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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KENNETH M. STERN,

Plaintiff,

v.

DOES, et al.,

Defendants.

Case No. CV 09-01986 DMG (PLAx)

**ORDER RE DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT AND REQUESTS FOR
ATTORNEYS' FEES**

This matter is before the Court on Defendants' Motions for Summary Judgment and Requests for Attorneys' Fees. A hearing was held on January 28, 2011. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Defendants' Motions and Requests are GRANTED in part and DENIED in part.

I.

PROCEDURAL HISTORY

Plaintiff filed this action on March 24, 2009 and the operative Second Amended Complaint [Doc. #38] on September 11, 2009. On January 6, 2010, this Court, the Hon. George H. King, presiding, granted Defendants' motions to dismiss all claims except Plaintiff's fifth cause of action for copyright infringement [Doc. #68]. On April 8, 2010,

1 the Court granted Plaintiff's request to dismiss all defendants except for Robert and Sara
2 Weinstein [Doc. #90].

3 Defendant Robert Weinstein filed a Motion for Summary Judgment and Request
4 for Attorneys' Fees [Doc. #126] on October 8, 2010. Plaintiff filed his Opposition [Doc.
5 #133] on October 29, 2010 and Defendant Robert Weinstein filed his Reply [Doc. #139]
6 on November 12, 2010.

7 On November 11, 2010, Defendant Sara Weinstein filed a Motion for Summary
8 Judgment and Request for Attorneys' Fees [Doc. #138]. Plaintiff filed his Opposition
9 [Doc. #144] on December 2, 2010. Defendant Sara Weinstein filed her Reply [Doc.
10 #147] on December 17, 2010.

11 The Court requested further briefing on the issue of fair use [Doc. #171]. On
12 January 19, 2011, supplemental briefs were filed by Plaintiff [Doc. #178], Defendant
13 Robert Weinstein [Doc. #175], and Defendant Sara Weinstein [Doc. #176]. In addition,
14 Defendant Sara Weinstein filed a Request for Judicial Notice [Doc. #177]. Plaintiff filed
15 an Opposition to Defendant Sara Weinstein's Request for Judicial Notice [Doc. #179] on
16 January 24, 2011.¹

17 II.

18 FACTUAL BACKGROUND

19 In setting forth the facts underlying this dispute, the Court draws exclusively from
20 Plaintiff's version of events, resolving all disputed facts in Plaintiff's favor and assuming
21 without deciding that Defendants' evidentiary objections are to be overruled.

22 Plaintiff is an attorney. In September 2006, Plaintiff retained the forensic
23 accounting firm White, Zuckerman, Warsavsky, Luna, Wolf & Hunt L.L.P. ("White
24 Zuckerman") to perform a mathematical calculation on behalf of one of his clients. (2nd
25 Am. Compl. ¶ 25.) In March 2007, after receiving a bill from White Zuckerman for this
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27 ¹ The Court agrees with Plaintiff that the Request for Judicial Notice is immaterial to the instant
28 litigation. The Court has not considered it for any purpose.

1 work, Plaintiff became concerned that the billed hours were excessive and that White
2 Zuckerman had been churning his client's file. (*Id.* ¶¶ 27-28.)

3 On March 26, 2007, Plaintiff sent an e-mail to the Consumer Attorneys
4 Association of Los Angeles ("CAALA") listserv, which stated in its entirety as follows:
5 "Has anyone had a problem with White, Zuckerman . . . cpas including their economist
6 employee Venita McMorris over billing or trying to churn the file?"² (SW Opp'n, Stern
7 Decl. ¶ 3 (ellipsis in original).)³ This statement—the subject of Plaintiff's copyright
8 infringement claim—was posted on the CAALA listserv. (*Id.*)

9 At the time, both Plaintiff and Defendant Robert Weinstein were members of the
10 CAALA listserv. (2nd Am. Compl. ¶¶ 16-17.) Robert Weinstein accessed the CAALA
11 listserv e-mails containing Plaintiff's writing, which he forwarded in an e-mail to his
12 sister, Defendant Sara Weinstein, who was a client of White Zuckerman. Sara Weinstein
13 then forwarded the e-mail containing Plaintiff's writing to White Zuckerman.⁴ (*Id.* ¶¶ 41-
14 42; McMorris Depo. at 9:17-10:16.) On September 5, 2009, the United States Copyright
15 Office issued Plaintiff a certificate of registration for his listserv post. (RW Opp'n, Ex.
16 2.)

17 Plaintiff asserts that he holds a valid copyright and that Defendants' acts—copying
18 and distributing his listserv post—constituted both copyright infringement and
19 contributory infringement. (2nd Am. Compl. ¶¶ 136, 140; RW Opp'n, Stern Decl. ¶ 17.)
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21 ² The Court reproduces the whole of Plaintiff's e-mail so that the ensuing discussion of
22 originality and fair use is not hopelessly abstract. The Court's "unauthorized reproduction" of Plaintiff's
23 copyrighted work is, as Judge Posner has succinctly put it, "a good example of the fair-use doctrine in
action." *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 519 (7th Cir. 2002).

24 ³ Citations to the record prefaced with "RW" refer to documents filed in support of or in
25 opposition to Defendant Robert Weinstein's Motion for Summary Judgment. Similarly, citations
prefaced with "SW" refer to documents associated with Defendant Sara Weinstein's Motion.

26 ⁴ Plaintiff appears open to the possibility that Defendants transmitted his listserv post to White
27 Zuckerman in some other manner. (*See, e.g.*, 2nd Am. Compl. ¶ 41.) Because the Court ultimately
28 finds that any copying and distribution of Plaintiff's writing was fair use, the exact method of its
transmission is immaterial. Defendant Robert Weinstein does not concede and Defendant Sara
Weinstein disputes that any transmission occurred.

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III.

LEGAL STANDARD

Summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *accord Munoz v. Mabus*, __ F.3d __, 2010 WL 5263141, at *2 (9th Cir. Dec. 27, 2010). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e) (1986)); *see also Norse v. City Of Santa Cruz*, __ F.3d __, 2010 WL 5097749, at *4 (9th Cir. Dec. 15, 2010) (*en banc*) (“Rule 56 requires the parties to set out facts they will be able to prove at trial.”). “[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

When a defendant challenges the quantum of the plaintiff’s originality or creativity as a matter of law, “these matters should be resolved solely by the judge.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.10[B][1] (rev. ed. 2010) (citing *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444, 452 (M.D.N.C. 2003)); *see also Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 225 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding that copyrightability is a question of law for a court to decide). Fair use presents a mixed

1 question of law and fact that a district court may resolve when the parties “dispute only
2 the ultimate conclusions to be drawn from the admitted facts.” *Fisher v. Dees*, 794 F.2d
3 432, 436 (9th Cir. 1986).

4 **IV.**

5 **DISCUSSION**

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7 **A. Plaintiff Cannot Enforce The CAALA Listserv Confidentiality Agreement**

8 At first blush, Plaintiff’s Second Amended Complaint presents a garden variety
9 infringement claim. Plaintiff muddies the waters somewhat by relying in part on
10 provisions of the CAALA listserv agreement:

11 [I]t is my position the infringement has occurred, because my writing is
12 copyrightable, and posted to the CAALA listserv, which constitutes a
13 license, which defendant Robert Weinstein was required to sign to be a
14 member of the listserv, that my writing may only be copied and distributed
15 within the parameters of the CAALA listserve [sic] agreement, and as my
16 writing, with my consent. That parameter is that any copying and
17 distribution must be solely within a posting to the CAALA listserv. Any
18 copying and distribution, as occurred herein, outside of the CAALA listserv
19 is a breach of the licensing agreement, and my right to determine who may,
20 and under what circumstances, copy and distribute his writing, thus, a
21 copyright violation.

