away with his
3 Corvette.⁵ Interestingly enough, Mr. Frederick's company never sued to enforce its rights, but
4 rather decided to commoditize those rights, transferring them to Righthaven for unexplained
5 reasons. To continue the car analogy, Righthaven's model is the equivalent of buying broken
6 cars in order to sue whoever may have damaged them. In short, Righthaven is engaged in a
7 callow use of the Copyright Act to create a litigation brokerage – not to vindicate rights
8 envisioned by the Copyright Clause.

9 As Righthaven has no legitimate interest in whatever copyright rights it possesses in the
10 Article, it is entitled to no more than nominal damages – if that. Righthaven is not a hard-
11 working content producer trying to preserve its relevant market from the unceasing raids of
12 content pirates. The authors of the Intellectual Property clause and the Copyright Act never
13 envisioned this kind of champerty dealership -- a dedicated litigation house that acquires rights
14 from other entities solely to sue in their stead in the most questionable cases. If Stephens Media
15 or the LVRJ had sued to protect content it produced and the market for it, an argument for more
16 than nominal damages might be tenable. Righthaven, however, has not suffered any financial
17 harm whatsoever from the infringement it alleges – for if any damages occurred, they occurred
18 before Righthaven procured the copyright. Righthaven's damages, if any, should be only enough
19 to observe that infringement occurred. Righthaven does not suffer any harm from lost profits or
20 a lost market for the work, as it does not produce, license or sell content, but merely acquires
21 rights in it to file lawsuits such as this one. In short, publishers might sue to enforce their right to
22 control their works in a relevant marketplace. However, Righthaven's marketplace is not the
23 news media consuming public – Righthaven's marketplace is a black market of impermissible
24 lawsuit brokering.

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26 ⁴ J. Patrick Coolican, *Review-Journal Publisher Sherman Frederick, Editor Thomas Mitchell Out*, Las Vegas Sun (Nov.
27 12, 2010), available at [http://www.lasvegassun.com/news/2010/nov/12/review-journal-publisher-sherman-frederick-
28 editor-/](http://www.lasvegassun.com/news/2010/nov/12/review-journal-publisher-sherman-frederick-editor-/) (last accessed Feb. 22, 2011).

⁵ Sherman Frederick, *Copyright theft: We're not taking it anymore*, Las Vegas Review-Journal (May 28, 2010),
available at http://www.lvrj.com/blogs/sherm/Copyright_theft_Were_not_taking_it_anymore.html (last accessed
Feb. 20, 2011).

1 If the court awards Righthaven its outrageous demand, it will simply throw gasoline on
2 the fire of Righthaven's unethical copyright trolling and attorney-fee-generation scheme to the
3 detriment of bloggers, including *Amicus*' members, and those who enjoy the Fair Use rights
4 granted by 17 U.S.C. § 107 and the First Amendment.

5 The Righthaven model, if sustained by law and emboldened by the outrageous six-figure
6 award that Righthaven seeks, poses a singular and unique threat to *Amicus*' membership. The
7 interests of bloggers acting under *Amicus*' umbrella will be adversely affected by any award of
8 damages granted to an entity that collects illusory copyright rights for the sole purpose of
9 litigation. Those served by *Amicus* will have no idea how to protect themselves from costly
10 litigation against a party they could not have foreseen acquiring copyright rights, or ignoring Fair
11 Use, and thus will limit their liability by taking the safest, least creative path of minimal
12 resistance: The path of silence. Such an award would contract the marketplace of ideas,
13 especially online, depriving the group served by *Amicus* of expression and harming others'
14 access to information about newsworthy and timely subjects.⁶

15 Simultaneously, *Amicus*' membership possesses legitimate copyrights that they themselves
16 have cultivated and may seek to protect from infringement in the future. These efforts will
17 require litigation against infringers, which *Amicus* fears courts will meet with a jaundiced eye
18 after witnessing the way in which Righthaven litigates its cases and overburdens their dockets
19 with claims that barely belong in small claims court, including this one. Thus, content creators
20 and other legitimate copyright holders fear that Righthaven's business practices and legal tactics
21 will poison the well of judicial relief, making courts and the public skeptical of legitimate
22 copyright infringement cases⁷ – even where the original creators of copyrighted works sue in

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24 ⁶ In fact, this has already occurred as Mr. Hyatt appears to have taken his entire website offline, rather than expose
himself to the risk that others might follow Righthaven's path.

