

No. 11-16776

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RIGHTHAVEN LLC,

Plaintiff-Appellant,

v.

THOMAS A. DIBIASE,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Nevada
Case No. 2:10-CV-01343-RHL-PAL, The Honorable Roger L. Hunt, Presiding

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INTRODUCTION

This action results from Appellant Righthaven LLC's efforts to build a business based exclusively on filing hundreds of copyright infringement lawsuits in the hope of obtaining quick settlements. To do so, Righthaven partnered with Stephens Media, the publisher of the *Las Vegas Review-Journal* ("LVRJ"). Under its business plan, Righthaven finds alleged infringement of an LVRJ article on the Internet, obtains a sham copyright assignment from Stephens Media, and files a lawsuit as the purported owner of the article. Pursuant to the Strategic Alliance Agreement ("SAA") between Righthaven and Stephens Media, any lawsuit proceeds are shared with Stephens Media (even though Stephens Media is not a party to the case).

Righthaven has filed hundreds of copyright actions in the District of Nevada, each case alleging "willful infringement" of a copyright owned by Stephens Media. The instant case concerns Righthaven's lawsuit against Appellee Thomas A. DiBiase, who allegedly posted to his website an LVRJ article authored by Doug McMurdo (the "McMurdo Article"). Mr. DiBiase was unwilling to accede to Righthaven's demands for a quick settlement, and vigorously contested its claims of infringement.

Initially, Righthaven asserted it owned the McMurdo article based on an assignment from Stephens Media. Near the end of discovery, however, Mr. DiBiase obtained the SAA, which governs that assignment. The SAA makes clear that Stephens Media did not transfer any rights under Section 106 of the Copyright Act to Righthaven — only a bare right to sue for infringement. Such a transaction was expressly rejected by the Ninth Circuit in *Silvers v.*

Sony as insufficient to provide standing under the Copyright Act. See *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (*en banc*) (“*Silvers*”) (holding that the bare right to sue does not grant standing under 17 U.S.C. § 501(b) to pursue an action for copyright infringement).

On that basis, Mr. DiBiase moved to dismiss Righthaven’s complaint. Recognizing the weaknesses in its position, Righthaven attempted to amend the SAA shortly after Mr. DiBiase filed his motion. That amendment could not save Righthaven, however, because standing must be determined based on the facts as they exist at the time a lawsuit is filed. Furthermore, Righthaven’s amendment was little more than an attempt to paper over the flaws of the original SAA – and it was unsuccessful. Even taking the amendment into consideration, Righthaven still does not own sufficient Section 106 rights to bring this action.

The District Court agreed with Mr. DiBiase’s reasoning, and dismissed the case. In a prior opinion that he incorporated into his decision, the District Court Judge held that “[t]he entirety of the SAA was designed to prevent Righthaven from becoming ‘an owner of any exclusive right in the copyright’ . . . regardless of Righthaven and Stephens Media’s post hoc explanations of the SAA’s intent or later assignments.” *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 973 (D. Nev. 2011) (quoting *Silvers*, 402 F.3d at 886). Every other court to consider Righthaven’s scheme has also rejected it. Righthaven now asks this Court to reverse the judgments of all of these courts, and allow it to circumvent *Silvers*. Mr. DiBiase respectfully requests that this Court affirm the decision below and decline to assist

Righthaven to revive its failed attempt to prosecute the claims of another.

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294 .

Appellant Righthaven LLC invoked the jurisdiction of United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1331 and Section 501(b) of the 1976 Copyright Act, 17 U.S.C. § 101, *et seq.* Righthaven's complaint was dismissed for lack of standing.

The District Court issued its Order Granting Defendant's Motion to Dismiss and entered final judgment on June 22, 2011.

Plaintiff-Appellant timely filed its appeal pursuant to Federal Rule of Appellate Procedure 4(a) on July 20, 2011.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly dismissed Righthaven's copyright infringement claim for lack of standing because Righthaven did not own any of the exclusive rights under the 1976 Copyright Act.

2. Whether the district court correctly refused to consider the May 9 Clarification and Amendment ("May 9 Amendment") to the SAA in determining that it lacked jurisdiction over the action because the May 9 Amendment could not retroactively remedy Righthaven's lack of standing; and whether the May 9 Amendment, if considered, still fails to grant Righthaven the rights necessary to bring this action.

STATEMENT OF MATERIAL FACTS

A. The Formation of Righthaven

Righthaven was born when attorney Steven A. Gibson partnered with the owners of Stephens Media, a media conglomerate that owns many newspapers including the *LVRJ*. On January 18, 2010, “Gibson (through his company Net Sortie Systems LLC), along with the [owners of Stephens Media] (through their investment vehicle SI Content Monitor LLC), executed the Righthaven Operating Agreement (“RHOA”)],” Righthaven’s foundational document. Order Dismissing Complaint at 1, *Righthaven LLC v. Pahrump Life*, No. 2:10-cv-01575-JCM (D. Nev. Aug. 12, 2011) (Dkt. 67) (“*Pahrump Findings of Fact*”); SER 108-178 (RHOA).¹

The RHOA candidly describes Righthaven’s business objectives: Righthaven was created solely to acquire a “limited, revocable assignment (with a license-back) of copyrights from third Persons.” SER 117. (RHOA § 3.2(c)). It contemplates that Righthaven would then obtain copyright registrations listing itself as the copyright owner and file lawsuits with the understanding that, after the litigation has ended, the relevant assignment would be revoked and the real copyright owner “would ultimately enjoy the copyright registration.” SER 117 (RHOA § 3.2(d)). Thus, as set forth in the RHOA, Righthaven was founded on the premise that Mr. Gibson’s team of lawyers would pursue a campaign of copyright infringement litigation while standing in the shoes of

¹ “SER” will henceforth be used when citing to Appellee Thomas A. DiBiase’s Supplemental Excerpts of Record, along with the corresponding page number. “ER” refers to the Appellant Righthaven LLC’s Excerpt of Record.

copyright holders who would ultimately retain complete ownership of the copyrights Righthaven sought to enforce.

B. The Strategic Alliance Agreement Between Righthaven And Stephens Media

On the day Righthaven was founded, Stephens Media and Righthaven entered into an elaborate and secret agreement, the SAA, to use Stephens Media's copyrights to execute the strategy set forth in the RHOA. *See generally* ER Tab 57, Ex. 2 (SAA); SER 108-178 (RHOA); *see also Pahrump* Findings of Fact at 1. Under the SAA, Righthaven's lawyer-principals were purportedly granted the right to sue over Stephens Media's copyrights without Stephens Media being named as a party to the litigation. ER Tab 57, Ex. 2 (SAA § 3).

This arrangement was engineered to provide an enormous and improper benefit to Stephens Media. Under the terms of the SAA, Stephens Media could more easily avoid the costs, discovery burdens, and reputational damage of being a party to an aggressive litigation campaign that has targeted hundreds of individuals and non-profit groups. Righthaven stood to benefit, too. It would not face the constraints of representing a client in litigation. Instead, Righthaven would be representing itself while prosecuting the claims of another.