22 (RW Opp’n, Stern Decl. ¶ 17.)

23 Plaintiff’s copyright claims cannot rely on provisions in the CAALA listserv
24 agreement. As an initial matter, the listserv agreement is not a single agreement. Rather,
25 it is a series of agreements between the CAALA and each individual member of the
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27 ⁵ “He will win who knows when to fight and when not to fight.” Sun Tzu, *The Art of War* 32-33
28 (Lionel Giles trans., Ulysses Press 2007).

1 listserv. Thus, Plaintiff can only enforce provisions of the agreement between the
2 CAALA and Defendant Robert Weinstein if Plaintiff is an intended third-party
3 beneficiary of that agreement. *See Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
4 Cir. 2009). He is not.

5 Under California contract law, “a purported third-party beneficiary must show that
6 the contract was ‘made expressly for the benefit of a third person’”—as opposed to the
7 case where the third person is merely an “incidental” beneficiary. *Trs. of Screen Actors
8 Guild—Producers Pension & Health Plans v. NYCA, Inc.*, 572 F.3d 771, 779 (9th Cir.
9 2009) (quoting Cal. Civ. Code § 1559; citing *Spinks v. Equity Residential Briarwood
10 Apartments*, 171 Cal. App. 4th 1004, 1021-22, 90 Cal. Rptr. 3d 453 (2009)). Here, it is
11 clear that Plaintiff is only an incidental beneficiary of the agreement between Defendant
12 Robert Weinstein and the CAALA.

13 Although the CAALA listserv rules require confidentiality, the purpose of this
14 requirement is concern over CAALA’s potential liability when a member’s client’s
15 confidential information is compromised—not concern over the member’s work product
16 or intellectual property rights. This purpose is apparent from CAALA’s disclaimer of
17 any liability due to breaches of confidentiality: “You agree, as a condition of
18 membership in the CAALA Listserv, to assume all responsibility for the breach of any
19 confidentiality that may occur as a result of your posting information on the Listserv, and
20 you acknowledge that CAALA cannot and does not act as a guarantor of such
21 confidentiality.” (RW Opp’n, Ex. 1 at 2.) Moreover, the listserv rules provide for their
22 enforcement only by the CAALA Executive Director, Executive Committee members,
23 and/or Board of Governors. (*Id.* at 3-4.) Conspicuously absent is any provision allowing
24 for enforcement of the rules by individual listserv members.

25 Thus, Plaintiff is only an incidental beneficiary of the agreement between
26 Defendant Robert Weinstein and the CAALA. As such, he cannot enforce its
27 confidentiality provisions. That Robert Weinstein allegedly violated the listserv
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1 agreement is not entirely immaterial; as discussed below, it is one factor to be considered
2 in the fair use analysis. It is not, however, an independent basis for liability.

3 **B. Plaintiff's Listserv Post Is Not Copyrightable Because It Lacks Originality**

4 **1. The Originality Standard**

5 The Copyright Act protects only “*original* works of authorship.” 17 U.S.C. §
6 102(a) (emphasis added). The originality requirement derives from the Constitution,
7 which, “by securing for limited Times to Authors . . . the exclusive Right to their . . .
8 Writings,” U.S. Const. art. I, § 8, cl. 8, “presuppose[s] a degree of originality.” *Feist*
9 *Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 111 S.Ct. 1282, 113 L.Ed.2d 358
10 (1991) (citing *The Trade-Mark Cases*, 100 U.S. 82, 25 L.Ed. 550 (1879); *Burrow-Giles*
11 *Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884)).

12 Originality does not require uniqueness. “‘Original’ in reference to a copyrighted
13 work means that the particular work ‘owes its origin’ to the ‘author.’ No large measure
14 of novelty is necessary.” *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d
15 Cir. 1951) (quoting *Burrow-Giles*, 111 U.S. at 57-58; footnote omitted). Thus,
16 “originality for copyright purposes amounts to ‘little more than a prohibition of actual
17 copying.’” 1 Nimmer, *supra*, § 2.01[B] (quoting *Alfred Bell*, 191 F.2d at 103; ellipsis
18 omitted); *accord Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004). Here, there is no
19 question that Plaintiff’s listserv post is his independent creation.

20 Nonetheless, to be copyrightable, a work must exhibit some minimal level of
21 creativity. While “the amount of creative input by the author required to meet the
22 originality standard is low, it is not negligible.” *Satava v. Lowry*, 323 F.3d 805, 810 (9th
23 Cir. 2003); *see also Feist*, 499 U.S. at 346 (explaining that “originality requires
24 independent creation plus a modicum of creativity”). “The vast majority of works make
25 the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble
26 or obvious’ it might be.” *Feist*, 499 U.S. at 345 (quoting 1 Nimmer, *supra*, § 1.08[C][1]
27 (1990)). There is, however, a “narrow category of works in which the creative spark is
28 utterly lacking or so trivial as to be virtually nonexistent.” *Urantia Found. v. Maaherra*,

1 114 F.3d 955, 959 (9th Cir. 1997) (quoting *Feist*, 499 U.S. at 359; quotation marks
2 omitted).

3 Plaintiff's certificate of registration raises the presumption that his work is original
4 and his copyright valid. See *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 987
5 n.2 (9th Cir. 2009); *Swirsky*, 376 F.3d at 851 (citing 17 U.S.C. § 410(c)).⁶ This
6 presumption is rebuttable upon a showing that the listserv post is not original. *Swirsky*,
7 376 F.3d at 851 (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir.
8 2000)).

9 **2. The Originality Of A Single Sentence**

10 The parties dispute whether Plaintiff's one-sentence listserv post contains the
11 "modicum of creativity" necessary to satisfy the originality requirement.⁷ Generally, "if
12 any author's independent efforts contain sufficient skill to motivate another's copying,
13 there is *ipso facto* a sufficient quantum of originality to support a copyright." 1 Nimmer,
14 *supra*, § 2.01[B] (citing, *inter alia*, *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d
15 87 (9th Cir. 1963); emphasis omitted); see also *Bleistein v. Donaldson Lithographing*
16 *Co.*, 188 U.S. 239, 252, 23 S.Ct. 298, 47 L.Ed. 460 (1903) (finding that works'
17 worthiness of copyright protection was "sufficiently shown by the [defendant's] desire to
18 reproduce them without regard to the plaintiffs' rights"). Here, as discussed more fully
19 below in the context of fair use, Defendants allegedly copied Plaintiff's writing not to
20 appropriate any purported creativity of expression but to convey the *fact* that Plaintiff had
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24 ⁶ The Copyright Act provides that "[i]n any judicial proceedings the certificate of a registration
25 made before or within five years after first publication of the work shall constitute *prima facie* evidence
26 of the validity of the copyright." 17 U.S.C. § 410(c). Plaintiff registered his work within this time
27 period.

