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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

RIGHTHAVEN, LLC,
Plaintiff,

vs.

NO. 2:10-CV-1322-JCM-LRL

CENTER FOR INTERCULTURAL
ORGANIZING, et al.,

SHOW CAUSE HEARING

Defendant.

_____ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, DECEMBER 28, 2010

10:30 A.M.

APPEARANCES:

For the Plaintiff: SHAWN A. MANGANO, ESQ.
JOHN CHARLES, COONS, ESQ.

For the Defendants: JASON M. SCHULTZ
CHRIS J. RICHARDSON, ESQ.
MATTHEW CAVANAUGH, ESQ.
CHAD BOWERS, ESQ.

Reported by: Joy Garner, CCR 275
Official Federal Court Reporter

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LAS VEGAS, NEVADA, TUESDAY, DECEMBER 28, 2010

10:30 A.M.

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P R O C E E D I N G S

THE CLERK: This is the time set for the show cause hearing, Civil Case Number 2:10-CV-1322-JCM-LRL, Righthaven, LLC versus Center for Intercultural Organizing, and all others.

Counsel, please note your appearance for the record.

MR. MANGANO: Your Honor, Shawn Mangano on behalf of the plaintiffs. With me is Charles Coons.

THE COURT: Yes, sir.

MR. MANGANO: Thank you.

THE COURT: Yes, sir.

MR. RICHARDSON: Good morning, your Honor, Chris Richardson from the law firm of Olson, Cannon, Gormley and Desruisseaux and with me and is Matt Cavanaugh on behalf of the defendants.

THE COURT: All right. Mr. Bowers.

MR. BOWERS: Good morning, your Honor,

1 Chad Bowers on behalf of Professor Jason Schultz.

2 THE COURT: All right.

3 MR. BOWERS: While we are here, it's a
4 little unusual with Mr. Schultz being amicus --

5 COURT REPORTER: Please speak into a
6 microphone, Mr. Bowers.

7 THE COURT: Come up to the lectern
8 here, Mr. Bowers, it's easier.

9 MR. BOWERS: Thank you, your Honor.

10 THE COURT: Yes, sir.

11 MR. BOWERS: Can you hear me?

12 THE COURT: We're good.

13 MR. BOWERS: Okay. Anyway Mr. Schultz
14 being amicus, it's a little unusual. I have
15 nothing to contribute in the courtroom, you'll
16 hear from him. I have another commitment so I
17 was going to ask the Court's permission that if
18 this runs long, I might be able to leave and let
19 him speak for himself.

20 THE COURT: Oh, yes, sir, sure. We
21 don't want to hear from you anyway.

22 MR. BOWERS: And certainly not on this
23 topic you don't I guarantee you. Thank you, your
24 Honor.

25 THE COURT: All right, and there are a

1 couple of preliminary matters and you're welcome,
2 Professor, to sit in. I took Latin from Mrs.
3 Corover (phonetic) so we pronounce it ameeus
4 (phonetic), but you can call him amacus
5 (phonetic) if you want to, but there are a couple
6 of preliminary matters.

7 First of all, as far as the
8 professor is concerned coming in as an amicus if
9 this were a gun control case, we'd have the NRA
10 and the Brady Organization people here wanting to
11 file amicus briefs. So, you know, I mean it's
12 understandable, I understand that the plaintiff
13 says he's a partisan, but people who file amicus
14 briefs are always partisan.

15 And, of course, you can say,
16 well, wait, here's an exception and you can
17 always find an exception to a general statement,
18 but generally the people who are interested
19 already have a partisan, they already have a dog
20 in the hunt, if you will, and so I take that into
21 account, but I'm glad to hear from people. If
22 you have something to contribute, fine. If not,
23 I'll cut you off.

24 And that's true of the lawyers,
25 and I'm sure you're used to cutting students off

1 when they go on too long. So I'll exercise the
2 same privilege. So I'm inclined to let the
3 professor come in and present whatever you want
4 to present and we'll listen to it.

5 Just as a preliminary matter,
6 I'm inclined to find that I have jurisdiction,
7 not general jurisdiction, but I think specific
8 jurisdiction. The defendants purposefully
9 availed themselves by taking an article from a
10 Nevada newspaper knowing that the copyright
11 belonged to the newspaper and intentionally
12 posting it on their website. And the plaintiffs'
13 claim then arise out of the defendants'
14 formulated activities because the RJ is a Nevada
15 paper. It's the largest paper in Nevada and
16 obviously the posting of that is related to the
17 newspaper's home which is Nevada.

18 So I -- and I'll give you a
19 chance to say anything you want to say on that
20 issue, but let's not spend a lot of time on
21 jurisdiction unless you have some killer point
22 that you want to make, but I want to focus on the
23 fair use. As I was going through this file with
24 my brain trust here seated to my right in the
25 jury box, this fair use popped out at us and it

1 just seemed like an overriding issue, and that's
2 the genesis for this hearing.