25 ⁷ For as long as Righthaven has existed, its lawsuits and tactics have received significant and sustained media
26 criticism both locally and nationally. *See, e.g.,* Steve Green, *Flood of Righthaven Copyright Lawsuits Lifts Total to*
27 *225*, Las Vegas Sun (Jan 28, 2011), available at <http://www.lasvegassun.com/news/2011/jan/28/flood-righthaven-copyright-lawsuits-lifts-total-22/> (last accessed Feb. 22, 2011); Steve Green, *Blogger, Websites Sued by Righthaven*
28 *Over 'TSA Advanced Patdown' Photo*, Las Vegas Sun (Jan. 24, 2011), available at
<http://www.lasvegassun.com/news/2011/jan/24/blogger-websites-sued-righthaven-over-tsa-enhanced/> (last accessed
Feb. 22, 2011); Steve Green, *Righthaven Extends Copyright Lawsuit Campaign to Individual Web Posters*, Las
Vegas Sun (Jan. 12, 2011), available at <http://www.lasvegassun.com/news/2011/jan/12/righthaven-extends->

1 good faith to defend their creations and preserve the marketplace in which they are sold.

2 Moreover, as Righthaven is designed solely to acquire rights and litigate them, it does not
 3 deserve the attorney's fees and costs awards granted to content producers who must undertake
 4 legal action to arrest infringement. Righthaven's litigation-factory model accounts for, or should
 5 account for, the costs of litigation. Righthaven does nothing but find infringements (before
 6 acquiring and registering the relevant copyright) and then sue on them. They should not be
 7 rewarded by being granted attorneys fees in addition to a statutory damages award. As the sole
 8 purpose of Righthaven is to incur the costs of costs litigation, recovering costs and attorney's
 9 fees from a defendant in this and similar cases is unseemly. These are not the costs borne by a
 10 copyright holder seeking in good faith to stop rank infringement and widespread piracy of its
 11 content. Instead, any award of attorney's fees and costs will turn Righthaven's damage award
 12 into pure profit, eliminating the costs of litigation inherent in its business model and effectively
 13 granting Righthaven an impermissible double recovery. *See, e.g., Gypsum Carrier, Inc. v.*
 14 *Handelsman*, 307 F.2d 525, 535 (9th Cir. 1962).