28 ⁷ Plaintiff begins his argument rhetorically, querying whether the following sentence is
copyrightable: "To be, or not to be, that is the question?" (RW Opp'n at 1 (quoting William
Shakespeare, *Hamlet* act 3, sc. 1).) Perhaps, a more appropriate play from which to draw quotations
would be *Much Ado About Nothing*.

1 expressed this particular message. Under these circumstances, Defendants’ alleged
2 copying of Plaintiff’s listserv post is not evidence of the post’s creativity.

3 “It is axiomatic that copyright law denies protection to ‘fragmentary words and
4 phrases’ and to ‘forms of expression dictated solely at functional considerations’ on the
5 grounds that these materials do not exhibit the minimal level of creativity necessary to
6 warrant copyright protection.” *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97
7 F.3d 1504, (1st Cir. 1996) (quoting 1 Nimmer, *supra*, § 2.01[B] (1995)); *see also* 37
8 C.F.R. § 202.1(a) (exempting from copyright protection “[w]ords and short phrases such
9 as names, titles, and slogans”).

10 Plaintiff gainsays the characterization of his listserv post as a “phrase,” describing
11 it instead as a “sentence.”⁸ (RW Opp’n at 8.) “Phrase” is a nebulous concept that may or
12 may not include an entire sentence, depending on context, and the divergent outcomes in
13 the few cases to attempt such a classification reflect this conceptual amorphousness.
14 *Compare Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 627, 633 (6th
15 Cir. 2001) (finding the following three sentences to be a “phrase or slogan not worthy of
16 copyright protection in its own right”: “Good morning, Detroit. This is J.P. on JR in the
17 A.M. Have a swell day.”), *abrogated on other grounds, Reed Elsevier, Inc. v. Muchnick*,
18 ___ U.S. ___, 130 S.Ct. 1237, 176 L.Ed.2d 17 (2009), *with Applied Innovations, Inc. v.*
19 *Regents of the Univ. of Minn.*, 876 F.2d 626, 635 (8th Cir. 1989) (“The test statements are
20 short, simple, declarative sentences [such as “I am a good mixer” and “No one seems to
21 understand me”], but they are not merely fragmentary words and phrases within the
22 meaning of 37 C.F.R. § 202.1(a). They are not names or titles or slogans.”).

23 Ultimately, the distinction between sentence and phrase is immaterial to the
24 originality analysis. The focus must remain on the presence of creativity. While a
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26 ⁸ That the sentence at issue is a question rather than a statement does not alter the analysis. *See,*
27 *e.g., Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981) (“Since the term ‘writings,’ as used
28 in the Constitution and in the [Copyright Act of 1909], is intended to be read expansively, the term
covers sets of questions as well as other forms of expression.” (citations omitted)).

1 shorter work, *ceteris paribus*, is less likely to possess the creative spark necessary to be
2 accorded copyright protection, that will not always be the case. A single sentence may be
3 singular. As the Sixth Circuit explained in the context of computer code,

4 we do not mean to say that brief computer programs are ineligible for
5 copyright protection. Short programs may reveal high levels of creativity
6 and may present simple, yet unique, solutions to programming quandaries.
7 Just as a mathematician may develop an elegant proof, or an author may
8 express ideas in a spare, simple, but creative manner, *see, e.g., e.e.*
9 *cummings* [sic⁹], *Selected Poems* (Richard S. Kennedy ed., 1994), so a
10 computer programmer may develop a program that is brief *and* eligible for
11 protection. But unless a creative flair is shown, a very brief program is less
12 likely to be copyrightable because it affords fewer opportunities for original
13 expression.

14 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 542-43 (6th Cir.
15 2004) (citing 1 Nimmer, *supra*, § 2.01[B]); *see also Universal Athletic Sales Co. v.*
16 *Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975) (“It appears . . . that there is a reciprocal
17 relationship between creativity and independent effort. The smaller the effort (*e.g.* two
18 words) the greater must be the degree of creativity in order to claim copyright
19 protection.” (quoting Nimmer)).

20 **3. Plaintiff’s Sentence Lacks Creativity**

21 Thus, the copyrightability of a very short textual work—be it word, phrase,
22 sentence, or stanza—depends on the presence of creativity. The opening sentence of a
23 poem may contain sufficient creativity to warrant copyright protection whereas a more
24 prosaic sentence of similar length may not. *See Narell v. Freeman*, 872 F.2d 907, 911-

26 ⁹ Notwithstanding his unconventional use of minuscules and majuscles, E.E. Cummings
27 preferred that his name appear traditionally, *i.e.*, with the initial letters capitalized. *See* Norman
28 Friedman, *Not “e.e. cummings” Revisited*, 5 Spring: J. E.E. Cummings Soc’y 41 (1996),
<http://www.gvsu.edu/english/cummings/caps2.html>.

1 12 (9th Cir. 1989). For instance, the opening stanza/sentence of the poem *Jabberwocky*
2 contains, coincidentally, the same number of words—23—as Plaintiff’s listserv post:
3 “‘Twas brillig, and the slithy toves / Did gyre and gimble in the wabe; / All mimsy were
4 the borogoves, / And the mome raths outgrabe.” Lewis Carroll, *Through the Looking-
5 Glass and What Alice Found There, in The Annotated Alice: The Definitive Edition* 148
6 (Martin Gardner ed., W.W. Norton & Co. 2000) (1871). The utter creativity of this
7 “greatest of all nonsense poems in English,” *id.* at 149 n.16, prompted one court to
8 suggest that even its first line would be entitled to copyright protection. *See Heim v.*
9 *Universal Pictures Co.*, 154 F.2d 480, 487 n.8 (2d Cir. 1946).¹⁰

10 Plaintiff’s listserv post, in contrast, displays no creativity whatsoever—its content
11 is dictated solely by functional considerations. Plaintiff merely requested factual
12 information: whether anyone on the listserv had a bad experience with a certain forensic
13 accounting firm—and one employee in particular—regarding overbilling and the
14 churning of client files. His single sentence conveys precisely this idea and no more. As
15 Plaintiff’s expression of his idea is indistinguishable from the idea itself, it is not entitled
16 to copyright protection. *See Dream Games*, 561 F.3d at 988 (“Because copyright protects
17 only an author’s expression of an idea, elements of expression that necessarily follow
18 from an idea, or expressions that are as a practical matter, indispensable or at least
19 standard in the treatment of a given idea are not protected.” (quotation marks, citations,
20 and ellipsis omitted)); *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614, 617
21 (9th Cir. 1996) (explaining that “where an idea contained in an expression cannot be
22 communicated in a wide variety of ways,” as is often the case with factual works, “the
23 notions of idea and expression may merge from such ‘stock’ concepts that even verbatim
24 reproduction of a factual work may not constitute infringement”).

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27 ¹⁰ *Heim* concerned the extent of copying necessary to establish infringement rather than
28 copyrightability. *See* 1 Nimmer, *supra*, § 2.01[B] n.41. Nonetheless, an infringement finding
presupposes originality.

1 In an effort to show that his sentence involved creative effort, Plaintiff points out
2 several alternative formulations that he considered and rejected. (*See* RW Opp’n, Stern
3 Decl. ¶ 7.) The fact that Plaintiff could have varied his sentence in trivial ways, however,
4 does not mean that his particular choice of words is original.

