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

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

13 Plaintiff,)

14 v.)

15 DOES 1-10, inclusive,)

16 Defendants.)

Case No.: CV 10-5022 LHK HRL

17) **MOTION FOR SUMMARY**
18) **JUDGMENT AND POINTS AND**
19) **MEMORANDUM OF AUTHORITIES**
20) **IN SUPPORT THEREOF OF**
21) **DOE/SKYWALKER AND DOE/KLIM**

22) Date: January 12, 2012
23) Time: 1:30 pm
24) Judge: Hon. Lucy H. Koh
25) Courtroom: 4

26) Filed herewith:
27) 4th Request for Judicial Notice
28) Koltun Decl.,
Administrative Motion to Seal
Proposed Order

Lodged pursuant to LR 79-5:
Redacted 3rd Skywalker Decl
Unredacted 3rd Skywalker Decl

Joshua Koltun ATTORNEY

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUMMARY 1

FACTUAL AND PROCEDURAL BACKGROUND..... 3

ARGUMENT 5

I. Summary Judgment Should Be Granted Where There is No Genuine Dispute As to Any Material Fact..... 5

II. Plaintiff Does Not Own the Copyright in the BWSM; its Registration Was Fraudulent 6

III. Skywalker’s Posting of the BWSM was “Fair Use.” 7

A. Defendant Meets Its Initial Burden to Show Fair Use Because Its Publication of the BWSM Was Noncommercial..... 7

B. The Purpose and Character of Skywalker’s Posting of the Text of the BWSM was Noncommercial “Comment” and “Criticism” of AOL and Shankar 9

C. The “Nature of the [Putative] Copyrighted Work” is Informational, Not “Creative.” 10

D. Although Skywalker Published the Entire [Putatively] Copyrighted Work, This Is Not Dispositive 10

E. Skywalker’s Posing Has No Effect On Any Potential Market for the BWSM 10

IV. Plaintiff Cannot Show That It is Entitled to Any Money Damages, the Only Remedy It Seeks 12

A. Plaintiff Can Only Recover Defendant’s Profits or Actual Damages..... 12

B. Skywalker Has Not Profitted from Publishing the BWSM and the Contention that Klim May “Indirectly” Do So in the Future is Frivolous..... 12

C. Plaintiff Cannot Show Actual Damages 13

D. Plaintiff Cannot Recover Presumed Damages Based on Hypothetical License Fees It Claims That Skywalker and Plaintiff Might Have Agreed To..... 15

V. Plaintiff Has Misused the Copyright -- Manufacturing a Claim that is Fraudulent at Worst and De Minimis at Best, In Order to Chill Skywalker and Klim’s Speech 16

A. Copyright Misuse is an Affirmative Defense Where Plaintiff Seeks to Leverage the Copyright to Accomplish Some Purpose Beyond What the Copyright Statute Provides..... 16

B. Plaintiff and Its Attorneys Manufactured the Copyright in the BWSM, Only to Place It in the Public Domain After Filing This Action Against Does..... 17

C. This Court Should Not Blind Itself to the Larger International Context In Which This Purported Copyright Claim Has Been Asserted, or the Multiple Players Involved 18

CONCLUSION..... 23

Joshua Koltun ATTORNEY

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986).....6

Andreas v Volkswagen of Am. Inc., 336 F.2d 789, 796-97 (8th Cir. 2003) 13

Associated Residential Design v. Molotky, 226 F. Supp. 2d 1251, 1256 (D. Nev. 2002) 13

Brown v. Entm’t Merchs. Ass’n., 131 S.Ct. 2729, 2739 (2011)..... 14

Campbell v. Acuff-Rose Music, 510 U.S. 569, 590 (1994) 11, 13

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).5

Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 732-733 (9th Cir. 1999) 14

Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 763 (1985)..... 16

Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986)8

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 517 (9th Cir. 1985) 13, 16

Gertz v. Robert Welch., Inc., 418 U.S. 342, 349-50 (1974)..... 16

Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 560 (1985).....8, 10, 11

Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986).....9, 10

Kulik Photography v. Cochran, 975 F. Supp. 812, 814 (E.D. Va. 1997) 18

Metabolife Int’l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001.)..... 19

Morgan, Inc. v White Rock Distilleries, Inc., 230 F. Supp. 2d 104, 108 (D. Me 2002)6, 7

Near v. Minnesota, 283 U.S. 697 (1931);..... 19

New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) 19

NXIVM Corp. v. Ross Inst., 364 F.3d 471, 481-482 (2d Cir. N.Y. 2004)..... 11

Oracle USA, Inc. v. SAP AG, 2011 U.S. Dist. LEXIS 98816, 26-27 (N.D. Cal)..... 16

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1166 (9th Cir. Cal. 2007).....9

Qad. Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1265 (N.D. Ill. 1991) 17, 18

Religious Tech. Ctr. v. Lerma, 897 F.Supp. 260 265-266 (E.D. Va. 1995)..... 18

Religious Tech. Ctr. v. Netcom On-Line Commun. Servs 923 F. Supp. 1231, 1248 (N.D. Cal. 1995)..11,

Joshua Koltun ATTORNEY

1 *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966).....9, 10, 17, 21

2 *Rubloff Inc. v. Donahue*, 1994 U.S. Dist. LEXIS 4657, 17-18 (N.D. Ill.).....6

3 *Russ Berrie & Company v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980 (S.D.N.Y. 1980).....6

4 *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1526 (9th Cir. 1992). 10

5 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)8, 9, 10, 11

6 *Telnikoff v. Matusевич*, 347 Md. 561, 602 (1997).....22

7 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).6

8 *UA Local 343 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*

9 *v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1995).....6

10 *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 205-206 (3d Cir. N.J. 2003).... 17

11 **Statutes**

12 17 U.S.C. 107.....7, 8

13 17 USC § 201.....3

14 17 USC § 409.....6

15 17 USC § 410.....1, 7

16 17 USC § 504.....12

17 23 U.S.C. § 4101.....22

18 **Rules**

19 F.R.C.P. 56.....5

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1 TO PLAINTIFF ART OF LIVING FOUNDATION AND ITS COUNSEL OF RECORD:
 2 PLEASE TAKE NOTICE that on January 12, 2012, at 1:30 p.m., or as soon thereafter as counsel may
 3 be heard, in Courtroom Four of this court, located at 280 South 1st Street, San Jose, defendants
 4 Doe/Klim and Doe/Skywalker will specially appear and move the Court under Federal Rule of Civil
 5 Procedure 56 for an order granting defendants summary judgment on the first cause of action
 6 (Copyright Infringement) in the First Amended Complaint (“FAC”). This motion is based upon the
 7 Memorandum of Points and Authorities that follows, on the Motion to Dismiss and Memorandum of
 8 Points and Authorities in Support thereof, on the 4th Request for Judicial Notice, the Declaration of
 9 Joshua Koltun, the 3rd Skywalker Declaration, all all submitted herewith, on all the pleadings, records
 10 and files in this case, and on such further material and argument as may be submitted at or before the
 11 hearing on this motion.

12 Defendants Doe/Klim and Doe/Skywalker respectfully request this Court to grant summary
 13 judgment in favor of all Defendants on the first (Copyright) cause of action below, for a declaration
 14 that the copyright and registration in the BWSM are invalid, and award reasonable attorney fees under
 15 17 USC §505 in an amount to be determined on subsequent motion.