The SAA's Litigation Scheme: The SAA states that Stephens Media shall "assign" to Righthaven certain classes of copyrights that might be subject to later copyright-infringement actions. ER Tab 57, Ex. 2 (SAA § 3.1). Righthaven then has sixty days to inform Stephens Media whether it intends to file suit over the "assigned" copyrights. *Id.* (§ 3.3). If not, Righthaven must "reassign" back to Stephens Media the copyrights that it has chosen not to pursue. *Id.* If Righthaven elects to

proceed with litigation, it generally must file suit within six to twelve months. *Id.* (§§ 3.3, 4). Stephens Media, however, has veto power over Righthaven's lawsuits if the putative defendant is a charitable organization, is judgment-proof, is affiliated with Stephens Media, or has a "valued business relationship" with Stephens Media. *Id.* (§ 3.3). Righthaven has the option of making settlement demands of would-be defendants prior to commencing litigation. *Id.* (§ 4). Upon recovering in an infringement action, Righthaven must pay Stephens Media 50% of the proceeds, less costs. *Id.* (§ 5).

The Sham Assignment Provision: The purported "assignment" of copyrights from Stephens Media to Righthaven reflected in the SAA is a sham. Any assignment of copyrights to Righthaven is made "[s]ubject to the other terms and provisions of [the SAA]." *Id.* (§ 7.1). According to the SAA, even after the purported "assignment" is executed, Stephens Media retains the unfettered right to "exploit the works that are subject to the alleged assignment. *Id.* (§ 7.2). The term "exploit" is broadly defined as "to use, make, sell, or otherwise exploit in any manner whatsoever (through any means now known of hereafter [d]eveloped)." ER Tab 57, Ex. 2. (SAA Schedule 1 — Definitions at 13). Indeed, Section 7.2 expressly denies Righthaven any rights other than to pursue infringement actions:

7.2 Despite any such Copyright Assignment, Stephens Media shall retain (and is hereby granted by *Righthaven*) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and ***Righthaven* shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.** To the extent that *Righthaven's* maintenance of rights to pursue infringers of the Stephens Media Assigned Copyrights in any manner

would be deemed to diminish Stephens Media's right to Exploit the Stephens Media Assigned Copyrights, **Righthaven hereby grants an exclusive license to Stephens Media to the greatest extent permitted by law so that Stephens Media shall have unfettered and exclusive ability to Exploit the Stephens Media Assigned Copyrights.**

Id. (bold emphasis added). Although the “Copyright Assignment” in this case purports to transfer “all copyrights requisite to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven being able to claim ownership as well as the right to seek redress for past, present and future infringements of the copyright,” (ER Tab 59) the SAA’s provides that “Righthaven shall have no right or license to Exploit ... the Stephens Media Assigned Copyrights ” other than to share the proceeds of a Recovery in litigation. ER Tab 57, Ex. 2 (SAA § 7.2). In fact, the SAA specifically says that Stephens Media “shall **retain**” these rights. *Id.* (emphasis added). Accordingly, the SAA “makes abundantly clear [that] Stephens Media *retained* the exclusive rights, never actually transferring them to Righthaven.” *Democratic Underground*, 791 F. Supp. 2d at 976 (emphasis in original).

The upshot of Section 7.2 of the SAA is that Righthaven does not have any rights with respect to the “assigned” copyrights other than to file lawsuits and collect a share of the proceeds. Stephens Media retains all of the other rights, without any duty to pay Righthaven a single cent for the money it makes licensing the “assigned” copyrights. That explains why, at the time Mr. DiBiase filed his motion to dismiss, the McMurdo Article still appeared on the Stephens Media’s *LVRJ*

website without any indicia of an “assignment” to Righthaven, and is indeed still there today.²

The Illusory Nature of the Assignment: The purported assignment is not only a sham on its face, but also is effectively meaningless. Stephens Media retains “the right at any time to terminate, in good faith, any Copyright Assignment . . . and enjoy a right of complete reversion to the ownership of any copyright” ER Tab 57, Ex. 2 (SAA § 8). If Stephens Media elects to exercise this “reversion” option with respect to any copyright over which Righthaven has sued, then Stephens Media becomes responsible for effectuating the termination of the litigation, is responsible for any losses associated with the dismissal, and must compensate Righthaven for the work it has put in. *Id.*

In other words, this provision purports to vest with Stephens Media the right to have a copyright assigned back to it on demand, and to put a stop to any action that Righthaven has commenced. If Righthaven actually owned the copyright to the McMurdo article, it could not be encumbered in this way.

Stephens Media’s Representations in the SAA: The artificial nature of the alleged assignment is also reflected in the representations that Stephens Media makes in the SAA. Stephens Media represents that it will not “sell,” encumber, or “assign” to any third party the very copyrights that it has purported to “assign” to Righthaven, unless it

² See SER 182; see also McMurdo Article (January 13, 2012), <http://www.lvrj.com/news/retired-teacher-gets-death-penalty-for-wife-s-murder-96191524.html>.

receives Righthaven's permission first. *Id.* (§ 9.3). That provision only makes sense if Stephens Media has not, in fact, assigned copyrights to Righthaven at all. Indeed, Stephens Media retains the right to use the "assigned" copyrights as collateral when receiving funding, so long as they are not singled out in the loan documents. *Id.* Stephens Media also represents that it will not settle any of the cases that Righthaven has brought unless it receives Righthaven's approval. *Id.* (§ 9.4) These representations are entirely inconsistent with a true assignment and entirely consistent with Stephens Media attempting to assign to Righthaven a naked cause of action for copyright infringement.

The Allocation of Liability for Abuse of Process/Malicious Prosecution: Finally, the SAA acknowledges Stephens Media's ownership rights in the "assigned" copyrights by stating that Righthaven and Stephens Media "may be liable for [a defendant's] attorneys' fees as required by Law in connection with an Infringement Action." *Id.* (§ 11). Both parties understood that a lawsuit brought to coerce a settlement "may result in liability for malicious prosecution or abuse of process." *Id.* By contract, the parties allocated liability for that inherent risk to Righthaven. *Id.* If the copyrights had truly been assigned to Righthaven, this provision would be unnecessary, as Righthaven would have borne all of the risks associated with copyright actions that it instituted.

C. Righthaven's Litigation Campaign

Within three months of its formation, Righthaven began filing copyright infringement suits. *See Righthaven LLC v. MoneyReign, Inc.*, No. 2:10-cv-00350-PMP (D. Nev. Mar. 13, 2010) (first case filed by Righthaven). As Judge Hunt explained, "Righthaven and Stephens

Media have attempted to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar.” SER 185 (*Democratic Underground* Order on Mot. for Recons. at 2). To date, Righthaven has filed more than two hundred and seventy-five copyright infringement lawsuits in three districts. *See generally* dockets of Districts of Nevada, Colorado, and South Carolina.

D. The Lawsuit Against Mr. DiBiase

Mr. DiBiase is a former Assistant United States Attorney in Washington, DC. SER 196 (Complaint Ex. 1). In 2006, Mr. DiBiase successfully tried a murder case where the victim’s body was never located—a so-called “no body” murder. *Id.* That prosecution stoked Mr. DiBiase’s desire to assist prosecutors, investigators, and the families of murder victims who confront “no body” homicides. Mr. DiBiase set out to provide a public service by tracking those cases and publicizing his findings on the Internet. *Id.* His website contains: (1) a blog with updates on pending “no body” cases; (2) a table summarizing the results of over 300 “no body” murder prosecutions; and (3) an article he wrote discussing how to prosecute a no body homicide. *Id.* Mr. DiBiase consults for free with law enforcement agencies throughout the United States and Canada. *Id.*

Pursuant to, and in the form mandated by, the SAA, on July 19, 2010, Stephens Media entered into an agreement with Righthaven purportedly assigning to Righthaven the copyright in a June 11, 2010 *LVRJ* article written by Doug McMurdo entitled “Man who killed wife sought ultimate sentence” (the McMurdo Article). *See* ER Tab 59. On August 9, 2010, Righthaven filed a complaint against Mr. DiBiase. *See*

SER 211 (Docket Sheet). Righthaven alleged that Mr. DiBiase committed copyright infringement by posting the McMurdo Article to his “no body” blog. SER 190-192 (Compl. ¶¶ 6-9). Righthaven claimed to be the “owner” of the McMurdo Article. SER 192 (¶¶ 6, 18, 25). Righthaven also alleged that it “holds the exclusive right” to reproduce, distribute, publicly display, and prepare derivative works of the article pursuant to 17 U.S.C. § 106(1), § 106(2), § 106(3), and § 106(5). SER 207(¶¶ 25-28). Righthaven claimed ownership of the McMurdo Article based on a transfer “by written agreement” from Stephens Media. *Id.* (Ex. 4).