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18 copyright-lawsuit-campaign-indi/ (last accessed Feb. 22, 2011); Steve Green, *Ties Between Stephens Media,*
 19 *Righthaven Copyright Lawsuit at Issue*, Las Vegas Sun (Dec. 8, 2010), available at
 20 <http://www.lasvegassun.com/news/2010/dec/08/ties-between-stephens-media-righthaven-copyright-1/> (last accessed
 Feb. 22, 2011); David Kravets, *Righthaven Expands Troll Operation with Newspaper Giant*, Wired (Dec. 7, 2010),
 21 available at <http://www.wired.com/threatlevel/2010/12/righthaven-expands-trolling/> (last accessed Feb. 22, 2011);
 Steve Green, *Judge to Righthaven: Show Why Lawsuit Shouldn't Be Dismissed*, Las Vegas Sun (Nov. 22, 2010),
 22 available at <http://www.lasvegassun.com/news/2010/nov/22/judge-righthaven-show-why-lawsuit-shouldnt-be-dism/>
 (last accessed Feb. 22, 2011); David Kravets, *EFF Sues Newspaper Chain's Copyright Troll*, Wired (Sept. 29,
 2010), <http://www.wired.com/threatlevel/2010/09/righthaven-sham/> (last accessed Feb. 22, 2011); Mike Masnick,
 23 *Righthaven Continues to Stretch the meaning of Copyright Law in Filing Lawsuits*, Techdirt (Aug. 12, 2010),
<http://www.techdirt.com/articles/20100812/01454910601.shtml> (last accessed Feb. 22, 2011); Steve Green,
 24 *Websites, Bloggers Make Moves to Avoid Righthaven Lawsuits*, Las Vegas Sun (Aug. 9, 2010), available at
<http://www.lasvegassun.com/news/2010/aug/09/websites-bloggers-make-moves-avoid-righthaven-laws/> (last
 25 accessed Feb. 22, 2011); Steve Green, *Some Targets of Righthaven Lawsuits Fighting Back*, Las Vegas Sun (Aug. 4
 2010), available at <http://www.lasvegassun.com/news/2010/aug/04/some-targets-righthaven-lawsuits-fighting-back/>
 (last accessed Feb. 22, 2011); Mike Masnick, *Righthaven Ramping up its Copyright Trolling Business*, Techdirt
 26 (July 23, 2010), <http://www.techdirt.com/articles/20100722/03152710320.shtml> (last accessed Feb. 22, 2011); Mike
 27 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,
 28 2011).

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

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

3 The Due Process clause of the U.S. Constitution has long been a source of limitation on
4 all forms of damages awarded in judicial proceedings. Damages beyond those actually suffered
5 by a plaintiff, awarded as a deterrent against similar unlawful acts in the future – known as
6 exemplary damages – have been tightly limited by the courts under the Due Process clause.
7 *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1992); *State Farm Mut. Ins. Co. v.*
8 *Campbell*, 538 U.S. 408, 417 (2003). Because these exemplary damages may become detached
9 from the harm actually caused to the plaintiff by defendant, these awards may fail to serve any
10 legitimate purpose, and instead hold a “devastating potential for harm.” *Campbell*, 538 U.S. at
11 417.

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

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

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

24 This analysis and scrutiny applies to the Copyright Act, just as it does to any federal law.
25 Every act of Congress, including the enactment of the Copyright Act, is subject to due process
26 limitations on account of the Fifth Amendment's limits on Congress' power. *Nebbia v. N.Y.*, 291
27 U.S. 502, 510 (1934). These statutory damages allow by the Copyright Act serve the same

1 purpose as punitive damages awarded by a jury (to punish and deter unlawful conduct) and
2 therefore require the same level of constitutional scrutiny.

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

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

11 *Walt Disney v. Video*, 47, 972 F. Supp. 595, 603 (S.D. Fla. 1996) (citations omitted). “‘Willful’
12 refers to conduct that occurs with knowledge that the defendant’s conduct constitutes copyright
13 infringement.’ . . . The determination of willfulness is a question of fact reserved for the
14 jury.” *Id.* Here there is no basis for the Court to find such willfulness, however. Indeed, as
15 explained in *Nintendo of Am. v. Ketchum*, 830 F. Supp. 1443, 1445 (M.D. Fla. 1993), even where
16 willfulness has been established, the this is not the end of the inquiry when evaluating the issue
17 of statutory damages

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

22 Although Plaintiff has suggested in its motion that the “Defendants saved substantial
23 license revenue expenses and reaped enormous profits,” Plaintiff has offered no evidence
24 of the expenses saved by Defendants for licensing fees, etc. Plaintiff has simply asked
25 this Court for an arbitrary amount of \$50,000 per infringement based upon the finding of
26 willful conduct.