16 SUMMARY

17 Plaintiff did not author the Breath Water Sound Manual (“BWSM”). The BWSM was
 18 authored by Ravi Shankar and is itself derivative of Shankar’s other works, including the (earlier
 19 editions of) the teacher’s manual at issue in the trade secret cause of action. The BWSM was
 20 published in Germany in 2002, prior to the (alleged) publication of the document in the United States
 21 by the American chapter. Plaintiff was obligated to bring to the Copyright Office’s attention that the
 22 BWSM was a derivative work. By failing to do so, and by falsely representing that it was the author
 23 of the BWSM, it obtained its registration by fraud. In any event, a copyright certificate obtained more
 24 than five years after publication – such as the one here—does not constitute *prima facie* evidence of
 25 copyright ownership. 17 USC § 410(c).

26 In any event, Skywalker’s posting of the BWSM constitutes “fair use.” Although “fair use” is
 27 often referred to as an “affirmative defense,” the burden shifts to plaintiff to show that defendant’s use
 28 was unfair where, as here, the use was noncommercial. Consideration of the “fair use” factors

1 strongly favors Skywalker. He published the BWSM as comment and criticism, as part of a larger
2 argument that Shankar is a charlatan and AOL a cult. That is an issue of public concern. The work
3 he copied was published (*i.e.*, not unpublished) and was “an informational booklet,” not a creative
4 work. The publication would not tend to harm the market for the work; indeed, there *is* no market for
5 the work. That Skywalker’s criticism of AOL as a cult and a sham may have influenced readers of the
6 BWSM not to take AOL’s courses is not cognizable harm under the Copyright Act. That Skywalker
7 posted the entire BWSM is not dispositive, and all the other factors strongly favor Skywalker.

8 Moreover, Plaintiff cannot show that it is entitled to any monetary relief, the only relief it now
9 seeks. Plaintiff cannot obtain “defendants’ profits.” Skywalker’s blog is noncommercial and he
10 derives no revenue from it. Plaintiff’s argument that it can obtain profits from a book that Klim is
11 contemplating writing -- because that book may contain copyrighted materials and/or because the
12 book will “indirectly” profit from Skywalker’s posting of the BWSM – is patently frivolous.

13 Plaintiff cannot show that it has suffered any actual damages. Plaintiff’s revenues were
14 dropping well before Klim or Skywalker started the Blogs, and in any event Plaintiff cannot show that
15 any drop in revenue was caused by the publication of the BWSM as opposed to Skywalker and Klim’s
16 constitutionally protected criticisms of AOL and Ravi Shankar. Any purported calculation of
17 damages from the supposed “upsell” of paid courses is utterly speculative, especially in light of the
18 fact that no more than 500 people on the entire planet ever viewed the BWSM on Skywalker’s blog.

19 Lastly, Plaintiff’s pursuit of this action constitutes copyright misuse. Plaintiff misled the
20 copyright office in order to get the registration in this action, and it filed this action to assist an
21 international effort to chill Skywalker’s critical speech about AOL/Shankar. Plaintiff’s own pleadings,
22 statements before this court, and the history of this dispute, show that this case involves international
23 participants who have chosen not to submit themselves to this Court’s jurisdiction are using this action
24 to learn Skywalker’s identity. Once they do so they will be free to pursue their declared goal of
25 shutting down his blog, suing in foreign venues that do not have the protections of the First
26 Amendment. Plaintiff filed this action in the (unfortunately) reasonable expectation that, in an
27 uncontested proceeding, it would quickly learn the identities of Does. This court should not allow the
28 copyright to be misused for this purpose.

FACTUAL AND PROCEDURAL BACKGROUND

1 AOL (worldwide) offers a Breath Water Sound program designed to bring certain aspects of
 2 the Art of Living Course to those who do not have the financial means to pay for them, and are thus
 3 generally given free, primarily in Third World countries, but also in disaster-relief projects in the
 4 West. 3rd SW Decl, ¶ 2; Dhall Decl, ¶ 41 (course is free); see also RJN, ¶ 11, Exh. K. The BWSM is
 5 designed for teachers of the BWS program, not for the students of the program. See Dhall Decl., Exh.
 6 E. Plaintiff AOLFUS claims to have published the BWSM in 2003. FAC, ¶ 50, 77.

7 Skywalker’s Blog does not carry advertising. RJN, Exh. E; Rosenfeld Decl., ¶ 15, Exh. M
 8 (complete Blog); 3rd SW Decl., ¶ 2, and he does not derive any revenue from it. *Id.*

9 On June 1, 2010, Skywalker began posting certain AOL material on his blog, together with an
 10 explanation of his reasons doing so. 3rd SW Decl., ¶ 9, RJN, ¶ 5, & Exh. E10. He added the text of
 11 the BWSM in a post he added on July 21, 2010. *Id.*; compare Dhall Exh. E. (D.E. 40). He deleted the
 12 text of the BWSM from the postings on August 27, 2010, immediately after receiving a Cease and
 13 Desist letter from Vyakti Vikas Kendra, an Indian entity that purports to own the rights to courses
 14 “designed by” Ravi Shankar. 3rd SW Decl., ¶ 2, Exh. A. He has not posted or published the BWSM
 15 in any other manner or on any other occasion. *Id.*

16 The webpage that contained the text of the Breath Water Sound Manual was viewed 147 times
 17 in July 2010 and 351 times in August 2010, the two months during which the BWSM was posted on
 18 Skywalker’s blog. 1st SW Decl., ¶ 12; 3rd SW Decl., ¶ 12, Exh. D. Thus, making the (unwarranted)
 19 assumption that every single viewing constitutes a discrete person, and that all the people who viewed
 20 the page in July did so after July 21, and that all the people who viewed the page in August did so
 21 before August 27, the maximum number of persons *on the entire planet* who could possibly have
 22 viewed the text of the BWSM on Skywalker’s blog is 498.

23 In October 2010, immediately prior to bringing this lawsuit, and acting with the advice of
 24 counsel, Plaintiff applied to the Copyright Office to register the BWSM, *id.* at ¶ 50, and subsequently
 25 received Registration No. TX000724023. Dhall Decl., ¶¶ 37; 63; 4th RJN., ¶, Exh. A.

26 In its application to the Copyright Office, Plaintiff claimed that it had published the BWSM in
 27 2003, and that it had been written by its employees as a “work made for hire.” *Id.*; see 17 USC 201(b)
 28

1 ("In the case of a work made for hire, the employer ... is considered the author ..., and ...owns all of
2 the rights comprised in the copyright."); *see also* FAC, ¶ 48 (Plaintiff is the author of BWSM); ¶ 76
3 (BWSM is an original work).

4 This was not, however, true. The Breath Water Sound Manual was written at least as early as
5 2002 and published by the German chapter of AOL. 3rd SW Decl., ¶ 3, Exh. B (hereinafter, the 2002
6 version will be referred to as the "2002 BWSM," and the version AOLFUS claims to have authored
7 and published in 2003 – Dhall Decl. Exh. E -- will be referred to as the "2003 BWSM"). The 2002
8 BWSM indicates that it is "knowledge given by Sri Sri Ravi Shankar, May 1st, 2002." *Id* [p 7].¹
9 "Knowledge given" is AOL parlance -- referring to the belief that every word uttered by Shankar is
10 sacred "knowledge," and to the AOL practice of faithfully transcribing and publishing the spoken
11 words of Ravi Shankar verbatim, because it would be sacrilegious to alter his words in any way. *Id*.
12 The same is true for materials that indicate that they are "as taught by" Ravi Shankar. *Id*; *see also* 2nd
13 MTS at 22 (quoting materials discussing AOL requirement that sacred knowledge be transmitted and
14 followed verbatim); *see also* 3rd SW Decl., Exh. A (Indian AOL related entity (Vyakti Vikas Kendra)
15 claiming in Cease and Desist letter to Skywalker that "through our authorized Teachers we teach
16 courses/programmes **designed by His Holiness [Ravi Shankar]** (popularly known as the Art of Living
17 Courses) all over the world.")(emphasis added).