E. The SAA Is Revealed to the Public

Although District of Nevada Local Rules required that Righthaven identify “all persons . . . or corporations . . . which have a direct, pecuniary interest in the outcome of the case” (District of Nevada L.R. 7.1-1), Righthaven’s Certificate of Interested Parties did not disclose that Stephens Media retained a financial interest in this case pursuant to the SAA. SER 187-188 (Righthaven’s Certificate of Interested Parties, Dkt. No. 6); *see also* SER 59-61 (*Democratic Underground Tr. of Hr’g on Order to Show Cause at 15:4-17:17*)³ (discussing “a concerted effort to hide Stephens Media’s role in this litigation” and imposing

³ It is proper for the Court to take judicial notice of its own records and those of other courts. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (holding that the court “may take judicial notice of court filings and other matters of public record”); *Biggs v. Terhune*, 334 F.3d 910, 916 n. 3 (9th Cir. 2003) (noting that “[m]aterials from a proceeding in another tribunal are appropriate for judicial notice.”), *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010).

sanctions of \$5,000 on Righthaven). Moreover, Righthaven did not attach either the SAA or the RHOA to the Complaint, and did not include either document in its initial disclosures served in January 2011.

It was not until April 8, 2011—eight months after the case was filed—that Righthaven made the SAA and the RHOA available to Mr. DiBiase as part of a “Supplemental Initial Disclosure.” SER 103, ¶ 11. Before the SAA was disclosed publicly, “Righthaven led the district judges of th[e] [D]istrict [of Nevada] to believe that it was the true owner of the copyright in the relevant news articles.” *Democratic Underground*, 791 F. Supp. 2d at 976. Righthaven accomplished this misdirection by contending that the various “copyright assignments” entered into with Stephens Media were the only documents relevant to ownership and by directing courts to cases that considered Righthaven’s standing without the benefit of the SAA. *See, e.g., Righthaven LLC v. Majorwager.com, Inc.*, No. 2:10-cv-00484-GMN, 2010 WL 4386499, at *2 n.2 (D. Nev. Oct. 28, 2010) (finding a “plausible inference” of jurisdiction based on the assignment agreement alone, but noting that “[r]egardless of the assignment’s assertions, if only a right to sue was transferred; Plaintiff may lack standing”).

F. Righthaven’s Attempts to Amend the SAA

Once the SAA was made public, Righthaven was beset by multiple motions to dismiss for lack of standing. Recognizing the deficiencies of the SAA, on May 9, 2011, five days after Mr. DiBiase filed his motion to dismiss, Stephens Media and Righthaven attempted to amend the SAA. ER Tab 57, Ex. 3 (“May 9 Amendment”). Under this after-the-fact revision, Righthaven purportedly obtained rights in the assigned

articles, then granted to Stephens Media a non-exclusive license to exploit the articles in exchange for one dollar. *Id.* (§ 7.2). Yet, Righthaven must give Stephens Media 30-days' notice to exploit the articles that it allegedly owns, other than by filing lawsuits. *Id.* According to the Amendment, “[t]he parties acknowledge that failure to provide such notice would be a material breach of this Agreement and would cause Stephens Media irreparable harm, remediable through injunctive relief, which Righthaven and those asserting rights obtained from it shall have no right to oppose.” *Id.* And Righthaven retains the option, on fourteen-days notice, to buy back any article for ten dollars. *Id.* (§ 8.1).

G. The District Court Concludes That Righthaven Lacks Standing

On May 4, 2011, prior to Righthaven's attempt to amend the SAA, Mr. DiBiase moved to dismiss this case with prejudice. SER 179-183. The District Court granted that motion. ER Tab 72.⁴ With the SAA in hand, the District Court had no trouble concluding that “Righthaven does not have standing to assert a copyright infringement claim against

⁴ In its Opening Brief, Righthaven states that the District Court dismissed this case without prejudice. Opening Br. at 3, 7. That is incorrect. Mr. DiBiase sought dismissal of the case with prejudice, SER 180, 181, 183, and the District Court granted Mr. DiBiase's motion, ER Tab 72 at 3. To the extent Righthaven is now questioning the prejudicial nature of the dismissal, the issue is not properly before this Court because it was not raised below or addressed substantively in Righthaven's Opening Brief. *See Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 994-95 (9th Cir. 2009) (holding that the Court will not consider issues not raised below, and not raised in the appellant's opening brief).

DiBiase.” *Id.* at 2. In so doing, the District Court expressly adopted the reasoning from *Democratic Underground*, 791 F. Supp. 2d 968 and *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. 2011).⁵ *Id.*

In *Democratic Underground*, Judge Hunt considered Righthaven’s argument that “the SAA’s provisions, which necessarily include Section 7.2, do not alter the unambiguous language of the Assignment or limit the rights it obtained from Stephens Media in the Assignment” and found the argument to be “flagrantly false—to the point that the claim is disingenuous, if not outright deceitful.” *Democratic Underground*, 791 F. Supp. 2d at 973. Reading the copyright assignment in view of the SAA, the court held that Righthaven received “nothing more than a fabrication since a copyright owner cannot assign a bare right to sue after *Silvers*.” *Id.* Because it found the SAA unambiguous, the court declined to invoke Righthaven and Stephens Media’s professed intent in order to “amend or reinterpret the SAA to suit Righthaven’s current desires.” *Id.* at 974. Finally, noting that “Righthaven and Stephens Media attempt to impermissibly amend the facts to manufacture standing,” the court refused to give effect to the May 9 Amendment. *Id.*

Nevada District Judge Philip Pro’s ruling in *Hoehn* adheres to and confirms the wisdom of *Democratic Underground*. The *Hoehn* court found that the copyright “[a]ssignment cannot be read in isolation [because] [t]he SAA governs the parties’ relationship with respect to Copyright Assignments,” observed that “[t]he Assignment together with the SAA are unambiguous,” and therefore held that the SAA “deprive[s]

⁵ The *Democratic Underground* decision is available at SER 1-17 and the *Hoehn* decision is available at SER 18-33.

Righthaven of any of the rights normally associated with ownership of an exclusive right necessary to bring suit for copyright infringement.” *Hoehn*, 792 F. Supp. 2d at 1145-46. The court evaluated the May 9 Amendment for the sake of argument, but concluded that it was insufficient to vest Righthaven with standing. The *Hoehn* court held that the May 9 Amendment “provides Righthaven with only an illusory right to exploit or profit from the Work” because it vests Stephens Media with a liberal right of reversion in exchange for a nominal sum, and requires that Righthaven give Stephens Media thirty days notice before exploiting the assigned works, thereby giving Stephens Media the “power to prevent Righthaven from exploiting the Work for any purpose other than pursuing infringement actions.” *Id.* at 1147.