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

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

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

15 A similar treatment of the matter can be seen in a case from the Southern District of New
16 York, even in the face of the situation that obtains here – a defendant's default. The case
17 involved pirated pay-per-view broadcasts, but the court was unwilling to bring down the wrath of
18 heaven in the form of statutory damages when considering the reality of the economic picture at
19 bar:

20 Some courts ... have concluded that a defendant's default itself could be viewed as
21 evidence of willfulness [or make similar inferences based on profit motive to infringe]. . . .
22 [But] the plaintiff has failed to offer credible evidence that an enhanced damages award
23 in the exorbitant amount of \$100,000, or something in that range, is necessary to
24 accomplish the goals of the statute, i.e., the use of enhanced damages to alter the
25 economic expectations of prospective violators. Regardless, even in the case of a default
26 judgment, a plaintiff must do more than gesture at an inference to support its request for
27 enhanced damages. *Garden City Boxing Club, Inc. v. Ayisah*, No. 02-CV-6673 2004 U.S.

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1 *Dist. LEXIS 7867* at *5 (S.D.N.Y. April 28, 2004) (“plaintiff must... substantiate a claim
2 with evidence to prove the extent of damages”).

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

12 *Joe Hand Promotions, Inc. v. Hernandez*, Case No. 03-CV-6134 2004 U.S. *Dist. LEXIS 12159* at
13 *10-11 (S.D.N.Y. June 30, 2004) (some citations omitted). In so ruling the court cited *Doehrer*
14 *v. Caldwell*, Case No. 79-C-394 1980 U.S. *Dist. LEXIS 10713* at *3 (N.D. Ill. 1980), which
15 taught as follows:

16 A mechanical application of the statutory damage provision of the Copyright Act leads to
17 absurd results. While Section 504’s compensatory purpose should not be minimized, its
18 deterrent provisions should not be converted into a windfall where, as a practical matter,
19 the plaintiff has suffered only nominal damages. It is clear from the legislative history of
20 the Copyright Revision Act of 1976 that Section 504 was designed, in part, “to provide
21 the courts with reasonable latitude to adjust recovery to the circumstances of the case,
22 thus avoiding some of the artificial or overly technical awards resulting from the
23 language of the existing statute.” S. Rep. No. 94-473, 94th Cong., 2d Sess., reprinted in
24 CCH Copyright Revision Act of 1976 P2042. . .

25 The fact that statutory damages are not to be regarded as penalties, and that their purpose
26 is to permit a wronged plaintiff to recover where there is insufficient proof of actual damages or
27 profits, has been recognized as rising to the level of due process limitations in numerous other

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1 recent copyright cases. Predicated by other courts' expectations that constitutional due process
2 protections would apply to statutory damages copyright infringement,⁸ two courts have used the
3 due process clause to limit the damages available in copyright infringement cases based on users
4 uploading songs on peer-to-peer networks. In *Capitol Records v. Thomas-Rassett*, 680 F. Supp.
5 2d 1045, 1048 (D. Minn. 2010), the court limited the infringer's damages to \$2,250 per
6 infringement – three times the statutory minimum of \$750. While the court noted that this was a
7 “significant and harsh” punishment, due process required “some” relationship between the
8 damages suffered by the plaintiff and the damages imposed on the defendant. *Id.* at 1049, 1053.
9 The *Thomas-Rassett* court even noted that the \$2,250 cap on damages for infringement was
10 higher than the court would have imposed, but was an appropriate remittitur of the jury's
11 \$2,000,000 damages award based on plaintiff's sharing of 24 songs. *Id.* at 1049.

12 By a similar decision, the District of Massachusetts reaffirmed this \$2,250 limitation for
13 instances of willful song sharing in *Sony BMG Music Entertainment v. Tenenbaum*. 721 F. Supp.
14 2d 85, 117 (D. Mass. 2010). In her opinion, Judge Gertner held that \$2,250 – three times the
15 statutory minimum damages allowed in 17 U.S.C. § 504(c) – was the “outer limit” of damages
16 that could constitutionally be imposed in such a case. 721 F. Supp. 2d at 117. The opinion went
17 on to note that while drawing a line in the sand of \$2,250 in song-sharing cases may be
18 controversial, any line-drawing is controversial, even when required by due process and the
19 Constitution. *Id.* This limitation was based on the evidence adduced at trial regarding the
20 recording studio plaintiffs' actual damages from the defendant's file-sharing, which revealed a
21 damages-to-lost profits ratio between 22,000 and 32,000 to 1, far higher than the 114:1 ratio of
22 punitive to compensatory damages permitted in *Williams*. *Id.* at 112-14.