5 When the uncopyrightable subject matter is very narrow, so that the topic
6 necessarily requires, if not only one form of expression, at best only a
7 limited number, to permit copyrighting would mean that a party or parties,
8 by copyrighting a mere handful of forms, could exhaust all possibilities of
9 future use of the substance. In such circumstances it does not seem accurate
10 to say that any particular form of expression comes from the subject matter.
11 However, it is necessary to say that the subject matter would be appropriated
12 by permitting the copyrighting of its expression. We cannot recognize
13 copyright as a game of chess in which the public can be checkmated.

14 *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967) (internal
15 quotation marks and citations omitted), *cited with approval in Allen*, 89 F.3d at 617-18;
16 *cf. Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir. 2003)
17 (“[A] combination of unprotectable elements is eligible for copyright protection only if
18 those elements are numerous enough and their selection and arrangement original enough
19 that their combination constitutes an original work of authorship.” (quoting *Satava*, 323
20 F.3d at 811)).

21 Furthermore, the variations that Plaintiff considered involved not just different
22 expressions but also different underlying ideas. For instance, Plaintiff considered asking
23 about either churning or overbilling but not both. (RW Opp’n, Stern Decl. ¶ 7(a).) Yet,
24 churning is not the same thing as overbilling and asking about one or the other is
25 substantively different than asking about both. In any event, with two exceptions, none
26 of the alternative formulations that Plaintiff considered possesses originality because in
27 each case the expression is indistinguishable from the idea.

28

1 Plaintiff's final two examples (*id.* ¶ 7(c)), although they too express different ideas
2 than the writing at issue, *do* possess some minimal creative effort insofar as Plaintiff
3 selected the particular evidence to cite when asking whether his fellow listserv members
4 thought it constituted churning or overbilling. Had Plaintiff in fact posted either of these
5 paragraphs to the listserv, he would now have a much stronger argument for originality.
6 The fact that Plaintiff *could* have expressed his idea in such a way as to warrant copyright
7 protection, however, has no bearing on whether his *actual* expression is copyrightable. A
8 court could deny protection, for instance, to the headline "Pedophile Kidnaps Teenage
9 Girl, Goes To Jail" without calling into doubt Vladimir Nabokov's copyright in *Lolita*.

10 The instant case is similar to *CMM Cable Rep*, which involved a brochure for a
11 radio station's on-air promotion. The plaintiff's brochure contained several sentences
12 and/or phrases, including the following:

13 3. CALL IN, CLOCK IN & WIN! When you hear your name, call: (800)
14 749-9290 within 10 minutes and "clock in!" Make \$50 every hour until the
15 next person whose name is announced calls in to replace you on the payroll.
16 If you're still "on the clock" at quitting time, you'll start over at 7 a.m. the
17 next workday making \$50 per hour until you're replaced.

18 97 F.3d at 1533. Viewing the text of the plaintiff's brochure as a whole, the First Circuit
19 concluded that it "simply does not involve an appreciable amount of text or the minimal
20 level of creativity necessary to warrant copyright protection." *Id.* at 1520. Like
21 Plaintiff's listserv post, the brochure in *CMM Cable Rep* could have been reworded in
22 several different ways—as evidenced by the defendant's extremely similar brochure—but
23 the brevity of the text and its merger of expression and idea precluded copyrightability.

24 Plaintiff's reliance on *Applied Innovations* is misplaced. As the foregoing
25 discussion indicates, this Court has no disagreement with the Eighth Circuit's holding
26 that short, declaratory sentences are not *per se* uncopyrightable. 876 F.3d at 635. The
27 facts of *Applied Innovations*, however, differ materially from those here. *Applied*
28 *Innovations* involved a set of test statements to which the test taker responded by

1 answering “true,” “false,” or “cannot say.” *Id.* at 628. The Eighth Circuit found that
2 these statements were copyrightable not as standalone sentences but “within the context
3 of the administration of the [test].” *Id.* at 635. The individual test statements were
4 carefully designed so as in the aggregate “to make objective assessments of major
5 personality characteristics that affect professional and social adjustment, such as
6 truthfulness, hypochondria, introversion, depression, and sexual orientation.” *Id.* at 628.
7 Thus, the individual statements did not merge with the underlying ideas being tested.
8 While concise, the statements could have been expressed in virtually unlimited ways.

9 In sum, the Court finds that Plaintiff’s one-sentence listserv post is devoid of
10 creative effort and therefore uncopyrightable. Courts seldom resolve copyright
11 infringement claims solely on that basis, however, in part because courts resist making
12 aesthetic judgments for which they are ill-equipped. *See Bleistein*, 188 U.S. at 250 (“It
13 would be a dangerous undertaking for persons trained only to the law to constitute
14 themselves final judges of the worth of [artistic works], outside of the narrowest and most
15 obvious limits.”). For this reason, the Court asked the parties to provide additional
16 briefing on the fair use doctrine.¹¹ This doctrine provides an even stronger ground for
17 granting summary judgment to Defendants because even if, *arguendo*, Plaintiff’s
18 expression is protectable, Defendants’ alleged copying fits comfortably within the range
19 of activities countenanced as fair use.

20 **C. Defendants’ Alleged Copying Of Plaintiff’s Listserv Post Was Fair Use**

21 A copyright holder’s exclusive right to reproduce the copyrighted work is subject
22 to a number of limitations, in particular fair use. *See* 17 U.S.C. §§ 106, 107; *Sony Corp.*
23 *of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447, 104 S.Ct. 774, 78 L.Ed.2d 574
24 (1984). The Copyright Act does not define “fair use,” which is at heart an “equitable rule
25 of reason.” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th
26

27 ¹¹ Defendants assert a fair use defense in their answers. (RW Answer to 2nd Am. Compl. ¶ 68;
28 SW Answer to 2nd Am. Compl. ¶ 52.)

1 Cir. 1997) (quoting *Sony Corp.*, 464 U.S. at 448). Nevertheless, the Act lists as examples
2 of fair use copying for such purposes as “criticism, comment, news reporting, teaching
3 (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107.
4 In determining whether a specific incidence of copying constitutes fair use, courts
5 consider at least the four factors enumerated in the Copyright Act:

- 6 (1) the purpose and character of the use, including whether such use is of
7 a commercial nature or is for nonprofit educational purposes;
- 8 (2) the nature of the copyrighted work;
- 9 (3) the amount and substantiality of the portion used in relation to the
10 copyrighted work as a whole; and
- 11 (4) the effect of the use upon the potential market for or value of the
12 copyrighted work.

13 *Id.*

14 The fair use analysis is flexible, and a court may consider additional factors on a
15 case-by-case basis. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 529 (9th Cir.
16 2008) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S.Ct. 1164, 127
17 L.Ed.2d 500 (1994)). These factors are not considered in isolation but instead are
18 weighed together “in light of the copyright law’s purpose ‘to promote the progress of
19 science and art by protecting artistic and scientific works while encouraging the
20 development and evolution of new works.’” *Id.* (quoting *Mattel, Inc. v. Walking
21 Mountain Prods.*, 353 F.3d 792, 799-800 (9th Cir. 2003)).