18 Although there is some material in the 2002 BWSM that is not in the 2003 BWSM, the
19 material in the 2003 BWSM is largely identical to the material in the 2002 BWSM, albeit the page
20 ordering is slightly different.

21 Moreover, the BWSM was itself a derivative work, drawn at least in part from previous works
22 by Ravi Shankar, including the "teacher's manual" (or "Training Guide Phase 1 Manual") that is at
23 issue in the trade secret cause of action. *Compare* Dhall Decl., Exh. A (under seal) at 8 (4 Sources of
24 Energy) at 4-5 (The 7 Levels of Existence); 3rd Skywalker Decl., ¶ 4, Exh. C (1996 edition of
25 teacher's manual by Shankar) at 8, 19 (Seven Levels of Existence), at 22 (4 Sources of Energy) with
26 Dhall Decl., Exh. E (BWSM) at [DE 40-1 p. 8] (4 Sources of Energy), [DE 40-1 p 18] (Seven Layers
27

28 ¹ See also, *id*. [at last page] (promotional letter attached to 2002 BWSM dated September 26, 2002:
"just take the advantage [sic] of this new gift from Guruji and apply"

1 of Existence).

2 The intellectual property rights in the teacher's manual are purportedly held by the
3 "International Art of Living Foundation," a Swiss entity that Plaintiff has certified as an interested
4 party per Local Rule 3-16. *See* Certification of Interested Parties [D.E. 2].

5 "While Shankar's teachings serve as a pillar of [Plaintiff's] courses, Shankar is not an
6 ...employee" of Plaintiff. Dhall Decl., ¶ 16. Plaintiff did not bring that fact, or Shankar's authorship
7 (or any contribution) to the BWSM to the Copyright Office's attention, nor of Shankar's previous
8 works that contained material from which portions of the BWSM were derived, nor did Plaintiff
9 disclaim copyright in any portion of the BWSM. 4th RJN, ¶ 1, Exh. A.

10 From the outset of this litigation, Defendant's counsel acted scrupulously to avoid prejudicing
11 Plaintiff's rights in the BWSM. When Plaintiff's counsel first appeared and referenced the BWSM in
12 the Motion to Quash, he did not file the BWSM through PACER but rather proposed to Plaintiff's
13 counsel that he file the BWSM under seal, to which Plaintiff stipulated. *See* Admin Mot., Stip, Order,
14 DE 34, 35, 75, 107 and entry for 2/24/11] Although Plaintiff's counsel stipulated to the filing of the
15 BWSM under seal, (DE 35), *Plaintiff's* counsel [sic] later reversed course and filed the BWSM in this
16 Court's public files. Dhall Declaration, ¶¶ 38, 61, Exh. E [DE 40-1].

17
18 **ARGUMENT**

19 ***I. Summary Judgment Should Be Granted Where There is No Genuine Dispute As to Any Material Fact***

20 Summary judgment should be granted if "the movant shows that there is no genuine dispute as
21 to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56 (a). The
22 "party seeking summary judgment always bears the initial responsibility of informing the district
23 court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers
24 to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes
25 demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317,
26 323 (1986). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and
27 upon motion, against a party who fails to make a showing sufficient to establish the existence of an
28 element essential to that party's case, and on which that party will bear the burden of proof at trial."

1 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The inquiry is whether the
 2 evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-
 3 sided that one party must prevail as a matter of law. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477
 4 U.S. 242, 250-52 (1986)). “Put another way, summary judgment should be granted where the
 5 nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its
 6 favor.” *Id.* at 1221. Evidence that is “merely colorable,” or “is not significantly probative,” is
 7 insufficient to defeat summary judgment. *Anderson*, 477 US. at 249. What facts are material is
 8 determined by the substantive law at issue, as is the relevant evidentiary burden. *Id.* at 254-55.²

9
 10 **II. Plaintiff Does Not Own the Copyright in the BWSM; its Registration Was Fraudulent**

11 Plaintiff cannot proceed with a copyright infringement action unless and until it has a valid
 12 copyright registration (or has filed a valid application for same). 17 USC § 411(a); *see Rubloff Inc. v.*
 13 *Donahue*, 1994 U.S. Dist. LEXIS 4657, 17-18 (N.D. Ill.). An application for copyright registration
 14 must state, among other things, “the names and nationality or domicile of the authors or authors,”
 15 whether the work is a “work made for hire,” and, “in the case of a compilation or derivative work, an
 16 identification of any preexisting work or works that it is based on or incorporates, and a brief, general
 17 statement of the additional material covered by the copyright claim being registered.” 17 USC § 409
 18 (1)(4) and (9).

19 Knowing failure to advise the Copyright Office of prior published works may result in
 20 invalidation of a copyright. *Russ Berrie & Company v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980
 21 (S.D.N.Y. 1980). Evasions and arful omissions in a copyright application constitute fraud on the
 22 Copyright Office. *Morgan, Inc. v White Rock Distilleries, Inc.*, 230 F. Supp. 2d 104, 108 (D. Me
 23 2002). The copyright application forms are straightforward, and the Court is not obligated to accept
 24 the contentions of plaintiff that any errors were inadvertent, even where plaintiff did not have the
 25 assistance of counsel. *Id.*

26
 27 ² Insofar as the movant bears the burden on any issue as a matter of substantive law, it must make out
 28 a *prima facie* case that would entitle them to judgment as a matter of law if uncontroverted at trial. *UA*
Local 343 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v.
Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1995).

1 The certificate of copyright registration constitutes *prima facie* evidence of the validity of the
 2 copyright *only* if the registration was made “before or within five years after first publication of the
 3 work.” 17 USC § 410(c) (emphasis added).³ Here, registration occurred in 2010, more than five
 4 years after the alleged 2003 publication date – not to mention the true publication date of 2001.

5 Plaintiff’s artful omissions and evasions in its copyright application constituted fraud on the
 6 copyright office. *Morgan, Inc.* 230 F. Supp. 2d at 108. In *Morgan, Inc.*, the Court refused to accept
 7 the representations of plaintiff that it had simply inadvertently mischaracterized the work, even though
 8 plaintiff had acted without the assistance of counsel. *Id.* *A fortiori*, then, where as here, Plaintiff’s
 9 mischaracterization occurs in a registration where plaintiff is not only advised by counsel, but is
 10 preparing its application at the behest of counsel -- when, in fact, the Registration was prepared in
 11 conjunction with litigation specifically concerning the very omitted information, the Court should find
 12 that Plaintiff has committed fraud and (as explained in section V) abused the copyright process.⁴

13 **III. Skywalker’s Posting of the BWSM was “Fair Use.”**

14 **A. Defendant Meets Its Initial Burden to Show Fair Use Because Its Publication of the** 15 **BWSM Was Noncommercial**

16 The “fair use of a copyrighted work ... for purposes such as criticism [or] comment” -- among
 17 other categories -- “is not an infringement of copyright.” 17 U.S.C. 107 (first sentence). For works
 18 that fall into one of the categories in the first sentence of section 107, “fair use” is determined by
 19 balancing the following factors:

- 20 (1) the purpose and character of the use, including whether such use is
 21 of a commercial nature or is for nonprofit educational purposes;
- 22 (2) the nature of the copyrighted work;
- 23 (3) the amount and substantiality of the portion used in relation to the
 24 copyrighted work as a whole; and

25 ³ In cases in which the certificate does constitute *prima facie* evidence of the facts stated therein, such
 26 facts may be rebutted. *Russ Berrie & Co.*, 482 F. Supp. at 984-985.