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⁸ *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 n.6 (N.D. Ill. 2008) (suggesting that *State Farm* might provide grounds for reducing statutory damages awarded under the Telephone Consumer 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 In this case, no evidence of Righthaven’s actual damages has been introduced to the
 2 Court, though it would have to be at least \$263.16⁹ from Hyatt’s infringement alone to remain
 3 within *Williams*’ constitutional threshold, reinforced by *Tenenbaum*. This evidence has not been
 4 presented to the Court, and to *Amicus*’ knowledge does not exist, and thus any award of damages
 5 in the range sought by Righthaven would be speculative and based wholly on conjecture.
 6 Indeed, it strains the imagination to conceive how Righthaven could show *any* damages,
 7 considering that Righthaven acquired the copyright in question only *after* determining that it the
 8 work been used by the defendant. If copyright infringement makes the original work “damaged
 9 goods,” thus entitling the author to compensation, then damages are appropriate. But, when a
 10 get-rich-quick scheme is premised on buying damaged goods after the damage occurs, the get-
 11 rich-quick scheme itself should not be compensated for specious “losses” to an “asset” it would
 12 never have bought but for the supposed infringement. Works are only valuable to Righthaven if
 13 they are already copied. Righthaven has no use for goods that are not damaged, and to the extent
 14 that it legally acquires any rights at all, it curiously acquires no rights to anything that is not
 15 already damaged goods. The entire enterprise is so unseemly and questionable that it is not clear
 16 that this Court, as a due process matter, should even award the *minimum* statutory minimum of
 17 \$750, although it is likely compelled to award at least this amount – if it is convinced that
 18 Righthaven had the right to sue at all.

19 It is instructive to consider the one case where the amount Righthaven received to
 20 conclude its lawsuit is known, *Righthaven LLC v. National Organization for the Reform of*
 21 *Marijuana Laws (“NORML”)*, in which the defendant filed a Rule 68 offer of judgment for
 22 \$2,185.00. Case No. 2:10-cv-0351, Offer of Judgment, Doc. # 30-1 at 2 (D. Nev. filed Jun. 4,
 23 2010). To arrive at this amount, NORML multiplied the total resale cost of the infringing article
 24 - \$2.95 – by the 247 people who *possibly* could have viewed it as a result of NORML’s
 25 infringement. *Id.* NORML did not identify what portion would have been the copyright holder’s

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 27 ⁹ 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 profits, but determined the total amount of revenue that could have *possibly* been lost due to
 2 NORML's actions was \$728.65¹⁰. NORML then tripled this amount, arriving at the amount it
 3 offered as judgment: \$2,185. *Id.* at 2. Righthaven accepted this offer of judgment. Case No.
 4 2:10-cv-0351, Acceptance of Offer of Judgment, Doc. # 30 (D. Nev. filed June 4, 2010).

5 This amount, accepted by Righthaven less than nine months ago as sufficient value for
 6 copyright claims virtually identical to those made here, is a mere 7.3%¹¹ of what Righthaven
 7 seeks from Hyatt. At the same time, publicly available information reports that the settlement
 8 amounts for these Righthaven cases has steadily increased since they began, from \$2,000-\$3,000,
 9 then to \$3,000-\$5,000, to now, inexplicably, \$6,000.¹² Righthaven has not presented a single
 10 piece of evidence as to the market damage suffered due to the allegedly infringing republication
 11 of the articles and photos in the cases it has brought before any Court. All of these settlements
 12 Righthaven has secured to date are likely to be factors greater than the LVRJ's or Stephens
 13 Media's lost revenues – which have limited bearing, if any, on Righthaven's damages, as it does
 14 not use the content in a way that would be harmed by others' infringement. In fact, Righthaven's
 15 delight in its "acquisitions" is pegged to the number of times and degree to which it has been
 16 copied – a perverse inversion of the equation that is involved in all other copyright infringement
 17 cases. The courts should not be gardens for such schemes, as the fertilizer used to make it bloom
 18 will bring a wretched stench to the entirety of Title 17 and those who seek to legitimately
 19 vindicate their rights thereunder, including the members of the Media Bloggers Association.