Similarly, since the SAA came to light, all of the following courts have rejected Righthaven’s scheme for lack of standing:

- *Righthaven LLC v. Barham*, No. 2:10-cv-02150-RLH, 2011 WL 2473602 (D. Nev. June 22, 2011)
- *Righthaven LLC v. Mostofi*, No. 2:10-cv-01066-KJD, 2011 WL 2746315 (D. Nev. July 13, 2011)
- *Righthaven LLC v. Pahrump Life*, No. 2:10-cv-01575-JCM (D. Nev. Aug. 12, 2011)⁶
- *Righthaven LLC v. Hyatt*, No. 2:10-cv-01736-KJD, 2011 WL 3652532 (D. Nev. Aug. 19, 2011)

⁶ The *Pahrump* court orally dismissed Righthaven’s claims, but ordered further briefing on whether the dismissal should be with prejudice. See *Pahrump Life*, No. 2:10-cv-01575-JCM, Transcript of Proceedings on Plaintiff’s Motion to Amend, Dkt. No. 68 at. 57-58 (orally dismissing case). The court has not yet issued a final order.

- *Righthaven LLC v. Wolf*, __ F. Supp. 2d __, 100 U.S.P.Q.2d 1476 (D. Colo. Sept. 27, 2011)
- *Righthaven LLC v. Newman*, No. 2:10-cv-01762-JCM, 2011 WL 4762322 (D. Nev. Oct. 7, 2011)
- *Righthaven LLC v. Newsblaze LLC*, No. 2:11-cv-00720–RCJ, 2011 WL 5373785 (D. Nev. Nov. 4, 2011)
- *Righthaven LLC v. Kelleher*, .No. 2:10-cv-01184-KJD (D. Nev. Jan. 13, 2012).

In the wake of these myriad adverse rulings, and despite its subsequent attempts to re-manufacture standing, Righthaven has seemingly given up the ghost and has publicly admitted that “the [LRVJ] copyrights are not owned by Righthaven, but rather constitute property of [Stephens Media] based on the ineffective assignment of ownership.” SER 39 (Pearson Decl. ¶ 26, Ex. 13).

STANDARD OF REVIEW

This Court reviews *de novo* a district court’s dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008). The Court reviews the district court’s factual findings relevant to the 12(b)(1) motion for clear error. *Viewtech, Inc. v. U.S.*, 653 F.3d 1102, 1104 (9th Cir. 2011). The party asserting jurisdiction bears the burden of proving that the court has jurisdiction over the matter. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001).

A 12(b)(1) motion may be either facial or factual. “In a facial attack, the challenger asserts that the allegations contained in a

complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where, as here, the attack on jurisdiction is factual, the court may look beyond the complaint to affidavits and other evidence presented by the parties. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

Righthaven based its copyright infringement suit against Mr. DiBiase on a purported assignment from Stephens Media of the allegedly infringed McMurdo Article. ER Tab 59. But that assignment is governed by a further agreement between Righthaven and Stephens Media, the SAA. ER Tab 57, Ex. 2. The SAA shows—beyond any genuine dispute—that Righthaven does not own any of the exclusive rights in the copyright at issue in this case. Stephens Media merely granted Righthaven a qualified right to bring suit. The Copyright Act and an *en banc* opinion from the Ninth Circuit make clear that a bare assignment of a copyright cause of action is not enough to establish standing to file a copyright-infringement lawsuit.

Recognizing the insufficiency of its rights under the original SAA, on May 9, 2011, five days after Mr. DiBiase filed his motion to dismiss for lack of standing, Stephens Media and Righthaven purported to amend the SAA. ER Tab 57, Ex. 3. But their gambit did not cure the jurisdictional defects in Righthaven’s case. First, jurisdiction must be present at the outset of an action, it cannot be invented nine months

later. Second, the amended SAA suffers from the same flaw as the original: Stephens Media still controls all of the relevant rights to exploit the copyright in the work at issue. Even if the amendment were considered, therefore, Righthaven's case should still have been dismissed for lack of standing.

Accordingly, the District Court correctly concluded Righthaven did not own the copyright at issue and properly dismissed the action.

ARGUMENT

A. Righthaven Lacked Standing to Sue Over the McMurdo Article

Because Righthaven does not own the McMurdo Article, which Righthaven alleges Appellee DiBiase infringed, Righthaven lacked standing to bring this action. *See Righthaven LLC v. DiBiase*, No. 2:10-cv-01343, 2011 WL 5101938, at *1 (D. Nev. October 26, 2011) (describing prior decision as “granting [DiBiase’s] motion to dismiss for lack of subject matter jurisdiction based on Righthaven's lack of ownership of the copyright and consequent lack of standing.”).

To have standing, a federal-court “plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations and quotations omitted). A party cannot be injured by infringement of a copyright it does not own (assuming purely *arguendo* that such infringement even occurred). That is why, under the Copyright Act, only “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any

infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b). “The bare assignment of an accrued [copyright] cause of action is impermissible.” *Silvers v. Sony Pictures Ent’m’t, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005). Where a plaintiff “is not the owner of the copyrights, and it does not have a beneficial interest in the copyrights it alleges defendant violated, it could not have suffered an invasion of its legally protected interest.” *Vianix Delaware LLC v. Nuance Comm’c’ns, Inc.*, No. 09-0067, 2009 WL 1364346, at *2 (D. Del. May 12, 2009) (holding that plaintiff did not have standing to bring copyright infringement action because it did not own, or retain a beneficial interest in, copyrights at issue). In short, as the District Court recognized, “only copyright owners and exclusive licensees of copyright may enforce a copyright.” *Hoehn*, 792 F. Supp. 2d at 1145 (quoting *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008)); *Democratic Underground*, 791 F. Supp. 2d at 974.⁷

Section 106 of the Copyright Act defines the relevant “exclusive rights” as the right:

- to reproduce the copyrighted work in copies or phonorecords;
- to prepare derivative works based upon the copyrighted work;
- to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and
- to display the copyrighted work publicly.

⁷ As noted in the Statement of Material Facts, Section G, *supra*, the District Court expressly incorporated the reasoning from the *Hoehn* and *Democratic Underground* decisions into its order in this case. ER Tab 72 at 2.

17 U.S.C. § 106(1), (2), (3), (5). The District Court correctly concluded that Righthaven is not the legal or beneficial owner⁸ of any of these rights with respect to the McMurdo Article. *See Hoehn*, 792 F. Supp. 2d at 1146-47; *Democratic Underground*, 791 F. Supp. 2d. at 976.

To the extent Righthaven has any interest in the McMurdo Article, that interest is delineated in the SAA and a July 19, 2010 alleged assignment of the article. ER Tab 57, Ex. 2 (SAA); ER Tab 59 (Assignment). Stephens Media purported to assign the copyright in the McMurdo Article to Righthaven using the format mandated by the SAA. *Compare* ER Tab 59 (purported assignment agreement for McMurdo Article) *with* ER Tab 57, Ex. 2. (Exhibit 1 of the SAA) The alleged assignment took place “subject to” Stephens Media’s reversion rights spelled out in the SAA. ER Tab 59. Stephens Media claimed it was transferring the rights “requisite to have Righthaven recognized as the copyright owner . . . for purposes of Righthaven *being able to claim* ownership as well as the right to seek redress for past, present, and future infringement.” *Id.* (emphasis added).