27 ⁴ At a minimum, Plaintiff’s copyright only extends to such portion of the BWSM that was actually
 28 authored by Plaintiff’s employees (if it has any), and only insofar as such material constitutes original
 work once compared to the previous versions of the BWSM and/or teacher’s manual authored by Ravi
 Shankar.

1 (4) the effect of the use upon the potential market for or value of the
copyrighted work.

2 *Id.*

3 Although the copyright statute expressly states that fair use “is not” copyright infringement,
4 courts often refer to it as an “affirmative defense.” Assuming that defendant has the initial burden to
5 show fair use, however, once he has discharged that burden as to any of the factors above, the burden
6 may then shift to plaintiff to show that the use was not “fair.” Thus, for example, a Defendant can
7 meet its initial burden by showing that his use of the work was noncommercial. As the Supreme
8 Court explained in *Sony Corp. of Am. v. Universal City Studios, Inc.*,

9 although every commercial use of copyrighted material is presumptively
10 an unfair exploitation of the monopoly privilege that belongs to the
11 owner of the copyright, noncommercial uses are a different matter. A
12 challenge to a noncommercial use of a copyrighted work requires proof
13 either that the particular use is harmful, or that if it should become
14 widespread, it would adversely affect the potential market for the
15 copyrighted work. Actual present harm need not be shown; such a
16 requirement would leave the copyright holder with no defense against
17 predictable damage. Nor is it necessary to show with certainty that
18 future harm will result. What is necessary is a showing by a
19 preponderance of the evidence that some meaningful likelihood of
20 future harm exists. If the intended use is for commercial gain, that
21 likelihood may be presumed. But if it is for a noncommercial purpose,
22 the likelihood must be demonstrated.

23 *Id.* 464 U.S. 417, 451 (1984).⁵

24 Fair use is a mixed question of law and fact. *Harper & Row, Publishers. v. Nation Enters.*, 471
25 U.S. 539, 560 (1985). Summary judgment should be granted if the court finds that there is no genuine
26 dispute as to material “historical” facts. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).
27 Disagreements about the the conclusions to be drawn from such historical facts present only questions
28 of law. *Id.*

Here, Skywalker’s Blog is noncommercial and he derives no revenue therefrom. Thus the
burden is on Plaintiff to show that his use of the BWSM was unfair.

⁵ See also, *id.* at n. 34 (“In certain situations, the copyright owner suffers no substantial harm from the use of his work. . . . Here again, is the partial marriage between the doctrine of fair use and the legal maxim de minimus non curat lex.”; quoting with approval Latman, Fair Use of Copyrighted Works (1958).

1 **B. *The Purpose and Character of Skywalker’s Posting of the Text of the BWSM was Noncommercial “Comment” and “Criticism” of AOL and Shankar***

2 The “purpose and character of the use” factor includes the question whether the work was
3 commercial or noncommercial, as well as whether the use served some public purpose. As the Court
4 of Appeals for the Ninth Circuit has explained:

5 The fair use doctrine confers a privilege on people other than the
6 copyright owner “to use the copyrighted material in a reasonable
7 manner without his consent, notwithstanding the monopoly granted to
8 the owner.” ... The doctrine is a means of balancing the need to provide
individuals with sufficient incentives to create public works with the
public's interest in the dissemination of information.

9 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986)(quoting
10 *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966)). Even where
11 the use is commercial, placing the copyrighted work in a different context may transform that work in
12 a publicly beneficial way and thus the purpose may favor a finding of fair use. *Perfect 10, Inc. v.*
13 *Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. Cal. 2007).

14 Thus, for example, in *Sony Corp.*, a factor favoring the Court’s ultimate conclusion that “time
15 shifting” -- that is to say the home videotaping of TV shows that were broadcast for free -- was fair
16 use was the fact that “expand[ing] public access to freely broadcast television programs [] yields
17 societal benefits.” *Id.* at 454.

18 Skywalker openly explained that he was disclosing the BWSM and other manuals at issue in
19 this litigation as part of a larger argument about Shankar and AOL. RJN, ¶ 5, Exh. E10. As this
20 Court recognized (in the trade secret analysis under the first Motion to Strike) he “published the
21 alleged trade secret documents as part of a larger effort to debunk the notion that the Art of Living
22 Foundation and Ravi Shankar possess some ‘secret higher knowledge.’” 6.15 Order at 16:25-27.

23 Here, the posting of the BWSM, as well as the putative trade secret documents, was part of the
24 argument that that AOL is “basically a cult and a sham” – an argument that, in the context of the
25 Motion to Strike, this Court rules was “speech on a public issue.” *Id.* Thus the “purpose and
26 character” factor strongly favors Skywalker.

1 **C. *The “Nature of the [Putative] Copyrighted Work” is Informational, Not “Creative.”***

2 Under the “nature of the copyrighted work” factor, courts have generally considered two
3 aspects of the work. First, the extent to which it is a creative work enjoying broader copyright
4 protection as opposed to a factual work requiring broader dissemination, and second, whether it is
5 unpublished, in which case the right of first publication is implicated. *Harper & Row*, 471 U.S. at
6 563-64.

7 Here, the work was published, so that factor favors Skywalker. Moreover, the BWSM is “an
8 informational booklet.” Dhall Decl., ¶ 37. Since the risk of restraining the free flow of information is
9 more significant with informational work, the scope of permissible fair use is greater. *Rosemont*
10 *Enterprises*, 366 F.2d at 307. Moreover, the Court must consider that the BWSM is a derivative
11 work. Insofar as any of the putative “creative” material in the BWSM comes from preexisting work in
12 which Plaintiff cannot claim copyright ownership (or as to which it does not have a valid registration),
13 such material must be ignored by the Court. Thus this factor favors Skywalker.

14 **D. *Although Skywalker Published the Entire [Putatively] Copyrighted Work, This Is***
15 ***Not Dispositive***

16 The fact that the entire work was “used” is not a dispositive factor negating fair use. *Sony*
17 *Corp.*, 464 U.S. at 449-50; *Hustler*, 795 F.2d at 1155; *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510,
18 1526 (9th Cir. 1992). So long as the use of the work was for a transformative purpose, the fact that
19 the entire work was incorporated does not diminish the transformative nature of the use. *Perfect 10,*
20 *Inc.*, 508 F.3d at 1165. Here the critical purpose of Skywalker’s posting was to show that the
21 “emperor has no clothes,” so to speak. It was essential to Skywalker’s critical purpose to publish the
22 materials accurately and in their entirety, to debunk the notion that some kind of powerful sacred
23 knowledge was contained therein.

24 Thus, although Skywalker used the entire work, this factor is neutral.

25 **E. *Skywalker’s Posing Has No Effect On Any Potential Market for the BWSM***

26 The “effect on the market” factor involves an inquiry into the effect on the potential market for
27 the copyrighted work itself, or for derivative works based on that original. *Campbell v. Acuff-Rose*
28

1 *Music*, 510 U.S. 569, 590 (1994); *Harper & Row*, 471 US. at 568.

2 “To be sure, some may read defendants' materials and decide not to attend plaintiffs' seminars,’
3 but the question is not whether the secondary use suppresses or even destroys the market for the
4 original work or its potential derivatives, but whether the secondary use usurps the market of the
5 original work.” *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-482 (2d Cir. N.Y. 2004) “That the fair
6 use, being transformative, might well harm, or even destroy, the market for the original is of no
7 concern to us so long as the harm stems from the force of the criticism offered.” *Id.*; *Campbell*, 510
8 U.S. at 591-592 (1994) (“lethal parody, like a scathing theater review, kills demand for the original, it
9 does not produce a harm cognizable under the Copyright Act.”); *Religious Tech. Ctr. v. Netcom On-*
10 *Line Commun. Servs* 923 F. Supp. 1231, 1248 (N.D. Cal. 1995)(“ [t]o the extent that Erlich's postings
11 suppress demand for the original works by persuading [potential buyers] that [L. Ron Hubbard, the
12 founder of Scientology] was a charlatan‘ or that the Church is a fraud, as clearly Erlich intends, such a
13 devastating critique‘ is not within the scope of copyright protection.”).