3 It seems like that was just an
4 issue that really popped out that needs to be
5 addressed early on. These cases I think, you
6 know, typically probably get settled. You can
7 tell me -- the plaintiffs can tell me that more
8 easily than anyone else, and you don't have to,
9 but I assume they get settled and the fair use
10 doctrine never gets raised probably, and it's
11 something that I think needs to be addressed.

12 So that's why we're here. Now
13 I'll hear from the plaintiffs first. I'll be
14 glad to hear whatever you have to say. And, if
15 you would, come up to the lectern, please. And
16 you're Mr. Coons, correct?

17 MR. MANGANO: Mangano.

18 THE COURT: I'm sorry, you're --

19 MR. MANGANO: Mr. Mangano.

20 THE COURT: Mangano, is that the way
21 you pronounce it?

22 MR. MANGANO: That is correct.

23 THE COURT: I mean I have Italian
24 heritage, and I pronounce it Manyano (phonetic)
25 is what I would call you.

1 MR. MANGANO: No one could spell it if
2 I pronounced it that way. So I've always gone
3 with Mangano.

4 THE COURT: If you would, put your
5 right hand on the slant there, your right hand.

6 MR. MANGANO: Okay.

7 THE COURT: Do you feel the button?

8 MR. MANGANO: Yep.

9 THE COURT: Push the button.

10 MR. MANGANO: All right.

11 THE COURT: Okay, that's good. It
12 still doesn't work, does it? That's supposedly
13 how you adjust the microphone. I was going to
14 show you your tax dollars at work.

15 MR. MANGANO: It doesn't work.

16 THE COURT: But instead you'll just
17 have to adjust the microphone manually like that,
18 if you would, please, sir.

19 All right, go ahead.

20 MR. MANGANO: All right, your Honor, as
21 you mentioned, we're here to discuss this issue
22 of fair use. Fair use is an affirmative defense.

23 THE COURT: Right.

24 MR. MANGANO: It is an affirmative
25 defense that obviously the defendants bear the

1 burden of proof and the burden of persuasion.
2 One issue that we were unable to glean from the
3 OSC was the procedural posture of this when the
4 Court says that it's considering dismissal based
5 upon fair use.

6 There's two basis that we could
7 see as you have an authority to do so sua sponte
8 under the Federal Rules of Civil Procedure, one
9 being 12(b)(6) and one being Rule 56. If
10 possible, I'd like to get some direction as to
11 what your thoughts are and where the Court is
12 leaning with regard to those two.

13 THE COURT: I don't answer questions.

14 MR. MANGANO: Because the problem I
15 have, your Honor, is that under 12(b)(6), as
16 you're aware, we're confined to the allegations
17 in the complaint. When we have a fair use
18 defense, that's going to be something that's
19 outside of the complaint and normally I would
20 assume it would be something that would be raised
21 more in the judgment on the pleadings. In this
22 case we don't have a procedural posture that
23 would allow for judgment on the pleadings because
24 there is no answer in place, therefore, the
25 pleadings are not locked in.

1 THE COURT: So you want -- what are you
2 suggesting? That we adjourn this and tell them
3 to file an answer and then we'll reconvene next
4 week or something?

5 MR. MANGANO: Well, the problem is,
6 your Honor, is that 12(b)(6) I don't believe is
7 the proper mechanism if you were to move forward
8 with dismissal. The other alternative would be
9 Rule 56. Obviously Rule 56, there's different
10 standards which apply under each. Rule 56
11 obviously we're looking at whether or not there's
12 issues of -- genuine issues of material fact
13 which preclude entry of judgment in favor of the
14 defendant.

15 THE COURT: I think I've heard about
16 that rule before.

17 MR. MANGANO: Yeah, and that's
18 particular --

19 THE COURT: I know I look stupid, but I
20 didn't just fall off the turnip truck, okay?

21 MR. MANGANO: No, your Honor, I -- I --

22 THE COURT: So what's your point?
23 What's your point?

24 MR. MANGANO: My point is is that we
25 have a case here where we're not -- there's

1 issues of fact that have been raised -- first of
2 all, numerous issues of fact raised by the
3 professor's amicus brief. It's replete with
4 factual assertions that are unsupported. They
5 are not there in a signed declaration and we have
6 not had an opportunity to conduct discovery on
7 those.

8 THE COURT: So what? So you want to
9 conduct discovery, is that what you want to do?

10 MR. MANGANO: If -- yes, your Honor,
11 sure, if that's --

12 THE COURT: On what issues? What
13 issues do you want to conduct discovery on?

14 MR. MANGANO: Well, if we have an issue
15 as to the effect on the market for work, the
16 issues related to website traffic, issues related
17 to revenues derived from the posting of the work,
18 these are all issues that are raised by Professor
19 Schultz in his filing with the court which would
20 require discovery for there to be a ruling under
21 Rule 56 at this stage. I mean we're simply
22 getting the cart in front of the horse on that
23 issue.