But when read in conjunction with the SAA that governs it, this purported assignment did not transfer to Righthaven any of the exclusive rights under Section 106 of the Copyright Act. The SAA provides that Stephens Media, the original owner of the McMurdo Article, “shall retain” the right to exploit the article in all forms: *only* Stephens Media has the exclusive right to reproduce, prepare derivative works, distribute copies, and publicly display the article. ER Tab 57,

⁸ For a discussion of the reasons why Righthaven is not a beneficial owner, see page 36-37, *infra*.

Ex. 2 (SAA § 7.2). Specifically, Section 7.2 provides that Stephens Media “shall retain . . . an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever.” *Id.* “Exploit” is a defined term, meaning “to use, make, sell, or otherwise exploit in any manner whatsoever.” *Id.* (Schedule 1 – Definitions at 13). Taken together, Section 7.2 and the definition of Exploit cover every possible Section 106 exclusive right in the McMurdo Article. Righthaven, thus, merely obtains “the right to proceeds” from copyright-infringement lawsuits. *Id.* (§ 7.2). That is not an exclusive right under the Copyright Act and does not vest Righthaven with standing. *See* 17 U.S.C. § 501(b) (only legal or beneficial owners may bring suit).

While the text of the Copyright Act is abundantly clear, this Court, in an *en banc* decision, has also considered and settled the standing question. In *Silvers v. Sony Pictures*, this Court addressed whether a copyright owner could assign an accrued cause of action for copyright infringement to a third party without also transferring to that third party any of its exclusive Section 106 rights. 402 F.3d at 890. A copyright owner in a movie had purported to assign “claims and causes of action” to a script writer so that she could file an action against an alleged infringer. *Id.* at 883. Citing Section 501(b) of the Copyright Act, the Court concluded that a plaintiff “must have a legal or beneficial interest in at least one of the exclusive rights described in § 106” to bring a copyright-infringement action. *Id.* at 885. And even a legal or beneficial owner “is not entitled to sue unless the alleged infringement occurred while he or she was the owner of it.” *Id.* at 885 (quotation,

citation and alteration brackets omitted).⁹ Because the scriptwriter did not own any Section 106 rights based on the assignment of a cause of action, the Court ruled that she lacked standing to pursue her copyright claim. *Id.* at 890.

The rule in *Silvers* bars Righthaven's claim against Mr. DiBiase. There is no dispute that Stephens Media purported to "assign" the copyright in the McMurdo Article to Righthaven. If the assignment had been unconditional, it facially might have vested Righthaven with the right to sue for infringement that allegedly occurred while Righthaven was the owner. But along with the assignment, Stephens Media either "retain[s]" or Righthaven simultaneously "gave back" to Stephens Media all of its exclusive Section 106 rights. ER Tab 57, Ex. 2 (SAA § 7.2). Righthaven thus has "no right" to exploit the McMurdo Article commercially (except for filing lawsuits).¹⁰ This structure is indistinguishable from the bare attempted conveyance of a cause of action for copyright infringement that *Silvers* prohibits. The label that the parties have used—"assignment"—does not make any difference.

Indeed, Righthaven has even fewer rights in the relevant content than had the plaintiff in *Silvers*. In that case, the plaintiff purportedly

⁹ The Second Circuit has recognized that a copyright owner may transfer a right to sue for past infringements *along with* at least one of the Section 106 exclusive rights. *See Silvers*, 402 F.3d at 890 (referencing the holding in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991)). Such is not the case here, however, because Righthaven never received any Section 106 rights.

¹⁰ Righthaven has also admitted that it "has not engaged in the commercial exploitation of news articles." SER 69.

was granted the unconditional right to sue certain defendants. *Silvers*, 402 F.3d at 883. Here, Righthaven is allegedly given the right to sue, but Stephens Media has veto rights over those lawsuits, even after litigation has commenced. *Id.* (§ 3.3).

A 2007 Central District of California case, *Nafal v. Carter*, applied *Silvers* on very similar facts and concluded that the plaintiff lacked standing to sue. *See Nafal v. Carter*, 540 F. Supp. 2d 1128 (C.D. Cal. 2007), *aff'd*, 388 F. App'x 721 (9th Cir. 2010) (unpublished). *Nafal* addressed standing to sue over a melody from an Egyptian song that was allegedly infringed by “Big Pimpin’,” a musical work produced by artist Shawn Carter (known as Jay-Z). *Id.* at 1130. The plaintiff based his standing on an “Assignment Agreement” that purported to give him an ownership interest and the right to sue. *Id.* at 1134.

The court found that the plaintiff’s description of the document as an “Assignment Agreement” was “not dispositive.” *Id.* at 1141. Instead, the nature of the transaction was “governed by the substance of what was given to the licensee and not the label that the parties put on the agreement.” *Id.* at 1141-42 (quoting *Althin CD Medical, Inc. v. West Suburban Kidney Center*, 874 F. Supp. 837, 843 (N.D. Ill. 1994)).¹¹

¹¹ Here, just as in *Althin*, Stephens Media retains the right to determine whether to bring an infringement action, and retains the right to veto every other exploitation of the work. *See, e.g.*, ER Tab 57, Ex. 2 (SAA §§ 3.3, 8). The court in *Althin* did not find that the assignment was invalid simply because there was no right to sublicense (though Stephens Media controls sublicenses here, too, through its notice and veto power). Rather, the court looked at the rights retained by the owner/licensor, including the absolute right to allow or disallow an infringement action, and found that “[g]iven the licensor’s retention

The *Nafal* court properly concluded that the instrument at issue did not vest the plaintiff with sufficient rights to file suit. And that agreement is remarkably similar to the SAA: (1) the copyright owner, (and purported assignor) retained nearly exclusive exploitation rights in the copyrighted composition; (2) the plaintiff was required to file suit or the alleged “assignment” would terminate; (3) the alleged assignor retained broad discretion about which defendants the plaintiff could sue; and (4) there were no identified Section 106 rights over which the plaintiff had exclusive control. *Nafal*, 540 F. Supp. 2d at 1142-44. On appeal, this Court affirmed, holding that the “assignment documents at issue here did not actually grant Plaintiff an ownership interest in an exclusive copyright license. Rather, the documents were a disguised assignment of a cause of action prohibited under *Silvers* . . .” *Nafal*, 388 F. App’x at 723. That is exactly how the purported assignment to Righthaven operates and the result should be the same.

1. Righthaven Never Held Exclusive Rights in the McMurdo Article—Not Even for a Moment

In the face of this clear precedent, Righthaven half-heartedly asserts that the Assignment can be read separately from the SAA to confer a brief moment of ownership on Righthaven. Appellant Righthaven LLC’s Opening Brief (“Opening Br.”) at 14-19. The District Court correctly rejected this argument. *Democratic Underground*, 791 F. Supp. 2d at 973; *see also Hoehn*, 792 F. Supp. 2d at 1145. The reality is inescapable: Stephens Media always retained the exclusive rights in

of these substantial rights, . . . [the plaintiff] had no standing to sue.” *Althin*, 874 F. Supp. at 843.

the McMurdo Article. When Righthaven filed this action against Mr. DiBiase, it had no rights other than the right to sue, and accordingly no standing to pursue any claims of copyright infringement.

The SAA makes clear that the Assignment cannot be read in isolation, but forms an integrated agreement with the SAA. The SAA creates Stephens Media's assignment obligations in the first place, dictates the format and terms of future assignments, explains what happens "despite any Copyright Assignment," and describes the reversion rights that the assignments must expressly incorporate. *See* ER Tab 57, Ex. 2 (SAA §§ 3-4, 7.1, 7.2, 8 & Ex. 1). While Righthaven notes that the SAA "does not effectuate the assignment of any work," Opening Br. at 15, that does not matter because the SAA *governs* the assignments that Stephens Media makes to Righthaven. *See* ER Tab 57, Ex. 2 (SAA § 7.1) (any assignment of copyrights to Righthaven is made "[s]ubject to the other terms and provisions of this Agreement").