20 The amounts both procured by Righthaven in other cases and sought by Righthaven in
 21 this matter ultimately violate due process. In *Tenenbaum* and *Thomas-Rassett*, the courts in
 22 those cases found that \$2,250 was the outer constitutional limit of damages for knowingly and
 23 intentionally sharing *songs* on a peer-to-peer network, and this intentional sharing of complex
 24 media like songs takes place on a network where republication is rampant, thus exacerbating the
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26 ¹⁰ \$2.95 multiplied by 247 is \$728.65.

27 ¹¹ 2,185 divided by 30,000 is 7.28333; this amount was rounded to the closest tenth.

28 ¹² "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 damages. This case, as the other Righthaven cases like it, compels a lower range of damages
 2 because of the social function achieved by sharing otherwise stale news stories of trivial
 3 economic value and minimal creative content, especially when buttressed by the all-important
 4 doctrine of fair use. *See Los Angeles News Svc. v. Reuters Television Int'l*, 149 F.3d 987, 994
 5 (9th Cir. 1998) (holding that news facts are not subject to copyright). Notwithstanding the
 6 presumptions permitted in a default, as a public policy matter and a matter of judicial integrity,
 7 this Court is obliged to consider the underlying merits of the claim and the propriety of the
 8 application of statutory damages to this situation. *See Joe Hand Promotions, Inc*, 2004 U.S.
 9 Dist. LEXIS 12159, *supra*. Here Hyatt's use of the Article is arguably a non-infringing fair use,
 10 as has been true of other cases before this Court. *Righthaven LLC v. Ctr. for Intercultural*
 11 *Organizing*, Case No. 2:10-cv-01322 (D. Nev. Mar. 18, 2011) (ruling from the bench that the
 12 non-profit organization's use of an entire LVRJ article was a non-infringing fair use; written
 13 opinion forthcoming); *Righthaven LLC v. Realty One Group, Inc.*, 38 Med. L. Rptr. 2441 (D.
 14 Nev. 2010) (finding the defendant's use of a LVRJ article to be non-infringing fair use).

15 Moreover, a finding that Hyatt was an innocent infringer would limit his damages to only
 16 \$200,¹³ and such a finding is entirely appropriate on the existing record, and represents less than
 17 1% of the baseline \$30,000 Righthaven seeks in its Motion (Doc. # 17).¹⁴ An innocent infringer
 18 is entitled to a significant reduction in damages, even below the statutory minimum set forth in
 19 17 U.S.C. § 504(c). *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978). In this case, Hyatt may
 20 have believed he had an implied license to share the Article, as there was a link encouraging
 21 viewers to e-mail the Article to others on the page where it appeared. (Doc. # 1 Exh. 1.) In other
 22 cases, this Court has considered the fact that the defendants were not aware of the content at
 23 issue's original source, or that they did not have any notice that it was a third party's intellectual
 24 property. *See, e.g., Righthaven LLC v. Wilcox*, Case No. 2:10-cv-01192, Def.'s Mtn. to Dismiss
 25 at 3:3-4:6, Doc. # 10 (D. Nev. Sept. 10, 2010) (explaining how content of unknown origin could
 26 appear on a defendant's website without his or her action or knowledge).

27 _____
 28 ¹³ 17 U.S.C. § 504(c)(2).

¹⁴ 200 divided by 30,000 is .00666, rounded to .007 – the equivalent of 0.7%.