22 **1. Purpose And Character Of Use**

23 The first fair use factor requires consideration of the purpose and character of the
24 allegedly infringing use. This inquiry’s “central purpose” is to determine whether and to
25 what extent the challenged work is “transformative.” *Perfect 10, Inc. v. Amazon.com,
26 Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) (quoting *Campbell*, 510 U.S. at 579). A work is
27 “transformative” when it “adds something new, with a further purpose or different
28 character, altering the first with new expression, meaning, or message.” *Campbell*, 510

1 U.S. at 579. If, on the other hand, the work merely “supersede[s] the use of the original,”
2 then “the use is likely not a fair use.” *Perfect 10*, 487 F.3d at 720 (quoting *Harper &*
3 *Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-51, 105 S.Ct. 2218, 85 L.Ed.2d
4 588 (1985); quotation marks omitted).

5 **a. Transformative Use**

6 Defendants’ use of Plaintiff’s sentence is highly transformative. Plaintiff’s listserv
7 post sought specific information about a forensic accounting firm’s questionable business
8 tactics. Defendants did not seek any information at all; their purpose was to alert the
9 company about Plaintiff’s post. By forwarding the post in e-mails, they conveyed the
10 fact of the post rather than its underlying message. Defendants’ e-mails thus had a
11 substantially different purpose than the post itself, a fact which weighs heavily in favor of
12 fair use. *See Perfect 10*, 487 F.3d at 721-22 (“[E]ven making an exact copy of a work
13 may be transformative so long as the copy serves a different function than the original
14 work.”); *Wall Data Inc. v. L.A. County Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006)
15 (“[T]he more transformative the new work, the less will be the significance of the other
16 factors.” (quoting *Campbell*, 510 U.S. at 579) (quotation marks omitted)).

17 **b. Non-Commercial Use**

18 Equally important is the non-commercial nature of Defendants’ use. *See*
19 *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir.
20 2000) (“[T]he absence of a commercial use . . . eliminates the presumption of
21 unfairness.”). There is no evidence that Defendants stood to profit in any manner from
22 their reproduction of Plaintiff’s listserv post, let alone evidence that they intended to
23 commercially exploit it. Plaintiff alleges that Defendant Robert Weinstein and Sara
24 Weinstein transmitted his listserv post to White Zuckerman to enhance their respective
25 business relationships with the forensic accounting firm. (2nd Am. Compl. ¶ 44.)
26 Plaintiff fails to identify evidence supporting this allegation.

27 Regardless, even if true, the allegation does not undermine a finding of fair use.
28 As discussed above, it was not Plaintiff’s particular form of expression that would have

1 enhanced Defendants’ business relationships; rather, it was the fact of his expression. To
2 the extent Defendants benefitted at all, they would have benefitted equally by simply
3 telling White Zuckerman that Plaintiff was publicly requesting information from other
4 White Zuckerman clients about negative experiences with the firm. In this respect,
5 Defendants’ alleged transmission of data to White Zuckerman resembles activities such
6 as “criticism, comment, [and] news reporting,” 17 U.S.C. § 107, which are
7 quintessentially fair uses. To be considered “commercial” use, the use must “exploit[]
8 the copyright for commercial gain—as opposed to incidental use as part of a commercial
9 enterprise.” *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir.
10 2003). Thus, Defendants’ use of Plaintiff’s work was not commercial.

11 **c. Violation Of The CAALA Listserv Agreement**

12 “Because fair use presupposes good faith and fair dealing, courts may weigh the
13 propriety of the defendant’s conduct in the equitable balance of a fair use determination.”
14 *Fisher*, 794 F.2d at 436-37 (quoting *Harper & Row*, 471 U.S. at 562; 3 Nimmer, *supra*, §
15 13.05[A] (rev. ed. 1985)) (internal quotation marks, citations, and brackets omitted).
16 Defendant Robert Weinstein’s alleged violation of the CAALA listserv agreement is
17 therefore relevant to the discussion because “[a] use that . . . clearly infringes the
18 copyright holder’s interests in confidentiality and creative control is difficult to
19 characterize as ‘fair.’” *Harper & Row*, 471 U.S. at 564.

20 Concerns about confidentiality and creative control, however, lie primarily if not
21 exclusively in the context of unpublished works. *See id.* (“The fact that a work is
22 unpublished is a critical element of its ‘nature. . . .’ [T]he scope of fair use is narrower
23 with respect to unpublished works.” (citation omitted)). Plaintiff asserts publication at
24 the time his e-mail was posted on the listserv. (*See* RW Opp’n, Ex. 2 (listing March 26,
25 2007 as the date of first publication).) Any confidentiality concerns based on post-
26 publication copying from the listserv are greatly attenuated. At bottom, Plaintiff’s
27 confidentiality concern is about the transmission of his unprotectable idea rather than the
28

1 disclosure of the manner in which he expressed it. Such concerns are outside the purview
2 of copyright law.

3 Defendants' highly transformative, non-commercial use of Plaintiff's work far
4 outweighs the negligible harm to Plaintiff from violation of the CAALA's confidentiality
5 provision. Accordingly, the first fair use factor—the purpose and character of the use—
6 substantially favors a fairness finding.

7 **2. Nature Of The Copyrighted Work**

8 The next factor focuses on the work's nature. "The more informational or
9 functional the plaintiff's work, the broader should be the scope of the fair use defense."
10 *Leadsinger*, 512 F.3d at 531 (quoting 4 Nimmer, *supra*, § 13.05[A][2][a]). As discussed
11 above in connection with originality, Plaintiff's one-sentence listserv post is entirely
12 informational or factual in nature. Plaintiff concedes that any copyright he holds is
13 "thin." (RW Opp'n at 2-3.) On the whole, the second factor also supports a fair use
14 finding.

15 **3. Amount And Substantiality Of The Portion Used**

16 Generally, "wholesale copying of copyrighted material precludes application of the
17 fair use doctrine." *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983); *see also Wall*
18 *Data*, 447 F.3d at 780 (finding that "'verbatim' copying of the entire copyrighted
19 work . . . weighs against a finding of fair use" (citing *Worldwide Church of God*, 227
20 F.3d at 1118)). In *Sony Corp.*, the Supreme Court recognized that wholesale copying is
21 not necessarily dispositive to fair use. *See* 464 U.S. at 449-50 (observing that in the
22 context of "timeshifting," *i.e.*, recording a television show for later viewing, "the fact that
23 the entire work is reproduced does not have its ordinary effect of militating against a
24 finding of fair use" (citation omitted)); *Hustler Magazine Inc. v. Moral Majority Inc.*, 796
25 F.2d 1148, 1155 (9th Cir. 1986) ("*Sony Corp.* teaches us that the copying of an entire
26 work does not preclude fair use *per se.*").

27 In addition to the Supreme Court in *Sony Corp.*, several courts have accepted fair
28 use defenses where the defendant copied all or most of the plaintiff's work. *See, e.g.*,

1 *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003) (holding that use of “all, or nearly all, of
2 the copyrighted work” did not undermine the protections granted by the Copyright Act
3 where the use “was not for its expressive content, but rather for its allegedly factual
4 content”); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171,
5 1177 n.15 (5th Cir. 1980) (“[T]he idea that the copying of an entire copyrighted work can
6 never be fair use ‘is an overbroad generalization, unsupported by the decisions and
7 rejected by years of accepted practice.’” (quoting *Williams & Wilkins Co. v. United*
8 *States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973))).