24 THE COURT: Do you really think that
25 the defendants make a lot of money from their

1 website, is that what you're saying?

2 MR. MANGANO: No, I'm not saying --

3 THE COURT: That they're competing with
4 the RJ maybe?

5 MR. MANGANO: No.

6 THE COURT: They're making a ton of
7 dough from this you think?

8 MR. MANGANO: No, your Honor, I don't
9 believe that's the proper inquiry whether or not
10 they've made a ton of dough or if they've made a
11 little dough. If you like, we can start walking
12 through the fair use analysis and the first prong
13 would --

14 THE COURT: Well, you are the one that
15 said you had some question that you didn't know
16 what we were doing, you're not sure how to
17 proceed. So what do you want me to do?

18 MR. MANGANO: What would I like you to
19 do? Well --

20 THE COURT: I mean rule in your favor
21 obviously, but what are you saying? I mean get
22 to the point. I can tell you're a lawyer --

23 MR. MANGANO: Yes.

24 THE COURT: -- because I don't know
25 your point, what's your point? You want me to

1 adjourn this hearing so you can conduct
2 discovery? What? What do you want? What are
3 you seeking?

4 MR. MANGANO: Well, your Honor, if
5 you're inclined to dismiss our complaint at this
6 stage of the proceedings on fair use grounds,
7 yes, we'd like -- we --

8 THE COURT: Well, that's what an order
9 to show cause -- that's why you're here is to
10 show cause why it shouldn't be dismissed.

11 MR. MANGANO: That's correct.

12 THE COURT: Why shouldn't it be
13 dismissed?

14 MR. MANGANO: Well, for one, your
15 Honor, procedurally, and I'll just say that we do
16 not have a record in front of you that would
17 permit you to enter sua sponte summary judgment
18 because there are numerous issues of fact --

19 THE COURT: But that -- you're
20 repeating yourself. What issues are they? Here
21 are the issues. Number one, is the CIO a
22 nonprofit organization or whatever? I don't
23 know. What are these issues of fact that are so
24 important?

25 MR. MANGANO: Okay. Well, your Honor,

1 one of the issues of fact talks about the effect
2 on the work, the market for the work, the fourth
3 factor. If you look at Professor Schultz's
4 amicus brief, it contains statements which are
5 relevant to the inquiry.

6 THE COURT: But every brief does that.
7 Everybody -- all briefs contain factual
8 allegations. I mean what are the genuine issues
9 of material fact? What's the material fact here?

10 MR. MANGANO: Well, one of the issues
11 of material fact, your Honor, would be how --
12 how -- what was the intent of CIO in its use?
13 Did it derive a benefit from the use of the
14 article? What was that benefit?

15 THE COURT: What's the material issue
16 of fact?

17 MR. MANGANO: That -- your Honor, that
18 just was the material issue of fact.

19 THE COURT: What? What their intent
20 is?

21 MR. MANGANO: What was the intent?
22 What was the amount? Was there revenue derived
23 from it?

24 THE COURT: Okay, that's three
25 questions. Now, what's the issue of material

1 fact? I said what's the issue of material fact?
2 And you should say this, this, and this. What is
3 the issue of material fact?

4 MR. MANGANO: Whether or not they
5 derived a benefit from it would go into your
6 analysis.

7 THE COURT: Well, of course they
8 derived a benefit from it.

9 MR. MANGANO: Okay, your Honor --

10 THE COURT: I'm willing to draw that
11 conclusion they derived a benefit from it.

12 MR. MANGANO: That's fine, that's fine.
13 If we're going to accept they derived a benefit
14 from it, then I would submit that under the first
15 factor that that's going to weigh against upon
16 the fair use.

17 THE COURT: Okay, and that may be. Now
18 let's stick to the issue, though, which we've
19 spent now ten minutes on. What do you want
20 today? Do you want to conduct discovery, is that
21 what you're saying? What discovery do you want
22 to conduct?

23 MR. MANGANO: Your Honor --

24 THE COURT: I mean if you're telling me
25 this is not appropriate for dismissal, you're

1 making something in the nature of a 56(f)
2 argument. So you say here are the genuine issues
3 of material fact, one --

4 MR. MANGANO: And, your Honor, we --

5 THE COURT: -- is this a Nevada
6 corporation? Two, is Mr. Bowers a licensed
7 attorney in the State of Nevada? Three, is this.
8 Four, five, six, seven, eight, nine, ten, those
9 are the genuine issues of material fact that
10 preclude you from proceeding until I can do
11 discovery. And then I'll give you a chance to do
12 discovery, but so far you're waltzing around and
13 saying, oh, we're going to do this and, you know,
14 what their intent was and, you know, the market
15 effect, and ya, da, da, da, da.