14 Where, as discussed above the “use” is noncommercial, the potential harm must be
15 affirmatively demonstrated by plaintiff. *Sony Corp.*, 464 US at 451. In *Sony Corp.*, although the
16 plaintiff broadcasters and advertisers contended that the use of home videotaping of their free
17 programs harmed them, the Court found that contention “speculative and, at best, minimal,” and
18 indeed, that it was “not implausible that benefits could also accrue to plaintiffs, broadcasters, and
19 advertisers,” as home videotaping made “it possible for more persons to view their broadcasts.” *Id.* at
20 454.

21 Here, there is simply no issue whatsoever of damage to the market for the copyrighted work or
22 its derivatives. The copyrighted work is the *teacher’s* manual to a course which is taught for free.
23 There is no “market” for it. There are no derivative works of the BWSM at issue. Plaintiff’s entire
24 theory of damages is one of speculative “upsell” of AOL’s paid courses. This theory is not cognizable
25 under the fair use inquiry because it does not relate to the market for the work or its derivatives. In
26 any event, as explained in the next section this theory of “upsell” is utterly speculative theory of actual
27 damages. This factor strongly favors Skywalker.

28 Skywalker’s has shown that his posting of the BWSM was fair use.

1 **IV. Plaintiff Cannot Show That It is Entitled to Any Money Damages, the Only Remedy It Seeks**

2 **A. Plaintiff Can Only Recover Defendant's Profits or Actual Damages**

3 In the First Amended Complaint, Plaintiff has dropped its demand for injunctive relief and is
4 now only seeking monetary damages. Plaintiff cannot show that there is any genuine issue of material
5 fact as to whether it is entitled to any monetary damages on the copyright claim. Plaintiff is suing on
6 a work that was not registered until after infringement, and can recover only "the actual damages
7 suffered by him or her as a result of the infringement, and any profits of the infringer that are
8 attributable to the infringement and are not taken into account in computing the actual damages.. 17
9 USC § 504(b). Thus, assuming for the moment that Plaintiff has a valid copyright in the entire
10 BWSM, Plaintiff can only recover by one of these two measures of damages. If Plaintiff only has a
11 valid copyright as to some portion of the BWSM, it must prove the damages "suffered" or wrongful
12 profits "attributable" to that portion only.

13 In its Initial Disclosures, Plaintiff indicates that it will show monetary damages as follows:

14 Plaintiff's damages calculations depend on the scope of Defendants'
15 [sic] unlawful disclosures of Plaintiff's trade secrets and copyrighted
16 materials. Thus discovery is necessary before Plaintiff will be in a
17 position to calculate the amount of its damages. As relates to the
18 infringement of Plaintiff's copyrighted materials, Plaintiff is working
19 with an expert to calculate a conversion rate for its use of the Breath
20 Water Sound manual in free classes into paying students. This
conversion rate multiplied by the number of viewers of the infringing
materials will demonstrate Plaintiff's lost profits resulting from
Defendant's copyright infringement. Plaintiff will also seek any
wrongful profits obtained by Defendants [sic] from its infringement of
the Breath Water Sound Manual, which information is in
Defendants'[sic] exclusive control.

21 Koltun Decl., ¶ 1, Exh. A. As explained below, the use of the plural "Defendants" is *not* a typo.

22 **B. Skywalker Has Not Profitted from Publishing the BWSM and the Contention that**
23 **Klim May "Indirectly" Do So in the Future is Frivolous**

24 Let us dispose first of the issue Defendants' "wrongful profits." What is at issue in this case is
25 the brief posting of the BWSM on Skywalker's Blog, as to which the only evidence is Skywalker's
26 own declaration. Skywalker has testified that he does not receive any revenue from the blog. 3rd
27 Skywalker Decl, ¶ 2. The Blog did not carry any advertising. *Id.*, Rosenfeld Declaration, Exh. M
28 (submitting entire Blog as attachment). It cannot be seriously contended that Skywalker profited from

1 his posting of the BWSM.

2 The repeated use of the plural “Defendants” in the initial disclosures is *not* a typo. It is a sign
 3 of plaintiff’s desperation to learn Klim’s identity – see discussion of copyright misuse in section V
 4 below -- that it proposes that it can recover profits from *Klim*. See Opp. to MTQ at 21:23-25. Here
 5 is the theory: (i) Klim indicated on his blog that he was contemplating writing a book, (ii) Plaintiff (or
 6 actually, Plaintiff’s counsel)⁶ “is informed and believes that Klim’s book is derived in part from
 7 Plaintiff’s copyrighted materials – though this evidence is in Klim’s exclusive control,” and (iii) Klim
 8 may have realized “indirect profits,” which “arise even when the infringer does not sell the
 9 copyrighted work, but rather uses the copyrighted work to sell another product.” *Id.* at 21:23-22:8
 10 (citing *Andreas v Volkswagen of Am. Inc.*, 336 F.2d 789, 796-97 (8th Cir. 2003) and *Associated*
 11 *Residential Design v. Molotky*, 226 F. Supp. 2d 1251, 1256 (D. Nev. 2002)

12 As Plaintiff’s own authorities show, such indirect profits can only arise where plaintiff has
 13 shown by non-speculative evidence that there is some causal nexus between the use of the copyrighted
 14 work and the sale of the other product. *Associated Residential Design*, 226 F. Supp. 2d at 1256
 15 (citing *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 517 (9th Cir. 1985)). In
 16 *Andreas*, relied upon by Plaintiff, there was a causal nexus because the copyrighted work was
 17 incorporated into (and was a major part of) an advertisement that Volkswagen used to sell cars. *Id.*
 18 336 F.3d at 796. Here, by contrast, no such nexus has been or could conceivably be shown.
 19 Skywalker’s brief posting of the BWSM took place in the summer of 2010. Klim’s book has not even
 20 been written yet – if it ever will be. It is difficult to imagine a more speculative basis on which to seek
 21 a monetary remedy.

22 **C. Plaintiff Cannot Show Actual Damages**

23 Nor can Plaintiff show actual damages. Plaintiff has insisted that there is a correlation
 24 between the commencement of Klim and Skywalker’s blogs and a drop in revenue. But Plaintiff’s
 25 own evidence concerning revenues demonstrates that there was *no* such correlation – revenue has
 26

27 ⁶ There is no evidence that anyone other than Plaintiff’s counsel holds this belief. Plaintiff’s counsel
 28 did not chose to disclose what basis it has for that (purported) belief, or which copyrighted materials it
 believes are at risk of being infringed *Id.* (citing Rosenfeld Decl. ¶ 22 & Exh. T).

1 been dropping steadily since well before *either* Defendant began their respective Blogs, despite the
 2 fact that enrollment has been more or less *flat*. Dhall Decl., Exh. F. In any event, evidence of
 3 “correlation [is] not evidence of causation.” *Brown v. Entm’t Merchs. Ass’n.*, 131 S.Ct. 2729, 2739
 4 (2011). Plaintiff has not and cannot show by admissible evidence that the brief posting of the alleged
 5 trade secrets has caused any actual damage.