9 The facts of this case reveal it to be one of the limited situations where *verbatim*
10 copying of an entire work is fair. There are two independent reasons why this is so.
11 First, the “work” at issue is a 23-word sentence. It would be nearly impossible to excerpt
12 this sentence for legitimate comment or criticism without reproducing it *in toto*. See
13 *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 678-79 (D. Minn. 1995). In *Belmore*, the
14 defendant copied the plaintiff’s entire work, a short parable of approximately 677 words,
15 surrounded by a brief commentary of approximately 202 words. See *id.* at 678-79, 681-
16 82. Although the defendant had “originally intended to publish excerpts,” it ultimately
17 decided that because the work was “relatively short,” reprinting the story as a whole was
18 necessary “to ensure that [the defendant’s] readers understood what [it] was criticizing.”
19 *Id.* at 679. Accepting this justification, the court held that the defendant’s complete
20 reproduction of the plaintiff’s work “does not have significant weight” in the fair use
21 analysis “when applied to the unique facts presented in this case.” *Id.*

22 The copying of Plaintiff’s entire sentence was also reasonable in light of the
23 purpose for which it was reproduced—to alert White Zuckerman about Plaintiff’s
24 potentially libelous statement. See *Campbell*, 510 U.S. at 586-87 (recognizing that “the
25 extent of permissible copying varies with the purpose and character of the use”). Plaintiff
26 claims that Defendant Sara Weinstein sent an e-mail to an individual named Paul White
27 at White Zuckerman containing the text of his listserv post and the introduction “PAUL,
28 FOR YOUR INFO—SARA.” (RW Opp’n, Stern Decl. ¶ 31, Ex. 5.) White Zuckerman

1 “made use of” Plaintiff’s writing, “claiming that [P]laintiff had ‘slandered’ [White
2 Zuckerman] to others, threatening to sue [P]laintiff”¹² (2nd Am. Compl. ¶ 56.)

3 Reproduction of copyrighted material for use in litigation or potential litigation is
4 generally fair use, even if the material is copied in whole. For instance, in *Jartech, Inc. v.*
5 *Clancy*, 666 F.2d 403 (9th Cir. 1982), the defendant city council copied five motion
6 pictures by photographing the screen images every few seconds and recording the
7 soundtracks in their entirety. *Id.* at 405. The city council used its copies in a nuisance
8 abatement proceeding against an adult film theater. *Id.* at 404-06. The Ninth Circuit
9 affirmed the jury’s fair use finding, holding that the city council’s use of the copies in the
10 legal proceedings was not “the same intrinsic use to which the copyright holders expected
11 protection from unauthorized use.” *Id.* at 407; *see also Bond*, 317 F.3d at 396 (holding
12 that the defendant’s use in a child custody proceeding of the plaintiff’s entire copyrighted
13 work—describing how the plaintiff killed his father—“does not undermine the
14 protections granted by the [Copyright] Act but only serves the important societal interest
15 in having evidence before the factfinder”); *Healthcare Advocates, Inc. v. Harding,*
16 *Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 638 (E.D. Pa. 2007) (holding that law
17 firm’s copying of an entire set of copyrighted web pages was justified where the web
18 pages were relevant evidence in other litigation).

19 In *Hustler*, a case highly relevant to the instant litigation, the plaintiff magazine
20 published a parody featuring Reverend Jerry Falwell, a fundamentalist minister,
21 “describing his ‘first time’ as being incest with his mother in an outhouse, and saying that
22 he always gets ‘sloshed’ before giving his sermons.” 796 F.3d at 1150. Failing to
23 appreciate the humor, Reverend Falwell and one of his co-defendants sent out copies of
24 this parody to 26,000 major donors, seeking donations to help finance Falwell’s lawsuit
25

26 ¹² “Plaintiff beliefs [sic], when [White Zuckerman’s employee] used the word slander,
27 considering the context of the comment, she really meant liable [sic]. Confusing liable [sic] with slander
28 is a mistake people commonly make.” (2nd Am. Compl. ¶ 56.) Confusing “libel” with “liable” is also a
commonly-made mistake.

1 against Hustler magazine for libel and related torts. Hustler magazine then sued Falwell
2 and the other defendants for copyright infringement. *Id.* at 1150 & n.1.

3 The Ninth Circuit affirmed a fair use finding. While acknowledging that the
4 defendants copied the plaintiff's entire parody, the Ninth Circuit found their use
5 reasonable: "[A]n individual in rebutting a copyrighted work containing derogatory
6 information about himself may copy such parts of the work as are necessary to permit
7 understandable comment. Falwell did not use more than was reasonably necessary to
8 make an understandable comment when he copied the entire parody from the magazine."
9 *Id.* at 1153. It made no difference, the court explained, that the parody did not defame
10 Falwell's co-defendants, because Falwell "used them as a medium to transmit his
11 messages." *Id.* at 1153 n.9.

12 Similarly here, Defendants acted on White Zuckerman's behalf when they
13 allegedly copied and forwarded Plaintiff's negative and potentially defamatory statement
14 about White Zuckerman. (*See* 2nd Am. Compl. ¶ 83 ("By so accepting the benefits of
15 Robert Weinstein and Sara Weinstein's wrongful conduct, and by using [P]laintiff's
16 confidential email to threaten to sue him for slander, [White Zuckerman] thereby
17 actually, apparently and impliedly gave Robert Weinstein and Sara Weinstein authority,
18 to commit such wrongful conduct, on behalf of [White Zuckerman] as if they were
19 originally authorized, by them, ab initio.").)

20 Although wholesale copying normally weighs against fair use, the extenuating
21 circumstances here—the extreme brevity of the work at issue and the reasonableness of
22 the purpose for which it was copied—render this third factor neutral in the overall fair
23 use analysis.

24 **4. Effect Upon The Value Of The Copyrighted Work**

25 Evaluating the fourth and final fair use factor—the effect of the infringing activity
26 upon the Plaintiff's potential market for or value of the copyrighted work—is
27 straightforward: There is no effect. Plaintiff's listserv post has no market value and
28 Defendants' alleged copying and distribution in no way diminishes the intrinsic value of

1 the post to Plaintiff or other listserv users. The only actual damages that Plaintiff alleges
2 are the copyright registration fee, his time spent on the instant litigation, and pain,
3 suffering, and emotional distress. (*See* RW Opp'n at 20-24.) Because Defendants'
4 alleged infringement has no effect on the value of Plaintiff's listserv post, this factor
5 strongly favors a fair use finding.

6 **5. Balancing The Factors**

7 Each of the four factors either support Defendants' fair use defense or are neutral.
8 This is unsurprising. In an age of blogs, listservs, and other online fora, a person's short
9 comment in cyberspace is frequently quoted in its entirety as others reply or forward it
10 elsewhere. It would be strange, dangerous even, if every such quotation subjected the
11 copier to liability and a federal lawsuit. Such heavy-handed tactics are akin to using a
12 cannon to kill a mosquito; they carry the same attendant risk of collateral damage by
13 chilling free speech. A free and vibrant democracy depends upon the unfettered
14 exchange of ideas. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390, 89 S.Ct. 1794,
15 23 L.Ed.2d 371 (1969) ("It is the purpose of the First Amendment to preserve an
16 uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to
17 countenance monopolization of that market, whether it be by the Government itself or a
18 private licensee.").

19 Even if Plaintiff had a thin copyright in his listserv post, Defendants' alleged use of
20 it was fair. Consequently, Defendants are entitled to summary judgment.