16 What are the genuine issues of
17 material fact?

18 MR. MANGANO: Your Honor, we did, in
19 fact, ask for 56(f) discovery and there was a
20 declaration submitted. There has been no
21 discovery conducted in the case as of today.

22 THE COURT: I realize that. Answer my
23 question, would you?

24 MR. MANGANO: Yes, your Honor.

25 THE COURT: Gee whiz.

1 MR. MANGANO: What are the issues of
2 material fact is the question.

3 THE COURT: Pardon me?

4 MR. MANGANO: What are the issues of
5 material fact is the question. Well, one of them
6 is how much and what, if any, benefit was derived
7 through the donations. That's one issue. We
8 don't have any --

9 THE COURT: That were derived from the
10 what?

11 MR. MANGANO: That were derived from
12 the posting on CIO's website. If we're going to
13 assume --

14 THE COURT: What was the benefit? How
15 is that relevant?

16 MR. MANGANO: Well, that goes into the
17 first factor of the fair use analysis, your
18 Honor, and how they used the work.

19 THE COURT: The purpose and character
20 of the use --

21 MR. MANGANO: Yes.

22 THE COURT: -- the purpose and use of a
23 character is what you see is what you get.

24 MR. MANGANO: Well, no, your Honor,
25 because under that analysis there's a division

1 which talks about whether it's for commercial use
2 or whether or not it's for educational purposes.

3 THE COURT: For a nonprofit
4 organization, how is that commercial use?

5 MR. MANGANO: Okay, your Honor, as we
6 discussed in our submission, the World Wide
7 Church of God case in the Ninth Circuit says that
8 that purpose and character analysis, that first
9 prong, commercial use or use for profit can be
10 derived from benefits received by a nonprofit
11 organization. You can have that result, your
12 Honor, and World Wide Church of God talks about
13 that because it squarely addressed whether or not
14 nonprofit --

15 THE COURT: But that's not on point,
16 though, is it? That's a case where the minister
17 wrote a book and then some rivals took the book,
18 removed the copyright, and then tried to pass it
19 off and say, well, I'm in competition with the
20 original church, right?

21 MR. MANGANO: That's correct.

22 THE COURT: And so CIO, the defendants
23 here, have a rival newspaper and they took this
24 RJ article -- and let me see if I can follow
25 through now -- they took the RJ article, erased

1 the copyright and then used it as their own --
2 no, that's not it. World Wide Church doesn't
3 apply here. That was a deliberate misuse of the
4 copyrighted material.

5 Here you've got these dodo's
6 took the material and actually put on their
7 website Las Vegas Review Journal, you know, Joe
8 Blow, whoever the reporter was. I mean it's
9 clear. Where did you get the article? It's
10 quite clear, the Las Vegas Review Journal.

11 MR. MANGANO: Okay, but if I could
12 maybe point out with the World Wide Church of God
13 case, it is applicable to this case because it
14 shows that a nonprofit organization can be found
15 liable for copyright infringement in view of the
16 fair use defense. That's one point that it
17 makes. Another point that it makes is it deals
18 with a case of a hundred percent replication of
19 the work which is what we have here.

20 THE COURT: It was a book there. Here
21 it's an article that's what, like eight column
22 inches long?

23 MR. MANGANO: This is an article that's
24 approximately a thousand words, thirty
25 paragraphs.

1 THE COURT: A thousand what?

2 MR. MANGANO: A thousand words.

3 THE COURT: A thousand words? A
4 thousand words?

5 MR. MANGANO: And it's thirty
6 paragraphs.

7 THE COURT: It's about eight column
8 inches or so on their website or it looked like,
9 if I remember correctly.

10 MR. MANGANO: I had a hard copy printed
11 out, your Honor, and it was three pages.

12 THE COURT: Okay, all right.

13 MR. MANGANO: But in any event they're
14 both written works and they are both entitled to
15 copyright protection. So the World Wide Church
16 of God is applicable here because we have --

17 THE COURT: The World Wide Church is
18 distinguishable.

19 MR. MANGANO: Okay.

20 THE COURT: That's a book. That was a
21 creative book. This is a news article.

22 MR. MANGANO: Okay, your Honor, the
23 work -- both are written works. Both -- and
24 we've cited case law to your Honor that shows
25 that just because we have a news article it's --

1 THE COURT: That's true, that's true,
2 but let's -- the devil can cite scripture for his
3 purposes. I can find a case that will say
4 anything. So cases are interesting, that's all,
5 but now what are the genuine issues of material
6 fact? Maybe we'll get to this ultimately or
7 maybe you just want to blather on. You tell me.

8 MR. MANGANO: Well, your Honor, maybe I
9 could just --

10 THE COURT: What are the genuine issues
11 of material fact? You're saying you can't
12 proceed today, we have genuine issues of material
13 fact. What are they? What are the issues you
14 want to do discovery on?