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 and the online marketplace of ideas. Left
4 unchecked, the inexplicably steep upward trend in Righthaven's settlement demands, now
5 reaching a crescendo with the Motion before this court for at least \$30,000 in damages, is certain
6 to chill internet users from expressing themselves where, as is common enough, they do not
7 understand the far-from-intuitive limits of fair use of copyright-protected materials.
8 Righthaven's copyright trolling will continue to have this effect until some kind of cap or
9 limiting guideline is placed upon what Righthaven may recover for the alleged infringements of
10 works with which it has essentially nothing to do and which it has pursued for almost a year.
11 Such a constitutionally compelled limitation on damages will serve the important purpose of
12 protecting expression and guarding the flow of information, commentary and expression of
13 issues of public interest, consistent with *Amicus*' goals and the objectives of its constituency and
14 with the First Amendment, while shutting down the shame of Nevada – its champertous export
15 known as Righthaven.

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

18 Righthaven's request for this Court to order the turnover of Hyatt's domain name where
19 the copyright infringement allegedly occurred – <lce.org> – cannot be granted. Domain names
20 are tremendously valuable assets, and can accrue value because of their intrinsically high
21 visibility (e.g., <news.com>), or acquired worth through the awareness and visits earned by high-
22 quality or unique content, or some other selling proposition (e.g., <drudgereport.com>). Thus, a
23 domain name is an important commodity to bloggers and one that must be protected, a blog's
24 loss of its unique domain name would cripple it, if not destroy it outright. Thus, within the Ninth
25 Circuit, domain names are regarded as intangible personal property that cannot be subject to
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1 turnover orders in copyright cases.¹⁵ *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138, 1143-44 (9th
 2 Cir. 2010); *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003). Like California’s approach to
 3 intangible personal property, articulated in *Kremen*, Nevada recognizes it as something which
 4 embodies “every intangible benefit and prerogative susceptible of possession or disposition.”
 5 *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 543 (Nev. 2008), citing
 6 *Kremen*, 337 F.3d at 1030. Therefore, just as California’s property laws extend this protection to
 7 domain names, the rule of *Crestdale* compels the conclusion that Nevada, too, would extend the
 8 same protections to website domain names.

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

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

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

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 27 ¹⁵ 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 31 (9th Cir. 2008) (affirming the lower court’s refusal to award attorney’s fees and costs under
2 18 U.S.C. § 505).

3 The facts weigh heavily against any award of attorney’s fees and costs to Righthaven
4 under 17 U.S.C. § 505. Righthaven’s success in this case is premised on an overmatched party’s
5 total failure to appear, rather than the strength or cogency of its legal position or the sympathetic
6 factual nature of its dubious claims of harm. Because Hyatt could have asserted the fair use
7 defense and prevail, particularly in light of this Court’s *Center for Intercultural Organizing* and
8 *Realty One Group* decisions, the Court should be mindful of how a monstrous award here – even
9 if only symbolic – would chill free speech in other fair use cases. Righthaven’s entire “business
10 model” is premised on cheap, exploitative litigation against mainly unschooled and defenseless
11 individuals, described in Sections I and II A. It should bear the costs of litigating its cases as part
12 of that business model, as it was conceived to do. This factor weighs particularly heavily against
13 Righthaven, as it is not protecting content it created or invested in during its “useful life,” but
14 bought unspecified rights in works solely so it could sue Hyatt and others after trawling the
15 Internet for possible instances of infringement – a fee-generating litigation business. The needs
16 of compensation and deterrence weigh *against* Righthaven receiving any attorney’s fees or costs
17 award, for, if anything, it is Righthaven’s conduct that should be deterred. Any compensation
18 for losses it never suffered should be derived solely in any damages award by this Court, which
19 should reflect the minimal-to-nonexistent harm his conduct inflicted on Righthaven.