21 **D. Attorneys' Fees**

22 Both Defendants request attorneys' fees. The Copyright Act of 1976 vests district
23 courts with the discretion to award "a reasonable attorneys' fee to the prevailing party."
24 *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614 (9th Cir. 2010) (quoting 17
25 U.S.C. § 505). In deciding whether to award attorneys' fees, courts generally consider
26 factors including "(1) the degree of success obtained; (2) frivolousness; (3) motivation;
27 (4) the objective unreasonableness of the losing party's factual and legal arguments; and
28 (5) the need, in particular circumstances, to advance considerations of compensation and

1 deterrence.” *Id.* (citing *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994)). An
2 attorneys’ fees award is reasonable if based on a reasonable number of hours expended
3 and a reasonable hourly rate. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 561 (9th Cir.
4 1996); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40
5 (1983). The Court considers each of the above-enumerated factors in turn.

6 **1. Defendants Are Entitled To Reasonable Attorneys’ Fees And Costs**

7 **a. Degree Of Success Obtained**

8 Defendants successfully obtained judgment against Plaintiff on his remaining
9 cause of action for copyright infringement. Their success was total. Thus, this factor
10 favors a fee award.

11 **b. Frivolousness Or Objective Unreasonableness Of Plaintiff’s**
12 **Factual And Legal Arguments**

13 Plaintiff asserts that his copyright claim was not frivolous because the Copyright
14 Office issued a certificate of registration in his writing. Plaintiff’s copyright registration
15 is relevant only to the validity of his copyright. As discussed above, Plaintiff is incorrect
16 about the validity of his copyright because his listserv post lacks originality.
17 Nonetheless, Plaintiff’s originality argument was not objectively unreasonable. The
18 problem with Plaintiff’s copyright claim lies in Defendants’ obvious fair-use defense. A
19 reasonable person, particularly one who happens to be an attorney, would not have
20 pursued such folderol. Plaintiff’s decision to proceed with this patently meritless cause
21 of action supports a fee award.

22 **c. Plaintiff’s Motivation**

23 **i. Evidence Of Damages Or Other Potential Remedies**

24 There is evidence that Plaintiff brought this suit—including the copyright claim—
25 in bad faith. First, there is a dearth of evidence that Plaintiff suffered actual damages.¹³
26

27 _____
28 ¹³ Plaintiff is barred from seeking statutory damages because he failed to register his work prior
to the alleged infringement or within three months of publication. 17 U.S.C. § 412.

1 The value of Plaintiff's purported copyright was not impaired. Plaintiff's claims for other
2 actual damages range from the implausible to the preposterous. Implausible are
3 Plaintiff's averments of emotional distress and stress-related ailments arising from
4 Defendants' alleged infringement. Plaintiff offers almost no evidence of these maladies.
5 He states, incredibly, that "[i]n having to deal with the violation of my copyright, I have
6 experienced aggravation of the then arthritis in my right hip, which resulted in excess
7 pain in the hip and leg and a decrease in the range of motion in my leg and hip." (RW
8 Opp'n, Stern Decl. ¶ 13.) In an equally conclusory fashion, he asserts emotional distress
9 and insomnia. (*Id.* ¶ 14.) Their dubiousness aside, none of these claims are compensable
10 under the Copyright Act. *See Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)
11 (holding that a plaintiff's subjective view about the harm from copyright infringement,
12 "which really boils down to 'hurt feelings' over the nature of the infringement, has no
13 place in [the damages] calculus"); *see also In re Dawson*, 390 F.3d 1139, 1146 n.3 (9th
14 Cir. 2004) (construing *Mackie* as limiting actual damages under the Copyright Act to
15 economic damages).

16 As for the time Plaintiff spent on the instant litigation, it would be compensable
17 only if Plaintiff had the prospect of recovering attorneys' fees, which, as a *pro se* litigant,
18 he did not. *See Elwood v. Drescher*, 456 F.3d 943, 947 (9th Cir. 2006) (interpreting *Kay*
19 *v. Ehrler*, 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991), as "impos[ing] a
20 general rule that pro se litigants, attorneys or not, cannot recover statutory attorneys'
21 fees"); *see also Musaelian v. Adams*, 45 Cal. 4th 512, 517, 87 Cal. Rptr. 3d 475 (2009)
22 ("The ordinary and usual meaning of 'attorney's fees,' in both legal and general usage, is
23 the consideration a litigant actually pays or becomes liable to pay in exchange for legal
24 representation. An attorney litigating in propria persona pays no such compensation.").

25 That leaves only Plaintiff's outlandish suggestion that his \$750 copyright
26 registration fee constitutes actual damages. Copyright registration is not mandatory.
27 Congress, wishing to encourage the development of a robust federal register of
28 copyrights, provides certain incentives to copyright registrants. For instance, registration

1 is a prerequisite to a copyright infringement suit involving a U.S. work. *See Cosmetic*
2 *Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 619 (9th Cir. 2010). Thus, registration
3 fees are not “damages”; rather, they are fees copyright holders pay to obtain certain
4 additional rights, such as the right to sue. As such, they are not recoverable.

5 The absurdity of Plaintiff’s position becomes apparent when one considers the
6 more typical infringement case where an author has a legitimate copyright in a work with
7 some commercial value. In such cases, infringement is often committed on different
8 occasions by more than one party. Allowing recovery of registration fees would
9 arbitrarily and unfairly punish the party that the author chose to sue first—not necessarily
10 the first party to infringe. To the extent the first party found liable even became aware of
11 subsequent liable parties, it would have no effective recourse against them. Exercising
12 the right to contribution on a \$750 fee award, assuming such a right existed, would be
13 economically impractical.

14 In addition to actual damages, Plaintiff maintains that he is entitled to injunctive
15 relief. Overlooking the frivolousness of this lawsuit, discussed *supra*, the potential for
16 injunctive relief might have provided justification for bringing Plaintiff’s copyright claim
17 were there a probability of continued “infringement.” But Plaintiff provides no evidence
18 that Defendants are likely to commit further acts of alleged infringement. Indeed, it is
19 highly unlikely that Defendants will have reason to forward Plaintiff’s listserv post to
20 White Zuckerman or anyone else in the future.

21 Because Plaintiff had no compensable damages and no reason to seek injunctive
22 relief, the Court concludes that he brought his copyright claim in bad faith. This
23 conclusion is bolstered by Plaintiff’s delay in providing Defendants with a copy of the
24 listserv post.

25 **ii. Plaintiff’s Delay In Turning Over His Listserv Post**

26 “[M]any actions are extended unnecessarily by lawyers who exploit or abuse
27 judicial procedures, especially the liberal rules for pretrial discovery.” *Roadway Express,*
28 *Inc. v. Piper*, 447 U.S. 752, 757 n.4, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). This case

1 easily could have been resolved on a motion to dismiss had Plaintiff disclosed the content
2 of his listserv post at the outset. By withholding disclosure of this information until
3 August 2010 (*see* RW Mot., Farrell Decl. ¶ 2), Plaintiff substantially prolonged this
4 litigation.

5 Plaintiff asserts that he would have turned over his listserv post sooner if
6 Defendants had agreed to provide a protective order. (RW Opp'n, Stern Decl. ¶ 24.)
7 This assertion strains credulity. Rule 26(c)(1) allows a court to enter a protective order
8 "to protect a party or person from annoyance, embarrassment, oppression, or undue
9 burden or expense." Plaintiff does not show how Defendants' unfettered access to his
10 listserv post falls into any of these categories. Nor can Plaintiff's listserv post be
11 described as "a trade secret or other confidential research, development, or commercial
12 information." Fed. R. Civ. P. 26(c)(1)(G).