6 Moreover, this Court’s ruling dismissing the defamation claims effectively negates Plaintiff’s
 7 (inadmissibly speculative) proposed inference that the posting of the alleged trade secrets caused any
 8 drop in the number of students enrolling in its courses. As counsel passionately argued, “we are here
 9 because the Art of Living has been harmed ... a relaxed atmosphere ... is key to teaching these classes
 10 and for the Art of Living to make money ... the allegations regarding rape, sexual fondling, and
 11 sexual harassment have been devastating.” But this Court has ruled that the “devastating” statements
 12 at issue are constitutionally protected. Order at 10-12. Thus Plaintiff cannot now contend that it has
 13 shown that any drop in enrollment was caused by Skywalker having posted the alleged trade secrets.
 14 *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 732-733 (9th Cir. 1999)
 15 (overturning jury finding of damages in defamation/Lanham Act case where liability was based on
 16 three statements, two of which were held, on appeal, to be constitutionally protected.); *cf. Religious*
 17 *Technology Cente.*, 923 F. Supp. at 1248 (“[t]o the extent that Erlich's postings suppress demand for
 18 the original works by “persuading [potential buyers] that [L. Ron Hubbard, the founder of
 19 Scientology] was a charlatan, or that the Church is a fraud, as clearly Erlich intends, such a
 20 devastating critique, is not within the scope of copyright protection.”)

21 Defendants do not doubt that AOL will submit a purported expert declaration as to the
 22 “conversion rate for the use of the Breath Water Sound manual in free classes into paying students.”
 23 AOL Initial Disclosure. Assuming for the moment that that expert’s testimony as to the “conversion
 24 rate” is otherwise admissible, AOL will nevertheless be unable to establish actual damages, because
 25 there is no relevant number by which to multiply that “conversion rate.”

26 Back in March, Plaintiff stated that “it could not quantify its damages until it receives analytics
 27 data for the Blogs and can verify Defendants’ unsupported numbers.” Opp. MTQ at 21:18-22. This
 28 was a reference to the analytic information provided by the Wordpress platform to Skywalker and

1 cited by Skywalker in his (first) declaration of January 31 2011. 1st SW Decl., ¶ 12. Plaintiff made
 2 absolutely no effort to follow through and “verify these unsupported numbers,” -- despite Defendant’s
 3 stipulation that it could do so (in May) -- until the afternoon of August 24, 2011. That is to say,
 4 Plaintiff made no effort to verify these numbers until several hours after Skywalker, in his Motion for
 5 Relief, pointed to Defendant’s failure to seek such information as one indication that Plaintiff’s
 6 copyright claim was a pretext for learning Skywalker’s identity, and that Plaintiff was not seriously
 7 interested in pursuing its purported monetary damages.

8 Skywalker attaches to his declaration filed herewith the screenshot of Automatic’s analytic
 9 information. 3rd SW Decl., ¶ 5; Exh. D. It verifies the numbers in his original declaration.

10 What this analytics data shows – and this is all that it can show – is that the BWSM was
 11 viewed fewer than 500 times while it was posted on the Blog. The data does not distinguish discrete
 12 viewers, so the number of persons may well be significantly fewer than 500, but not more. The data
 13 does *not* show how many of these persons were in the United States. It does not show whether these
 14 viewers had already taken the BWSM course, or whether indeed they had already taken AOL paid
 15 courses. The data does not show whether the persons who viewed the BWSM had visited other pages
 16 on the Blog. Obviously the data cannot determine whether any of the persons who viewed the BWSM
 17 were persuaded by the arguments of Skywalker and others that AOL is a cult and Shankar is a
 18 charlatan, an argument that directly accompanied the posting of the BWSM. RJN, Exh. E10.

19 ***D. Plaintiff Cannot Recover Presumed Damages Based on Hypothetical License Fees It***
 20 ***Claims That Skywalker and Plaintiff Might Have Agreed To.***

21 Plaintiff contends, however, that even if it cannot show “a provable loss,” it nevertheless can
 22 recover monetary damages on the theory that it lost “hypothetical license fees.” See Opp.MFR at 12:7-
 23 9. That is incorrect. As this Court recently explained:

24 [Plaintiff’s] suggestion — that upon proof of infringement, copyright
 25 plaintiffs are automatically entitled to seek “hypothetical” license
 26 damages because they are presumed to have suffered harm in the form
 27 of lost license fees — has no support in the law. Lost license fees are
 28 simply a method of calculating “actual damages suffered by [the owner]
 as a result of the infringement.” 17 U.S.C. § 504(b). Thus, a plaintiff
 must *prove that the license fees were actually lost* as a result of the
 infringement.

1 *Oracle USA, Inc. v. SAP AG*, 2011 U.S. Dist. LEXIS 98816, 26-27 (N.D. Cal.) (citing *Frank Music*
2 *Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d at 513-14 & n.8).⁷

3 *Wall Data Inc. v. L.A. County Sheriff's Dep't*, relied upon by Plaintiff, is not to the contrary.
4 *Id.*, 447 F.3d 769 774-775. (9th Cir. 2006). In that case, defendant was a licensee of plaintiff's
5 software. Defendant had exceeded the scope of permitted use, uploading the software onto 6007
6 computers where it was only licensed to do so on 3663 computers. *Id.* On those facts, the Court ruled
7 that it was possible to determine, without speculation, the hypothetical fee that the parties might have
8 agreed to had they negotiated over the excess use as a basis for determining actual damages. *Id.* at
9 786.

10 Here, plaintiff has not and cannot show that there is any basis to find such actual damages. The
11 parties had not agreed to an *actual* license that established a benchmark commercial value for a
12 "hypothetical" license. *Wall Data, supra*. On the contrary, the work is one which related to a course
13 which Plaintiff offered for free, and the copying here of the BWSM was purely ephemeral. There can
14 be no basis for an award of actual damages. There is simply no basis to speculate that Skywalker
15 would have ever agreed to pay license fees in order to be able to post the BWSM. *See Oracle*, , 2011
16 U.S. Dist. LEXIS 98816, at 23 (plaintiff failed to show that defendant, its competitor, would ever have
17 agreed to a license).

18
19 **V. *Plaintiff Has Misused the Copyright -- Manufacturing a Claim that is Fraudulent at Worst***
20 ***and De Minimis at Best, In Order to Chill Skywalker and Klim's Speech***

21 **A. *Copyright Misuse is an Affirmative Defense Where Plaintiff Seeks to Leverage the***
22 ***Copyright to Accomplish Some Purpose Beyond What the Copyright Statute Provides***

23 Copyright misuse is an affirmative defense arising from plaintiff's attempt to leverage its
24 copyright to obtain some right not granted by the copyright statute. *Practice Mgmt. Info. Corp. v.*

25
26 ⁷ Indeed, even if presumed "reasonable royalty" damages were allowed under the copyright statute,
27 such presumed damages would be unconstitutional as applied here. *Gertz v. Robert Welch, Inc.*, 418
28 U.S. 342, 349-50 (1974) (private figure must show actual malice to recover presumed damages); *Dun &*
Bradstreet v. Greenmoss Builders, 472 U.S. 749, 763 (1985) (*Gertz* rule on presumed damages is good law
at least as to matters of public concern). There can be no showing of actual malice here, since there is no
allegation that the publication – the BWSM -- was false.