15 MR. MANGANO: Your Honor, we have set
16 forth in our submission --

17 THE COURT: Which submission?

18 MR. MANGANO: My declaration, then the
19 brief.

20 THE COURT: Which submission? The one
21 you filed this morning?

22 MR. MANGANO: No, your Honor. If you
23 could -- can you give me a second and I'll see if
24 I can find the document number for that. I mean
25 I know it was filed in connection with our

1 response.

2 THE COURT: Okay, but it's your
3 declaration and you can't tell me what the
4 genuine issues of material fact are that you set
5 out in your declaration? See if you can find a
6 copy of it then.

7 (Attorney conference held.)

8 MR. MANGANO: Your Honor, while Mr.
9 Coons is locating that, I'm willing to move
10 forward on the fair use analysis.

11 THE COURT: Well, no, if we can't have
12 a hearing, we can't have a hearing. If there are
13 genuine issues of material fact, we can't have a
14 hearing. You need to do discovery. That's what
15 you're telling me, correct?

16 MR. MANGANO: Yes, and we've
17 done absolutely none.

18 THE COURT: All right, then let me know
19 what the genuine issues of material fact are.

20 (Attorney conference held.)

21 MR. MANGANO: Your Honor, unfortunately
22 I don't have a copy of my declaration. I know
23 it's Document 23 in the court's record. I've got
24 Document 22 which references it.

25 THE COURT: All right, so what are

1 the -- fifteen minutes later -- what are the
2 genuine issues of material fact?

3 MR. MANGANO: Well, your Honor, I would
4 submit that at a minimum the issues of fact
5 relate to the Court's analysis under the
6 fourth --

7 THE COURT: Well, not relate, don't
8 give lawyer gibberish. What are the -- here are
9 the issues of fact. One, whether this is that,
10 whether CIO is a licensed organization, or
11 something, or whatever. I don't know, whatever
12 in heck the issues of fact are that preclude us
13 proceeding today.

14 MR. MANGANO: The fourth factor in the
15 fair use analysis --

16 THE COURT: Pardon me?

17 MR. MANGANO: The fourth factor under
18 the fair use analysis relates to the market, the
19 effect on the market for the work. That's one of
20 the --

21 THE COURT: The effect of the use upon
22 the potential market, now since Righthaven
23 doesn't operate a newspaper, all it does is sue
24 people apparently, I don't know, what is the
25 issue of fact there?

1 MR. MANGANO: Well, one of the facts
2 that's pointed out by Professor Schultz is an
3 issue of causation with regard to whether or not,
4 as you pointed out, whether or not there is any
5 effect on the work -- on the market for the work
6 based upon their use. Right now one of our first
7 arguments under that prong is a presumption,
8 okay?

9 And if that presumption does not
10 apply because there is an absence of commercial
11 use, then we must show actual affect on the
12 market for the work. We must have evidence of
13 that fact. They're claiming that they have no
14 affect on the market because there was no website
15 traffic, there weren't enough lures.

16 We don't have any of that
17 information, your Honor. That would be an issue
18 of fact as to whether or not there were a hundred
19 viewers or a thousand viewers or how many viewers
20 there were. We don't know. That's one issue of
21 fact.

22 THE COURT: How is that relevant,
23 though?

24 MR. MANGANO: Well, your Honor, it's
25 under the fourth factor of the fair use analysis.

1 THE COURT: Well, the affect of the use
2 upon the potential market for or value of the
3 copyrighted work, there's no market for the
4 copyrighted work, is there? You aren't
5 publishing it, you don't have a newspaper.

6 MR. MANGANO: Your Honor, there's other
7 moving parts here. If we've got a license -- if
8 we have an assignment of the mark, we can also
9 license that work to others. I mean that --
10 that --

11 THE COURT: Have you licensed it to
12 others?

13 MR. MANGANO: Your Honor, that would be
14 subject to discovery. Do you want me to answer
15 that on behalf of my client? I don't know as I
16 stand here right now.

17 THE COURT: So you are telling me you
18 don't know. This is an issue of fact, but you
19 don't know your own side of this issue of fact.
20 You don't know, you can't argue anything about it
21 then.

22 MR. MANGANO: Well, your Honor --

23 THE COURT: You don't know if you've
24 licensed it.

25 MR. MANGANO: That's fine, that's fine,

1 your Honor. We can proceed then I guess. If the
2 Court doesn't appreciate the issues of fact,
3 we've submitted them in our brief.

4 THE COURT: Well, no, no, what I would
5 appreciate would be an answer to my question
6 which I asked over fifteen minutes ago and you
7 haven't answered yet.

8 MR. MANGANO: Your Honor, I've tried.

9 THE COURT: You haven't tried.
10 You've -- all you've given me is the lawyer mumbo
11 jumbo. What are the issues of fact? One, two,
12 three, four, five, that's what we need to do
13 discovery on. With 56(f), this is why I need to
14 do discovery. I can't respond to CIO here
15 because I need to do discovery on this issue,
16 one, two, three, four, five, and then we'll
17 adjourn and give you a chance to do your
18 discovery.