Righthaven apparently contends that the assignment in this case transferred the full panoply of Section 106 rights to Righthaven for a brief instant. Opening Br. at 16-17. That is wrong. As described previously, Section 7.2 provides that, "despite any such Copyright Assignment," Stephens Media "shall *retain*" "an exclusive license" to Exploit the work purportedly assigned. ER Tab 57, Ex. 2 (SAA § 7.2) (emphasis added). Under this structure, no rights under Section 106 ever actually changed hands.

And even if the Court were to indulge the fiction that Righthaven had Section 106 rights for some immeasurably small time period, the analysis would not change. A copyright owner that licenses all of its Section 106 rights on an exclusive basis to a third party may not

thereafter file suit based on that copyright. *See* 17 U.S.C. § 101 (defining “transfer of copyright ownership” to include an “exclusive license”); *Campbell v. Bd. Of Trustees of Stanford Univ.*, 817 F.2d 499, 504 (9th Cir. 1987) (Stanford University purported “to retain ‘ownership’ of the copyrights” despite giving an exclusive license to a third party; however, the Ninth Circuit looked past the labels of the contract into the nature of the rights, and determined that “Stanford clearly transferred part of this property interest monopoly to CPP in the form of an exclusive license.”); *see also U.S. Naval Instit. v. Charter Commc’ns, Inc.*, 936 F.2d 692, 695 (2nd Cir. 1991) (“An exclusive license granted by the copyright owner constitutes a transfer of ownership of the copyright rights conveyed in the license.”); *Althin*, 874 F. Supp. at 842 (“Once the copyright owner grants an exclusive license of particular rights, only the exclusive licensee and not the original owner can use for later infringement of such rights.”).

Indeed, if Righthaven’s ownership-for-an-instant argument were correct, the *Silvers* prohibition on assigning a naked cause of action for copyright infringement would be meaningless. The assignor could transfer all Section 106 rights along with the right to sue for accrued causes of action, and then have the assignee immediately transfer back the Section 106 rights to the assignor. This Court should not allow its rules to be circumvented so easily.

Righthaven also claims that Stephens Media’s reversion right in the McMurdo Article has “no impact” on the ownership status of the article. Opening Br. at 17. Righthaven is incorrect. The reversion right, referenced in the assignment itself, shows that any purported transfer from Stephens Media to Righthaven was illusory. *See* ER Tab

59; ER Tab 57, Ex. 2 (SAA § 8) (“Stephens Media shall have the right at any time to terminate, in good faith, any Copyright Assignment (the ‘Assignment Termination’) and enjoy a right of complete reversion to the ownership of any copyright that is the subject of a Copyright Assignment”). Righthaven’s business model is to sue over copyrights owned by third parties, and then abandon those copyrights when the lawsuits end. The RHOA could not be clearer on this point: Righthaven seeks “limited, revocable assignment[s]” from copyright owners so that it can file lawsuits, but the copyright owners will “ultimately enjoy the copyright registration upon revocation of the assignment.” SER 117 (RHOA §§ 3.2(c)-(d)). Righthaven’s assertion that there is “nothing in the record to suggest” that Stephens Media will exercise its reversion rights ignores Righthaven’s own charter. *See* Opening Br. at 17.

Stephens Media retains other accoutrements of ownership as well, despite the alleged assignment to Righthaven. Stephens Media can use the “assigned” copyrights as collateral when securing funding. ER Tab 57, Ex. 2 (SAA § 9.3). And it can “sell” or “assign” the allegedly “assigned” articles to third parties so long as it receives Righthaven’s prior agreement. *Id.* Righthaven does not try to explain how these provisions can coexist with an interpretation of the SAA under which Righthaven is vested with genuine ownership rights upon the execution of an assignment agreement. And without such ownership rights, Righthaven lacks standing to sue for infringement.

2. This Court Should Not Rewrite the SAA to Assist Righthaven

Given the patent failure of the plain language of the SAA to convey any exclusive rights to Righthaven, Righthaven next asks this

Court to rewrite the agreement. Opening Br. at 19-23. The District Court refused to do so, and this Court should as well. *Democratic Underground*, 791 F. Supp. 2d at 973-74; *Hoehn*, 792 F. Supp. 2d at 1145.

Based on the alleged intent of the parties, Righthaven contends the District Court should have construed the SAA and Assignment to convey to Righthaven all rights that are necessary to have standing to maintain this action. Opening Br. at 20. That would have been improper.

“[T]he plain language of the SAA conveys the intent to deprive Righthaven of any right, save for the right to sue alleged infringers and profit from such lawsuits.” *Democratic Underground*, 791 F. Supp. 2d at 973-74; *see also Hoehn*, 792 F. Supp. 2d at 1145 (“The Assignment together with the SAA are unambiguous.”). Given that the SAA and Assignment are unambiguous, this Court should not look beyond those agreements to determine the parties’ intent—much less alter the plain language of those agreements. 11 *Williston on Contracts*, 4th Ed. § 30:6 at 80-83 (1999) (“When a contract is unambiguous, the court must, in the absence of a showing that the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity, give effect to the contract as written, the duty of the court being to declare the meaning of what is written in the instrument, not what was intended to be written.”); *Sheehan & Sheehan v. Nelson Malley & Co.*, 117 P.3d 219, 223-24 (Nev. 2005) (holding that since the plain language of the contract was unambiguous, the court would not go beyond it to effectuate the parties’ intent); *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d 559, 603 (Nev. 2005)

(“The court has no authority to alter the terms of an unambiguous contract.”); *Ellison v. Cal State Auto. Ass’n*, 797 P.2d 975, 977 (Nev. 1990) (“It has long been the policy of Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written.”).¹²

Furthermore, “it is clear from the language of the RHOA that it was never the intent of the parties that created Righthaven for true copyright ownership to vest.” *Pahrump Findings of Fact* at 5; SER 117-118 (RHOA § 3.2). The contemporaneous intent of the parties was for Righthaven to sue for copyright infringement with Stephens Media retaining full ownership rights in the “assigned articles”—as is reflected in the plain language of the SAA. Righthaven has provided no legitimate basis for an alternative construction.¹³

In a last ditch effort to salvage its claims, Righthaven points to SAA Section 15.1, which provides that if any provision of the SAA is found to be “void or unenforceable,” a court may correct the defect “to approximate the manifest intent of the parties.” Opening Br. at 20, 22-23. Section 15.1 is of no help to Righthaven.¹⁴ Righthaven does not

¹² The SAA is to be interpreted in accordance with Nevada law. ER Tab 57, Ex. 2 (SAA § 15.3).

¹³ Indeed, reading between the lines of the declarations submitted by Righthaven’s CEO Steven Gibson and Stephens Media’s General Counsel Mark Hinueber reveals their intent to convey a bare right to sue to Righthaven while leaving all exploitation rights in the hands of Stephens Media. ER Tab 57 (Gibson Decl., ¶¶ 6, 13); SER 70-73 (Hinueber Decl., ¶¶ 9, 12).