1 AMA, 121 F.3d 516, 520 (9th Cir. 1997). This defense is not limited to antitrust-type efforts to
 2 monopolize; it also encompasses efforts to use the copyright to chill speech. “The spirit of the First
 3 Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any
 4 attempted interference with the public's right to be informed regarding matters of general interest
 5 when anyone seeks to use the copyright statute which was designed to protect interests of quite a
 6 different nature.” *Rosemont Enterprises*, 366 F.2d at 311 (2d Cir. 1966) (Lombard, J. and Hays, J.,
 7 concurring); *accord Qad. Inc. v. ALN Assocs., Inc.*, 770 F. Supp. 1261, 1265 (N.D. Ill. 1991)(“ Just as
 8 freedom of expression is the fount of copyright protection, so a copyright may not be asserted
 9 improperly to inhibit other persons' freedom of expression.”) ; *see also Video Pipeline, Inc. v. Buena*
 10 *Vista Home Entm't, Inc.*, 342 F.3d 191, 205-206 (3d Cir. N.J. 2003) (copyright holder’s attempt to
 11 leverage copyright to restrict expression critical of it may, in context, “subvert Copyright’s policy
 12 goal to encourage the creation and dissemination to the public of creative activity”).

13 In *Rosemont*, the Court of Appeals reversed the grant of an injunction, on copyright grounds,
 14 to a Howard Hughes-owned entity that had sought to prevent publication of a biography that was
 15 critical of Hughes. *Id.* The decision was premised not only on fair use, but also, for a majority of the
 16 court, concurring, on the conclusion that that that the record “pointed to the existence of a scheme
 17 developed by Hughes and his attorneys and employees to prevent the publication of any biography of
 18 Hughes and, in particular, the [critical] biography.” *Id.* at 12.

19 Another form of the defense arises when there has been an abuse of the copyright registration
 20 process itself to obtain an unfair advantage. Thus, for example, when the putative copyright holder
 21 fails to acknowledge to the copyright office that the work in question was derived from another work,
 22 and asserts both there and in court that the work was completely original, it abused the copyright
 23 process. *Qad. Inc* 770 F. Supp. at 1266. This would be true even if the copyright owner did not act in
 24 bad faith. *Id.*

25 ***B. Plaintiff and Its Attorneys Manufactured the Copyright in the BWSM, Only to Place***
 26 ***It in the Public Domain After Filing This Action Against Does***

27 As explained above in section II, the copyright registration was itself fraudulently
 28 manufactured by Plaintiff on the advice of counsel and in conjunction with the filing of this lawsuit.

1 As such, the registration was an abuse of the copyright process. *Qad. Inc* 770 F. Supp. at 1266.

2 Moreover, the copyright lawsuit is pretertual -- the proof is Plaintiff's own decision to
 3 intentionally filed an unsealed copy of the BWSM on the Court's PACER docket. *See* Dhall Decl., ¶
 4 ___, Exh. E. This had the effect of placing the BWSM in the public domain, *forever*. *Religious Tech.*
 5 *Ctr. v. Lerma*, 897 F.Supp. 260 265-266 (E.D. Va. 1995) (documents placed unsealed in court docket
 6 were in public domain and could be cited by the news media). In *Lerma*, it was the defendant, not the
 7 copyright owner (the Scientology-affiliated plaintiff) that had placed the files in the public docket; the
 8 plaintiff had sought a court order sealing the documents, which was denied. *Cf. Kulik Photography v.*
 9 *Cochran*, 975 F. Supp. 812, 814 (E.D. Va. 1997) (news program's broadcasting of copyrighted
 10 photograph was "fair use" where photo had been admitted into evidence in a murder case not
 11 involving the copyright owner). Thus, *a fortiori*, where plaintiff has voluntarily placed the documents
 12 into the public docket, the documents are in the public domain. Neither the Court nor any reasonable
 13 factfinder can take seriously Plaintiff's effort to seek money damages for Skywalker's posting of the
 14 BWSM in light of the far more serious damage Plaintiff has caused to itself.

15 **C. *This Court Should Not Blind Itself to the Larger International Context In Which***
 16 ***This Purported Copyright Claim Has Been Asserted, or the Multiple Players***
 17 ***Involved***

18 The peculiar sequence of events shows that the copyright claim was manufactured *solely* for
 19 the purpose of identifying Doe defendants to assist in an effort to chill Doe defendants from freely
 20 expressing their criticisms of Shankar and the organizations that surround him.

21 Plaintiff persists in contending that it (AOLFUS) "was able to get [the BWSM] removed
 22 through a Digital Millenium Copyright Act takedown notice," FAC, ¶ 69; Dhall Decl., ¶ 48. But that
 23 is not what happened. As was the case on the Motion to Dismiss, Plaintiff continues to obfuscate
 24 regarding the fact that there are multiple "Art of Living" entities, only one of which has chosen to
 25 submit itself to the jurisdiction of this Court. In fact the only takedown notice was from an Indian
 26 entity, Vykati Vikas Kendra ("VVK"). 3rd SW Decl., ¶ 2, Exh. A. VVK claimed that "through our
 27 authorized Teachers we teach courses/programmes designed by His Holiness [Ravi Shankar]
 28 (popularly known as the Art of Living Courses) all over the world." *Id.* VVK demanded that

1 Skywalker disclose his name and residential address, contended that the Blog *was defamatory*,
 2 demanded that he remove the (unspecified) defamatory material and threatened further legal action.
 3 *Id.*

4 It was only after VVK succeeded in getting the BWSM and other materials taken down (in
 5 August 2011), but failed to intimidate Skywalker into removing his criticisms of AOL and Shankar,
 6 that Plaintiff AOLFUS entered the picture and manufactured the copyright registration and cause of
 7 action in connection with the filing of the defamation/trade libel case.

8 The Court should not now overlook this original context of the dispute. Plaintiff's original
 9 complaint was not solely, or even primarily, a case about Skywalker's posting of allegedly
 10 copyrighted materials, but rather about multiple other Defendants' "false" and "defamatory" criticisms
 11 of Ravi Shankar and AOL. Plaintiff was quite clear what its aim was – it wanted an injunction
 12 ***“restraining Defendants from operating the Blogs and requiring that the Blogs be removed from***
 13 ***the internet,”*** Complaint at 19:4-6.⁸

14 In the United States, of course, the relief Plaintiff sought is a flatly unconstitutional prior
 15 restraint, and this Court strongly indicated that Plaintiff would not be able obtain such an injunction.
 16 6.15 Order at 11 n.2. The Supreme Court ruled almost eighty years ago that such a prior restraint
 17 cannot issue against the future publication of a “malicious, scandalous and defamatory newspaper,
 18 magazine or other periodical.” *Near v. Minnesota*, 283 U.S. 697 (1931); accord *New York Times Co.*
 19 *v. United States*, 403 U.S. 713, 723-24 (1971) (barring a prior restraint against publication of
 20 *Pentagon Papers*, even assuming, *arguendo*, that such publication could be prosecuted under
 21 Espionage Act).

22 But at the time of the filing of the lawsuit, Plaintiff may very well have hoped that Defendants
 23 would not obtain *pro bono* counsel to defend the action, and that the unconstitutionality of the
 24 requested relief would not have been brought to the Court's attention, and, in an uncontested default
 25

26 ⁸ It should also not escape this Court's attention that by filing a copyright cause of action, Plaintiff were
 27 able to assert federal jurisdiction, thus seeking availing itself of 9what themselves of what Plaintiff argues
 28 are) more liberal discovery rules that apply to California SLAPP motions in federal court. Opp.MTS
 at 6:12-20 (citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).)

1 proceeding, the prior restraint might well have issued.

2 In any event, at the time of the filing of the lawsuit Plaintiff – or more specifically Ravi
3 Shankar and his Art of Living organization in its various permutations -- had every reason to hope that
4 it would quickly discover the identity and location of Does, at which point Shankar/VVK/IAOLF
5 and/or the various AOL chapters could determine the best venue to pursue the defamation claims and
6 the announced objective of shutting down the Blogs. As counsel for Plaintiff explained to this Court,
7 filing the lawsuit in this district

8 is the only avenue the Foundation has. We looked at places to
9 potentially bring this action. The Northern District of California was
really the only place we could think to bring this action because we do
not know the identities of these Does.