19 MR. MANGANO: Okay, your Honor.

20 THE COURT: And then we'll come back
21 here and deal with the fair use doctrine.

22 MR. MANGANO: Okay, your Honor, but let
23 me approach it this way then. Here's a listing
24 of statements that are made that Professor
25 Schultz has made in his brief that raise issues

1 of fact that would require discovery and we'll go
2 down the list.

3 THE COURT: Well, no, don't, don't. I
4 don't want to hear what he says. I want to hear
5 what you are telling me the issues of fact are.

6 MR. MANGANO: Okay.

7 THE COURT: What do you need to do
8 discovery on?

9 MR. MANGANO: Who are the readers of
10 CIO's blog? They claim that the readers are
11 specifically --

12 THE COURT: Now, why is that a material
13 issue of fact?

14 MR. MANGANO: Yes, who are the readers?

15 THE COURT: Why? Why? Why? Why is
16 that an issue of material fact?

17 MR. MANGANO: It is an issue of
18 material fact, your Honor, because the use of the
19 work they're claiming, as has been argued in the
20 briefs, that their blog is specifically directed
21 towards Oregon residents and immigrants in the
22 Oregon area, okay? We have a Nevada based
23 article from a Nevada publication, and they're
24 claiming that their use is different from our
25 use. Both uses are giving information to the

1 public about a topic related to immigration.

2 THE COURT: That's right.

3 MR. MANGANO: They are saying that
4 their use is unique because it's directed to a
5 specific segment of the population, residents of
6 Oregon, okay? One of the statements contained in
7 the amicus brief says that readers of CIO's blog
8 are most likely Oregon residents each vested in
9 the nonprofit's mission.

10 THE COURT: Most likely, and it could
11 be anybody because it's the Internet. I could
12 log on.

13 MR. MANGANO: Well, your Honor, you
14 would have to grant that if they were readers of
15 the blog or members of the organization that were
16 Nevada residents, then you would also be
17 disseminating information concerning a Nevada
18 based article to people in Nevada as well as
19 Oregon. That is --

20 THE COURT: Which the RJ has done, it's
21 an RJ article.

22 MR. MANGANO: Yes.

23 THE COURT: So I mean people in Nevada
24 already have access to it.

25 MR. MANGANO: Well, that's correct,

1 but, see, the use that's being employed here is
2 we're both disseminating the same article and
3 we're both doing it for informative purposes,
4 okay?

5 THE COURT: You aren't disseminating
6 the article to anyone. The RJ disseminated the
7 article.

8 MR. MANGANO: That's correct. The RJ
9 disseminated the article, but in doing so if
10 you're doing it for the same purpose which is
11 that first prong --

12 THE COURT: The RJ is a newspaper,
13 correct?

14 MR. MANGANO: Correct.

15 THE COURT: The CIO a not a newspaper.

16 MR. MANGANO: Correct.

17 THE COURT: So what's the -- and
18 understand I'm not saying let's create some
19 issues of fact. What's material about that?

20 MR. MANGANO: Well, what's material
21 about the Oregon --

22 THE COURT: They aren't competing with
23 the RJ.

24 MR. MANGANO: No, no, no, it's not a
25 matter of competing directly. They don't have to

1 be newspaper to newspaper or in World Wide Church
2 of God, which we've pointed out, church to
3 church. They are taking the same information and
4 they are making it available at another location.

5 'THE COURT: That's right.

6 MR. MANGANO: So what that does is from
7 our standpoint you go to read that article on
8 their website and you don't read it on the RJ's
9 website, the RJ's deprived of certain benefits
10 because of that. I mean as we go on the Internet
11 we've got banners of advertisements and all that
12 stuff and other articles, too, that may be linked
13 or associated with that publication.

14 THE COURT: But that's the RJ and now
15 it's been assigned to you, you have now have the
16 copyright.

17 MR. MANGANO: That's correct.

18 THE COURT: And you don't publish a
19 newspaper.

20 MR. MANGANO: No.

21 THE COURT: Okay.

22 MR. MANGANO: But we are not looking at
23 Righthaven now, we're looking at when the
24 infringement occurred. So it still -- we've --
25 we've raised the standing issue, but it's a

1 matter of let's look at when the infringement
2 occurred and what we're dealing with. We're
3 dealing with use by the RJ, the source
4 publication where the work originated and how it
5 was used in CIO's case on their blog.

6 THE COURT: I mean you've been going
7 twenty minutes and you've given absolutely no
8 information. I mean what are the issues of
9 material fact? You're saying that we cannot
10 proceed today, is that your position? Is that
11 what you are telling me, we cannot proceed today?

12 MR. MANGANO: That's if you're inclined
13 to dismiss it, yes. We do not believe that
14 there's sufficient --

15 THE COURT: I'm not going to tell you
16 what I'm inclined to do. I mean I want to hear
17 what the parties have to say. So I mean you're
18 saying, if you're going to rule against me, yeah,
19 I can't proceed today, but if you're going to
20 rule in my favor, yeah, I can proceed today.