20 Indeed, it is not the intent of bloggers to “rip off” or damage the markets for publications
21 that supply them with reporting and other facts that are used as the foundation for commentary
22 and other analysis. The “blogosphere” and traditional media exist in a symbiotic relationship, in
23 which blogs generate significant traffic to the sources they credit for works created by the latter
24 and give new life to what would otherwise be essentially dormant online archives. Such
25 traditional outlets recognize the benefit of bloggers to their online presences and are in the best
26 position, in their own right, to correct and manage bloggers who may overstep the bounds of fair
27 use – ideally in advance of initiating scorched-earth litigation. In contradistinction, Righthaven,

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1 having never produced or distributed any content, is an outsider to this relationship. Righthaven
2 has no interest in protecting the market for content – only the market for dubious copyright
3 litigation conducive to shakedowns of individuals who have become citizen journalists or
4 commentators, but will never be copyright experts.

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

14 **Conclusion**

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

26 Because of the complete and utter lack of harm experienced by Righthaven in such cases,
27 the damages it seeks via settlement and now by the pending Motion (Doc. # 17) are

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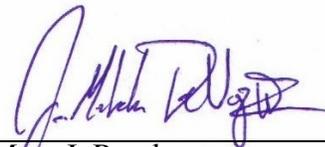
1 impermissible. The proportions of Righthaven’s desired recovery compared to its actual harm
2 are beyond those that have been authorized by the Supreme Court, and due process compels their
3 reduction. As in *Tenenbaum* and *Thomas-Rassett*, willful infringer cases that did not have the
4 compelling First Amendment defenses available to Hyatt and similarly situated defendants, this
5 Court should set a defined limit as to what due process will allow for recovery, and that limit
6 should be as close as possible to the Copyright Act’s statutory minimum damages of \$750. As
7 for Righthaven’s request to have the Court order <1ce.org>’s turnover from Hyatt to Righthaven,
8 such a remedy is not available in this case.

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

14
15 Dated April 14, 2011

Respectfully Submitted,

RANDAZZA LEGAL GROUP

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Marc J. Randazza
J. Malcolm DeVoy IV

Co-Counsel:
Ronald D. Coleman
GOETZ FITZPATRICK LLP

Attorney for *Amicus Curiae*,
Media Bloggers Association

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a
3 representative of Randazza Legal Group and that on this 14th day of April, 2011, I caused
4 documents entitled:

- 5 • BRIEF OF *AMICUS CURIAE*, MEDIA BLOGGERS ASSOCIATION

6 to be served as follows:

7
8 by depositing same for mailing in the United States Mail, in a sealed envelope
9 addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne
10 Avenue, Suite 210, Las Vegas, Nevada, 89129-7701, upon which first class
postage was fully prepaid; and/or

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

12
13 to be hand-delivered;

14
15 by the Court's CM/ECF system.

16
17 /s/ J. Malcolm DeVoy

18 J. Malcolm DeVoy

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

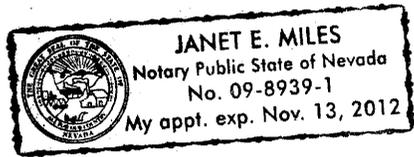


EXHIBIT A

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



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 or 702-383-0456.

EXHIBIT 2



Your #1 source for news
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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:

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

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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

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

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

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

- 24 1. I am a duly licensed attorney in Nevada and a member of the Nevada bar in good
25 standing, attorney for the Randazza Legal Group law firm, and counsel of record for
26 Amicus Media Bloggers Association in this matter.
27 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.

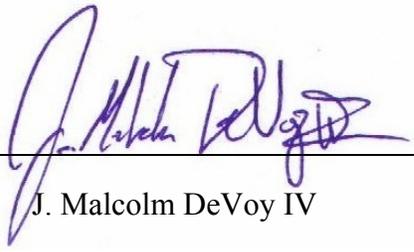
11 5. A true and correct copy of this online purchase screen for "FX's manly man shows
12 hold outsider appeal," as it appeared on February 21, 2011, is attached to this Amicus
13 Curiae brief as Exhibit 2.

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: April 14, 2011

25
26 By: 

J. Malcolm DeVoy IV