¹⁴ Righthaven's interpretation of this section would lead to absurd results, such as allowing parties to draft an illegal or invalid agreement

contend that the agreement is void or unenforceable, only that the District Court's conclusion regarding standing is inconsistent with Righthaven and Stephens Media's purported intent that Righthaven be able to pursue this infringement action. For that reason, the District Court declined to rewrite the SAA to facilitate Righthaven's attempt to circumvent *Silvers*, and this Court should also. *Democratic Underground*, 791 F. Supp. 2d at 973-74.

B. Righthaven's Belated Amendment of the SAA Should Not Effect the Outcome of Dismissal

During the District Court proceeding, after the language of the SAA was revealed and threatened to unravel its scheme, Righthaven scrambled to amend the agreement to paper over the jurisdictional defects in its case. The purported amendment, executed during the middle of briefing on Mr. DiBiase's motion to dismiss, does not help Righthaven because it was not in existence at the time the complaint was filed and, even if considered, would not change the the underlying standing analysis.

1. Standing Is Determined at the Time a Suit Is Filed

Righthaven's standing to bring this lawsuit depends on the facts *as they existed when it filed this action*. See *Lujan*, 504 U.S. at 569 n.4;

and then to ask that the court use its expertise to rewrite the agreement in order to make it valid. *Cf. All Star Bonding v. State of Nevada*, 62 P.3d 1124, 1125 (Nev. 2003) (Under Nevada law, a "court should not revise a contract under the guise of construing it" and may not "interpolate in a contract what the contract does not contain.").

Moore's Federal Practice § 101.32 (3d ed.) ("Standing is determined as of the time the suit is filed."). "The plaintiff must establish by a preponderance of the evidence that he had standing when the complaint was filed." *Doran v. Del Taco, Inc.*, No. SACV04046CJC(ANX), 2006 WL 2037942, *7 (C.D. Cal. July 5, 2006). Righthaven did not have standing when it filed this case in August 2010 because it did not own any Section 106 rights in the McMurdo Article at that time. The District Court, therefore, correctly refused to consider Righthaven's May 2011 amendment when deciding the standing question. *Democratic Underground*, 791 F. Supp. 2d at 974-75; *see also Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1224 (D. Haw. 2001), *aff'd*, 342 F.3d 934 (9th Cir. 2003) (refusing, for purposes of a standing analysis, to consider facts that occurred after case was filed); *Gaia Techs, Inc. v. Reconversion Tech.*, 93 F. 3d 774, 779-80 (Fed. Cir. 1996), *amended on rehearing in part on other grounds by* 104 F.3d 1296 (Fed. Cir. 1996) (plaintiff lacked standing to file suit where it did not own the intellectual property at issue before filing suit; an alleged *nunc pro tunc* assignment signed after the complaint was filed was ineffective to confer standing).¹⁵

Accordingly, a decision remarkably similar to the present case rejected an attempt to sidestep the ban on the assignment of the bare right to sue, holding that a later transfer of Section 106 rights could not

¹⁵ *See also Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364-67 (Fed. Cir. 2010) (reversing trial court's failure to dismiss where plaintiff lacked ownership patent rights at outset of litigation); *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1309-10 (Fed. Cir. 2003) (company that lacked standing at outset of suit could not cure the defect by later actions).

cure the lack of standing at the outset. *See Benchmark Homes, Inc. v. Legacy Home Builders LLC*, No. 8:03CV527, 2006 WL 208830, at *6 (D. Neb. Jan. 26, 2006).

Likewise with patents and trademarks, where a plaintiff initiates an action without rights in the intellectual property, even where it subsequently obtains those rights, its lack of standing cannot be cured and the case should be dismissed. *See, e.g., Gaia Techs.*, 93 F.3d at 779-80 (reversing trial court's failure to dismiss where a party lacked ownership of a patent and trademark at outset of litigation but subsequently executed a *nunc pro tunc* assignment); *Enzo APA & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090, 1092-94 (Fed. Cir. 1998) (granting summary judgment where the plaintiff had initiated the suit as a non-exclusive patent licensee with no standing, despite subsequent grant of an exclusive license purporting to have retroactive effect). As one court has persuasively reasoned:

Permitting non-owners and licensees the right to sue, so long as they eventually obtain the rights they seek to have redressed, would enmesh the judiciary in abstract disputes, risk multiple litigation, and provide incentives for parties to obtain assignment in order to expand their arsenal and the scope of litigation. Inevitably, delay and expense would be the order of the day.

Procter & Gamble Co. v. Paragon Trade Brands, Inc., 917 F. Supp. 305, 310 (D. Del. 1995).

The various non-binding cases Righthaven cites do not aid its cause. Opening Br. at 25-28. The majority address the situation where an oral assignment of rights was later ratified by a required written agreement (*Billy-Bob Teeth, Inc v. Novelty, Inc.*, 329 F.3d 586, 591 (7th

Cir. 2003); *Imperial Residential Design, Inc. v. The Palms Dev. Grp., Inc.*, 70 F.3d 96, 99 (11th Cir. 1995); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir. 1994)); or address a situation in which an earlier assignment of exclusive rights was simply silent on the matter of the right to sue for past infringement (*Wade Williams Dist., Inc. v. Am. Broad. Co.*, No. 00 Civ. 5002 (LLM), 2005 WL 774275, *3-4 (S.D.N.Y. Apr. 5, 2005); *Intimo, Inc. v. Briefly Stated, Inc.*, 948 F. Supp. 315 (S.D.N.Y. 1996); *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614 (N.D. Ga. 1993)). *Godinger Silver Art Co. v. International Silver Co.*, No. 95 CIV. 9199, 1995 WL 702357 (S.D.N.Y. Nov. 28, 1995), an unpublished decision, focuses on a dispute over whether the plaintiff had properly registered the work at issue as a work made for hire. While the court briefly touched on the issue of whether a subsequent assignment might help the plaintiff maintain its claim, it also settled the authorship question on other grounds. *Id.* at *4-5; *see also Democratic Underground*, 791 F. Supp. 2d at 975 (distinguishing cases).¹⁶ Crucially, none of these cases address a situation like the one at bar where a plaintiff initially enters an

¹⁶ Righthaven also attempts to support its position with two non-binding, pre-*Lujan* circuit court decisions. Neither is persuasive. Based on much earlier versions of Colorado and federal law, *Kilbourn v. Western Surety Co.*, 187 F.2d 567, 571-72 (10th Cir. 1951), found that a written assignment, ratifying an earlier oral assignment of the rights in suit, granted an existing plaintiff the ability to continue to pursue the claims of another plaintiff. Similarly, in *Bubuque Stone Prods. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 723-24 (8th Cir. 1966), an existing plaintiff insurance agent was able to assume the attendant claims of the plaintiff insurance company that issued the violated policy.

untenable transaction in which only a bare right to sue is transferred, and later tries to back fill its lack of any semblance of exclusive rights in order to entitle it to maintain suit.¹⁷

2. Even If This Court Were to Consider the May 9, 2011 Amendment, that Amendment Does Not Confer Standing on Righthaven

As Judge Pro recognized, even if the May Amendment could affect the standing analysis, the practical reality is that “[t]he May 9, 2011 Clarification provides Righthaven with only an illusory right to exploit or profit from the Work.” *Hoehn*, 792 F. Supp. 2d at 1147. Even after the Amendment,¹⁸ all exclusive rights and ability to control exploitation effectively remain with Stephens Media, resulting in the inescapable conclusion that Righthaven still lacks standing.

The Amendment only serves to obscure what the original SAA made clear: that Stephens Media retains “an exclusive license” to any work purportedly “assigned” to Righthaven. *See* ER Tab 57, Ex. 2 (SAA § 7.2).