21 MR. MANGANO: Okay, your Honor, one of
22 the issues of material fact as I just pointed out
23 was who are the members of CIO, who are the
24 readers?

25 THE COURT: And how is that material?

1 MR. MANGANO: How is it?

2 THE COURT: Yeah, how is that material?

3 MR. MANGANO: It is material, your
4 Honor, because it goes directly towards the
5 nature and use under the first fair use prong.

6 THE COURT: Okay, that does not answer
7 my question at all, does it?

8 MR. MANGANO: The first fair use --

9 THE COURT: That's lawyer speaking.
10 The first one is purpose and character of the
11 use.

12 MR. MANGANO: Okay.

13 THE COURT: We know how they used it,
14 don't we?

15 MR. MANGANO: Okay, your Honor, if --

16 THE COURT: Don't we know how they used
17 it?

18 MR. MANGANO: Yes and no, I can tell
19 you that. Yes and no based upon what --

20 THE COURT: And what don't we know
21 about how they used it?

22 MR. MANGANO: Okay. They're trying to
23 distinguish their use saying that their use is
24 different from the RJ's because their viewers are
25 exclusively in Oregon.

1 THE COURT: Nobody said they were
2 exclusively in Oregon.

3 MR. MANGANO: Okay, maybe they are not
4 in Nevada. They haven't said that they are or
5 not. If they do say they're in Nevada, they have
6 a problem under that first prong.

7 THE COURT: Why?

8 MR. MANGANO: Because we have the exact
9 same use. We don't have this little segment that
10 they're trying to carve out that it's virtually
11 everyone in the Oregon area. They're trying to
12 say that's unique.

13 THE COURT: Well, their website goes to
14 immigrant -- I mean it deals with immigration
15 issues. Let me put it that way. So if somebody
16 is interested in immigration issues, that person
17 logs on and reads it. That person may never
18 read -- may never have heard of the RJ until they
19 read that article and it could be somebody from
20 Illinois, it could be somebody from Nebraska. It
21 could be somebody from Nevada, but somebody who's
22 interested in a newspaper reads the RJ. So I
23 mean -- well, I should say -- let me rephrase
24 that. Someone from here who's interested in a
25 newspaper typically reads the RJ.

1 MR. MANGANO: Uh-huh.

2 THE COURT: And so it's a totally
3 different market.

4 MR. MANGANO: Well, not if you do have
5 people from Nevada that see the article and get
6 their information solely from that source from
7 CIO's website, right? They may know of the RJ
8 and they may look at and read the article which
9 they've read in its entirety, there's no need to
10 go --

11 THE COURT: But the RJ has the
12 copyright, assigns it to you, so it's now yours.
13 So you aren't printing a newspaper. Does the RJ
14 still have this on its website?

15 MR. MANGANO: Yes.

16 THE COURT: Are you suing the RJ?

17 MR. MANGANO: No, your Honor.

18 THE COURT: Why not?

19 MR. MANGANO: Well, because we hold the
20 copyright to it. They assigned it to us.

21 THE COURT: Pardon me?

22 MR. MANGANO: They assigned the
23 copyright to us. We wouldn't sue them.

24 THE COURT: Why not? They have no
25 right to the material, do they? Huh? Huh? Do

1 they?

2 MR. MANGANO: Yes, they do.

3 THE COURT: They do? How do they have
4 rights to the material?

5 MR. MANGANO: Well, I'm sure that it's
6 covered in their license agreement with the RJ
7 and the assignment.

8 THE COURT: Okay, all right.

9 MR. MANGANO: I mean I'm not privy to
10 that information as to how, but they do allow it
11 to be accessed from the website and they do allow
12 it to be shared via the Internet and their
13 hyperlink so they do maintain control of it.
14 They don't have the entire article being taken,
15 copied, and pasted and placed on some other
16 source, which is what happened, and when you go
17 in to read the entire article --

18 THE COURT: Is there any question about
19 that's what happened? We know what happened.

20 MR. MANGANO: When you read the entire
21 article, it's someplace else, your Honor. You're
22 not going to want to go to the source
23 publication.

24 THE COURT: Well, you might.

25 MR. MANGANO: You might, you might not,

1 but I'll tell you if you've got a hundred percent
2 of the article --

3 THE COURT: Well, I mean, okay, now
4 you're -- now this has nothing to do with
5 factual. You're just arguing, well, you might,
6 you might not. What are the issues of material
7 fact that you say preclude us from proceeding
8 today? Other than you've wasted so much time
9 that we'll probably have to adjourn this anyway.

10 MR. MANGANO: Your Honor, another issue
11 is -- well, first of all, the membership
12 composition of CIO is an issue of fact because it
13 does go to the first fair use prong, the first
14 analysis it does as we've discussed that.