13 Throughout this litigation, Plaintiff has inaptly described the listserv post as his
14 "work product." (*See, e.g.*, RW Opp'n, Stern Decl. ¶ 24.) "The work product doctrine is
15 a 'qualified privilege' that protects 'certain materials prepared by an attorney acting for
16 his client in anticipation of litigation.'" *Hernandez v. Tanninen*, 604 F.3d 1095, 1100
17 (9th Cir. 2010) (quoting *United States v. Nobles*, 422 U.S. 225, 237-38, 95 S.Ct. 2160, 45
18 L.Ed.2d 141 (1975)). Plaintiff's query to the CAALA listserv cannot reasonably be
19 construed as material prepared on behalf of a client in anticipation of litigation. It is
20 better characterized as material prepared on his own behalf incidental to the litigation
21 whence it arose. It is thus no more an example of work product than if Plaintiff's printer
22 had jammed while printing out a client's brief and Plaintiff had inquired on the listserv
23 whether other attorneys had experienced similar difficulties with that particular model.

24 Even if, for the sake of argument, the listserv post did constitute Plaintiff's work
25 product, Plaintiff unquestionably waived its protection. Plaintiff shared his question with
26 approximately 2,300 other attorneys on the CAALA listserv and registered it with the
27 Copyright Office. Furthermore, by filing the instant lawsuit, Plaintiff waived any work
28 product claim in the listserv post because he should have known that its disclosure would

1 be necessary. *See Hernandez*, 604 F.3d at 1100 (“[R]aising a claim that requires
2 disclosure of a protected communication results in waiver as to all other communications
3 on the same subject.”); *cf. Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.
4 1992) (“Where a party raises a claim which in fairness requires disclosure of the
5 protected communication, the [attorney-client] privilege may be implicitly waived.”).

6 Plaintiff’s obstructionist tactics, such as filing two unfounded applications to seal
7 [Doc. ##41, 84-85], are not surprising given his apparent litigation goal of obtaining
8 discovery. Nonetheless, they wasted Defendants’ time and money defending this action
9 as well as scarce judicial resources. They are yet another example of Plaintiff’s bad faith.

10 **d. Compensation And Deterrence**

11 Awarding attorneys’ fees to a prevailing defendant in a copyright infringement suit
12 may compensate the defendant, but it may also deter the very creativity that the
13 Copyright Act seeks to promote by providing copyright holders with disincentives to
14 enforce their rights and thereby undermining the value of copyright protection. These
15 concerns are not present here, however, because Plaintiff’s one-sentence listserv post was
16 not a creative work and has no commercial value.

17 Discouraging frivolous lawsuits would not erode the value of copyright protection.
18 Furthermore, lawsuits of this nature have a chilling effect on creativity insofar as they
19 discourage the fair use of existing works in the creation of new ones. *See Feist*, 499 U.S.
20 at 349-50 (“The primary objective of copyright is not to reward the labor of authors, but
21 ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures
22 authors the right to their original expression, but encourages others to build freely upon
23 the ideas and information conveyed by a work.” (quoting U.S. Const., Art. I, § 8, cl. 8)
24 (internal citations omitted)). Therefore, considerations of compensation and deterrence
25 also weigh in favor of an award.

1 **e. Balancing The Factors**

2 Although all four factors favor a fee award, the frivolousness of Plaintiff's
3 copyright claim and his bad faith in bringing it weigh most heavily. Defendants are
4 entitled to attorneys' fees under the Copyright Act.

5 **2. Defendants Fail To Submit Evidence Supporting An Award**

6 The Court cannot grant Defendants' Requests for Attorneys' Fees, however,
7 because Defendants omit the necessary evidentiary support. Defendant Robert Weinstein
8 requests an award of \$19,973 in attorneys' fees incurred defending this action. (RW Mot.
9 at 10.) Defendant Sara Weinstein requests an award of \$51,180. (SW Mot. at 14.)
10 Defendants support their requests with brief statements from counsel setting forth their
11 billing rates and billable hours. (RW Mot., Farrell Decl. ¶ 4; SW Mot., Belilove Decl. ¶
12 7.) This showing is inadequate.

13 The Copyright Act only provides for attorneys' fees attributable to defending
14 against copyright and related claims. *See The Traditional Cat Ass'n, Inc. v. Gilbreath*,
15 340 F.3d 829, 833 (9th Cir. 2003). Detailed billing records are generally required to
16 assist the Court in its determination of reasonable fees. *See, e.g., Entm't Research Grp.,*
17 *Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1232 (9th Cir. 1997) (“[T]he district
18 court abused its discretion by not requiring . . . original time records and billing
19 statements.”).

20 In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), the Ninth
21 Circuit set forth 12 factors, taken from *Johnson v. Georgia Highway Express, Inc.*, 488
22 F.2d 714 (5th Cir. 1974), that a district court must evaluate in determining reasonable
23 attorneys' fees: (1) the time and labor required, (2) the novelty and difficulty of the
24 questions involved; (3) the skill requisite to perform the legal service properly; (4) the
25 preclusion of other employment by the attorney due to acceptance of the case; (5) the
26 customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by
27 the client or the circumstances; (8) the amount involved and the results obtained; (9) the
28 experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case;

1 (11) the nature and length of the professional relationship with the client; and (12) awards
2 in similar cases.

3 The Ninth Circuit “has since relaxed the standard, saying that application of at
4 least some of, or the most relevant, factors may be sufficient for review on appeal.”
5 *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.11 (9th Cir. 1987) (citing, *inter*
6 *alia*, *Harris v. McCarthy*, 790 F.2d 753, 758 (9th Cir. 1986), which affirmed a fee award
7 based on the district court’s consideration of three factors); *see also Davis v. City and*
8 *County of San Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992) (“In determining an
9 appropriate market rate, a district court may make reference to the [*Kerr*] factors . . .”),
10 *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993). The Supreme Court has
11 deemed one factor—the fixed or contingent nature of the fee—irrelevant to the fee
12 calculation, and has cast doubt on the relevance of an additional factor—a case’s
13 “undesirability.” *Davis*, 976 F.2d at 1546 n.4 (citing *City of Burlington v. Dague*, 505
14 U.S. 557, 563, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)).

15 Defendants do not explain why the non-copyright claims are sufficiently “related”
16 as to qualify for fees under the Copyright Act. In addition, Defendants fail to submit the
17 detailed billing records that would allow the Court to determine whether the hours
18 expended on the applicable claims were reasonable. Finally, Defendants do not address
19 any of the *Kerr* factors. In any amended motion, Defendants should include this
20 information and should avoid overreaching.

21 **V.**

22 **CONCLUSION**


23 In light of the foregoing:

- 24 1. Defendants’ Motions for Summary Judgment are GRANTED;
25 2. Defendants’ Requests for Attorneys’ Fees are DENIED without prejudice;
26 and
27
28

1 3. Defendants shall lodge a proposed judgment within 10 days from the date of
2 this Order.

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4 **IT IS SO ORDERED.**

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6 DATED: February 10, 2011

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9 DOLLY M. GEE
10 UNITED STATES DISTRICT JUDGE
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