10 Transcript, 5.26 hearing at 45:6-10. Plaintiff had every reason to expect at the outset of the case that,
11 in an uncontested proceeding, it would be able to quickly leverage the federal subpoena power to
12 obtain the identity of Does.⁹ As Plaintiff's counsel advertises:

13 We're also adept at leveraging the subpoena powers of state and federal
14 courts to discover the server logs and other digital footprints of online
15 perpetrators. Unlike most traditional firms, we relish the challenge of
stalking, identifying and bringing Internet actors to justice - often before
they even know we're onto them.

16 4th RJN, ¶ 2, Exh. B (<http://www.kbinternetlaw.com/anonymousfraud.html>).

17 Fortunately for Defendants however, this Court (the Honorable Laurel Beeler), however,
18 declined to issue Plaintiff's proposed order which would have authorized it to issue subpoenas to
19 Google, Automatic, and unspecified other third parties without notice to Defendants. *Compare*
20 Amended Proposed Order, [DE 7], with 12.17.2010 Order [DE 10]. Instead, this Court ordered that
21 Google and Automatic give notice to Defendants and a 30 day opportunity to find US counsel and
22 file a motion to quash. *Id.* at 5:15-17.

23 Even then, however, Plaintiff had every reason to assume that Does would be unable in that
24 brief 30-day-window to find US counsel willing to take on this complex case *pro bono*. Plaintiff

25 _____
26 ⁹ This Court's order that Defendants be given notice and an opportunity to quash implicitly
27 recognizes the risk that any ruling issued in an uncontested proceeding may be erroneous. *Cf.*
28 12.17.2010 Order [DE 10] (Court rules after uncontested hearing that defamation and trade libel
claims would survive a motion to dismiss) *with* 6.15.2011 Order (dismissing defamation and trade
libel claims after contested proceeding).

1 inadvertently confirmed that this was its expectation – even while vehemently protesting the opposite
 2 – in its Opposition to the Motion for Relief. Plaintiff tips its hand when it complains that it ***“has***
 3 ***already spent more money on this litigation than should ever have been necessary as a direct result***
 4 ***of Defendant’s efforts to shield his identity.”*** Opp.MFR at 15:16-18; *cf.* 13:18-20 (“it is worth noting
 5 that Defendant has forced Plaintiff to incur thousands upon thousands of dollars in attorneys’ fees,
 6 while Defendant has relied on the free assistance of counsel.”)

7 The remark makes no sense unless Plaintiff never expected to have to litigate the merits of its
 8 causes of action, much less take any of them forward through discovery and trial.¹⁰ The remark
 9 confirms the unfortunate reality that plaintiffs in the United States can quite reasonably hope, at little
 10 expense, to discover the identity of Does “by leveraging the subpoena powers of state and federal
 11 courts.” 3rd RJN, Exh. B, *see* Amici Brief [DE 96-1] 16:4-17:3 (citing literature on this prevalent
 12 practice among counsel).

13 Strangely, Plaintiff complains about the thousands of dollars it is spending seeking *monetary*
 14 *relief only* against a defendant, Skywalker, who Plaintiff (correctly) believes does not have the
 15 resources to pay a judgment of any consequence. Opp.MFR at 15:18-21. But of course monetary
 16 relief is not the goal. Shutting down the Blogs is the goal.

17 It is difficult to imagine a case more obviously pursued for no other reason than to intimidate
 18 and obtain unfair leverage over defendant. The facts of *Rosemont* pale by comparison. In that case,
 19 at least, Howard Hughes and the corporate entity through which he operated did not openly declare
 20 their goal of shutting down his critics. And in the present case and the other entities through which
 21 Ravi Shankar operates (VVK, IAOLF, etc) -- have many other “avenues” than the United States court
 22 system through which to accomplish that purpose.

23 The obvious question from the outset of this case– with which the Court began the hearing on
 24 May 26 – was: *why isn’t Ravi Shankar a plaintiff?* To which the reply was: “there’s no need for Mr.
 25 Ravi Shankar to be a Plaintiff. The harm here was suffered by the Art of Living Foundation” of the

26 _____
 27 ¹⁰ Plaintiff’s complaint about the “motion after motion filed by Defendant” might make more sense if
 28 those motions had been dilatory. But Plaintiff ignores the fact that it *lost* the motion to dismiss, and
 that the Motion to Strike is essentially still pending, and obviously was meritorious at least as to the
 defamation and trade libel claims.

1 United States. 5.26. Hearing at 2:22-3:4.

2 The Court rejected that proposition and dismissed the defamation case, but granted leave to
 3 amend. See 6.15 Order at 9:19 (“Ravi Shankar would have a good argument that Defendants’
 4 statements are ‘of and concerning’ him because the statements expressly mention his name numerous
 5 times.”). But neither Ravi Shankar, nor VVK, nor the “interested party” IAOLF (the Swiss entity that
 6 purportedly owns the IP too) -- has elected to submit himself/itself to the jurisdiction of this Court.
 7 Why should they? This Court has already clearly signaled that they will never be able to shut down
 8 the Blogs. But if Plaintiff can obtain Doe’s identities, then, as plaintiff’s counsel suggested to this
 9 Court, other “avenues” would become available to Shankar and his adherents and the various and
 10 sundry AOL-related entities around the world. See Transcript at ___.

11 At that point, Shankar/VVK/IAOLF could sue in India, or in a country such as the United
 12 Kingdom, which has, quite notoriously, made itself a haven for non-resident “libel tourists” to avail
 13 themselves of favorable libel laws, just as Switzerland has made itself a tax haven by virtue of its bank
 14 secrecy laws. See *Telnikoff v. Matusevitch*, 347 Md. 561, 602 (1997) (citing British media law treatise
 15 for the proposition that “British libel law is so notoriously favorable to plaintiffs that an increasing
 16 number of forum- shopping foreigners are taking action in London against newspapers and books that
 17 are printed, and mainly circulated, abroad”) This problem of libel tourism is so serious that Congress
 18 recently passed legislation giving defendants a right to remove foreign libel judgments to federal court
 19 to ensure that the judgment comports with the protections of the First Amendment. 23 U.S.C. § 4101
 20 *et seq*; see also § 4101 annotations (congressional finding that “some persons are obstructing the free
 21 expression rights of United States authors and publishers, and in turn chilling ***the first amendment to***
 22 ***the Constitution of the United States interest of the citizenry in receiving information*** on matters of
 23 importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech
 24 protections to authors and publishers that are available in the United States.”) (emphasis added).

25 In the United Kingdom – and other nations that still adhere to common-law libel –it is the
 26 defendant’s burden to prove falsity, and there is no requirement that public figures show actual malice
 27 – or indeed any intent at all. *Telnikoff* 347 Md. 561, *passim* (refusing to enforce English libel
 28 judgment because English libel law is contrary to the First Amendment). And under the English rule,

1 the loser has to pay the winner’s attorney fees. It is thus difficult to imagine that Shankar or IAOLF
2 would not prefer to avail themselves of a more favorable jurisdiction, if that “avenue” were to open
3 up.

4 Plaintiff’s decision to manufacture this fraudulent copyright claim is a naked attempt to
5 leverage the copyright to chill constitutionally protected speech on an important public issue. That is
6 copyright misuse, and indeed, abuse of the judicial system.

7 **CONCLUSION**

8 For the reasons stated, Defendants respectfully request that summary judgment be granted in
9 favor of Skywalker, Klim and all Doe Defendants.

10 Dated: September 26, 2011

_____/s/_____
Joshua Koltun
Attorney for Defendants
Doe/Klim and Doe/Skywalker

Joshua Koltun ATTORNEY

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