15 THE COURT: How does that -- how does
16 their membership go to the first prong? The
17 purpose and character of the use has nothing to
18 do with their membership, does it?

19 MR. MANGANO: Okay, your Honor, then I
20 would say that --

21 THE COURT: Well, I mean so you're
22 throwing up the old here's an argument, wait,
23 here's an argument, here's an argument.

24 MR. MANGANO: No, your Honor.

25 THE COURT: You haven't even thought

1 this through. You're saying, oh, you can't grant
2 summary judgment today, you're granting summary
3 judgment. Well, what are the issues of material
4 fact then that preclude me from proceeding today?
5 Well, let's see, half an hour later we still
6 don't know.

7 MR. MANGANO: Okay, your Honor. Well,
8 let's approach it this way. Why -- my issue then
9 I see it as an issue of material fact in the
10 first fair use prong, and I would assume that
11 Professor Schultz agrees with me since he's cited
12 the factor --

13 THE COURT: Well, leave Professor
14 Schultz out. I don't care about him. No
15 offense, Professor, but what are the issues of
16 material -- we're here to decide legal issues,
17 not to engage in personalities.

18 MR. MANGANO: Okay. The CIO -- there's
19 a statement that they say they did not profit in
20 any way because the article appeared on its blog.
21 We've conducted absolutely no discovery as to
22 whether or not CIO profited in any way, derived
23 any benefit, or received donations from its
24 members.

25 THE COURT: Well, I'm sure they've

1 received a benefit. It's an educational benefit,
2 that's what they say, that's what we do. Am I
3 correct? Am I mischaracterizing something?

4 MR. RICHARDSON: No, that's correct,
5 sir.

6 MR. MANGANO: Your Honor, as we've
7 pointed out in our submissions, there's a
8 donation banner as well as a membership banner
9 that appears on the website.

10 THE COURT: That's right. And so
11 somebody sees their website and says, I like what
12 you guys are doing, I'm going to support you, I
13 mean just like any other advocacy group.

14 MR. MANGANO: Okay, I'm following you.

15 THE COURT: That's good.

16 MR. MANGANO: It's the question of --

17 THE COURT: That makes one of us
18 because I'm not following you at all. How is
19 that relevant?

20 MR. MANGANO: Your Honor, it's relevant
21 because under -- under --

22 THE COURT: Okay, let's do this, let's
23 do this. Let's just adjourn the hearing, and you
24 file genuine issues of material fact, here are
25 the issues of material fact. And I want you guys

1 to respond to it and say, here's the ones we
2 agree are genuine and here's the ones that we
3 disagree. And then I'll decide what's -- I'll
4 give you time to do discovery so that you can
5 respond properly to this. How is that? How is
6 that? Can you answer one question? Can you hear
7 me?

8 MR. MANGANO: Yes, your Honor.

9 THE COURT: And what's your answer?
10 Does that meet with your approval?

11 MR. MANGANO: Yes. Your Honor, if
12 that's --

13 THE COURT: Fine, sit down.

14 MR. MANGANO: Okay.

15 THE COURT: How long will it take you
16 to generate a list of the genuine issue of
17 material facts?

18 MR. MANGANO: Five days, your Honor.

19 THE COURT: Pardon me?

20 MR. MANGANO: Five days?

21 THE COURT: Well, the holiday is coming
22 up.

23 MR. MANGANO: So ten, would that be
24 acceptable?

25 THE COURT: So let's make it -- what

1 would be next Friday?

2 THE CLERK: Friday, January 7th, your
3 Honor.

4 THE COURT: Friday, January 7th. By
5 Friday, January 7th, file and serve these are the
6 genuine issues of material fact that we feel
7 preclude the court proceeding on the fair use
8 hearing, do you understand?

9 MR. MANGANO: Yes, your Honor, we can
10 do that.

11 THE COURT: Thank you. And then a week
12 for you to respond the following Friday, is that
13 agreeable?

14 MR. RICHARDSON: That's plenty of time.

15 THE COURT: And, Professor, you as well
16 as the amicus, if you want to respond and say
17 since you apparently seem to be the focus of
18 something here, I don't know what --

19 MR. SCHULTZ: Thank you, your Honor.

20 Yes, I'd appreciate that
21 opportunity.

22 THE COURT: Yes, sir.

23 So then I'll review that with my
24 brain trust and we'll see whether we agree with
25 your statements of issues and what they are and

1 how much discovery is worthwhile here.

2 We'll be in recess.

3

4 (Whereupon, the proceedings concluded.)

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14 I hereby certify that pursuant
15 to Section 753, Title 28, United States Code, the
16 foregoing is a true and correct transcript of the
17 stenographically reported proceedings held in the
18 above-entitled matter.

19

20

21 Date: January 3, 2011

22

23

/s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter

24

25

____JOY GARNER, CCR 275____
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