¹⁷ Additionally, Righthaven makes an unsupported argument that denying it the ability to obtain standing by amending the SAA somehow undermines Righthaven’s general right to amend its agreements. Opening Br. at 27. That is nonsensical. Righthaven may amend the SAA as it pleases. Whether that amendment confers standing for lawsuits previously filed—which it does not—is a separate question.

¹⁸ At issue in this appeal is the May 9, 2011 Amendment. After the District Court issued its decision, Righthaven and Stephens Media amended the SAA yet again. That subsequent amendment is not properly before this Court, and is also irrelevant because standing is determined at the time the original complaint was filed.

Recognizing that this structure is fatal to any claim that Righthaven has standing to bring copyright infringement actions, the parties amended Section 7.2 so that Righthaven purportedly grants to Stephens Media a “non-exclusive” license to exploit the articles in exchange for one dollar. ER Tab 57, Ex. 3 (Amendment to SAA § 7.2) (emphasis added). But the license is non-exclusive in name only. *See HyperQuest, Inc. v. N’Site Solutions, Inc.*, 632 F.3d 377, 385-86 (7th Cir. 2011) (reasoning that the use of the word “exclusive” was not dispositive, but rather the “decision whether Safelite, as the owner of the copyright, has conveyed clear exclusive rights to HyperQuest is one that can be made only after careful analysis of the agreement between the parties”). If Righthaven wishes to exploit the articles that it allegedly owns (other than by filing lawsuits and splitting the proceeds with Stephens Media), it must give Stephens Media 30-days’ prior written notice. *Id.*

As recognized by the *Hoehn* court, Stephens Media further bolsters its control over Righthaven by added language that declares failure to provide such notice will cause Stephens Media irreparable injury, and give Stephens Media the right to obtain unopposed injunctive relief. *See Hoehn*, 792 F. Supp. 2d at 1147. The notice period is critical because if Righthaven ever provides notice, Stephens Media has the right to purchase the article back for the nominal sum of *ten dollars* within fourteen days, well before Righthaven engages in any exploitation of the assigned articles. ER Tab 57, Ex. 3 (Amendment to SAA § 8.1); *see also Hoehn*, 792 F. Supp. 2d at 1147 (finding no standing under the Amendment due to “Stephens Media’s power to prevent Righthaven from exploiting the Work”). Unless and until

Stephens Media decides to allow Righthaven to pursue any particular exploitation by choosing not to exercise its veto authority—an event the record does not suggest has ever occurred—Stephens Media remains, in effect, the exclusive licensee of the work.

Indeed, Stephens Media and Righthaven did not change other aspects of the SAA that make clear that Stephens Media is the true owner of the “assigned” copyrights. *See, e.g.*, ER Tab 57, Ex. 2 (SAA § 3.3) (Stephens Media has veto power over Righthaven’s lawsuits); *id.* (§ 9.3) (Stephens Media may use the allegedly assigned articles as collateral and may assign them to third parties with Righthaven’s approval); *see Democratic Underground*, 791 F. Supp. 2d at 972 (holding that “collectively, [these sections in the original SAA] destroy Righthaven’s supposed rights in the Work” and doubting that the Amendment’s “seemingly cosmetic adjustments change the nature and practical effect of the SAA”). The Court should pay no heed to the artificial labels that Stephens Media and Righthaven have attached: Righthaven decidedly does not have authority to exploit the assigned works.

Finally, Righthaven’s suggestion that its entitlement to one dollar per year from Stephens Media creates a beneficial ownership is specious. Opening Br. at 24. A quintessential “beneficial owner” is “an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.” *Silvers*, 402 F.3d at 886 (quoting H.R. Rep. No. 94-1476, at 159 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5775). The beneficial owner, as assignor, is entitled to assert an equitable interest because its revenue will fall if the assignee does not take care of the copyright. Righthaven

is not the author of the McMurdo Article, nor does Righthaven's claimed interest depend on licensing by Stephens Media. It will get its dollar no matter what. ER Tab 57, Ex. 3 (Amendment to SAA § 7.2).

Accordingly, Righthaven lacked the necessary, exclusive rights to bring this infringement action, and the District Court properly dismissed the case on that basis.¹⁹

¹⁹ Additionally, under Nevada law, “[t]o maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit.” *Lum v. Stinnett*, 488 P.3d 347, 350 (Nev. 1971) (citing *Gruber v. Baker*, 23 P. 858, 862 (Nev. 1890)). “A champertous agreement is one in which [i] a person without interest in another’s litigation [ii] undertakes to carry on the litigation at his own expense, in whole or in part, [iii] in consideration of receiving, in the event of success, a part of the proceeds of the litigation.” *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 603 (5th Cir. 1982), cert. dismissed, 458 U.S. 1122 (1982) (quoted with approval by the Nevada Supreme Court in *Schwartz v. Eliades*, 939 P.2d 1034, 1035 (Nev. 1997)).

Here, the very purpose of Righthaven – to bring suit without exclusive rights in the allegedly infringed content in order to share in any potential payout without subjecting the actual owners of the content to the burdens of being party to a lawsuit – violates the policy behind the doctrine of champerty: “that no encouragement should be given in litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.” William Patry, 2 PATRY ON COPYRIGHT, § 5:136 at 5-292 (2009) (quoting *Graham v. La Crosse & M.R. Co.*, 102 U.S. 148, 156 (1880)). Whether this Court considers the original or the amended SAA, therefore, both are contrary to public policy in addition to failing to confer standing on Righthaven.

CONCLUSION

For the foregoing reasons, Appellee DiBiase respectfully requests that this Court affirm the District Court's dismissal of this action for lack of standing.

Dated: January 13, 2012

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Colleen Bal
Colleen Bal

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Thomas A. DiBiase

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellee Mr. DiBiase concurs with the Appellant Righthaven that there are two related cases now pending in front of the Ninth Circuit. These cases are *Righthaven LLC v. Hoehn*, Case No. 11-16751, and *Righthaven LLC v. Democratic Underground, LLC*, Case No. 11-17210. In each of these cases, Righthaven sued the respective defendants for copyright infringement. The district court dismissed these cases based on lack of subject matter jurisdiction, and Righthaven is in the process of appealing the decisions.

Appellee Mr. DiBiase disagrees with Righthaven to the extent that it includes *Righthaven LLC v. Center for Intercultural Organizing*, Case No. 11-16358, and *Righthaven LLC v. Realty One Group, Inc.*, Case No. 11-15714 as related cases. The district court dismissed these copyright infringement cases on fair use grounds. The case at hand involves a dismissal of the case for lack of ownership of the copyright and consequent lack of standing.

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Righthaven also includes *Righthaven LLC v. Newman*, Case No. 11-17690 as a related case. That appeal, however, was dismissed on December 28, 2011 because Righthaven failed to file a Mediation Questionnaire. This case is no longer pending in front of the Court, and is therefore no longer a related case.

Dated: January 13, 2012
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WILSON SONSINI GOODRICH &
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By: _____
 /s/ Colleen Bal
 Colleen Bal

Attorneys for Defendant-Appellee
Thomas A. DiBiase

**CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
FOR CASE NO.: 11-16776**

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief :

1. Complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 10,547 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is written in 14-point proportionally spaced typeface.

Dated: January 13, 2012

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Colleen Bal
Colleen Bal

Attorneys for Defendant-Appellee
Thomas A. DiBiase

9th Circuit Case Number(s): 11-16776

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 13, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Deborah Grubbs

Deborah Grubbs