

Case No. 11-16751

In the
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RIGHTHAVEN LLC,
Plaintiff-Appellant,

v.

WAYNE HOEHN,
Defendant-Appellee.

On Appeal From a Judgment of the United States
District Court for the District of Nevada
Case No. 2:11-CV-00050-PMP-RJJ
The Honorable Philip M. Pro

**BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN
PUBLISHERS & THE RECORDING INDUSTRY ASSOCIATION OF
AMERICA IN SUPPORT OF NEITHER PARTY**

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Pursuant to Federal Rule of Appellate Procedure 26.1, the Association of American Publishers has no parent corporation, and no publicly held company owns 10% or more of its stock. The Recording Industry Association of America also has no parent company, and no publicly held company owns 10% or more of its stock.

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**CERTIFICATE OF COMPLIANCE
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I hereby certify that pursuant to Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) & (C) and Ninth Circuit Rule 32-1, the enclosed brief is proportionately spaced, has a typeface of 14-point Times New Roman including footnotes, and contains approximately 3,471 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 5, 2011

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STATEMENT OF INTERESTS

The Association of American Publishers and the Recording Industry Association of America have moved for leave to file this brief because counsel for Appellee Wayne Hoehn refused to consent to its filing. Counsel for Appellant Righthaven LLC consented.

No party's counsel authored this brief in whole or in part. No party contributed money intended to fund the preparation or submission of this brief. No person other than *Amici* contributed money intended to fund the preparation or submission of this brief.

The Association of American Publishers ("AAP") is the trade association for U.S. book publishers, providing advocacy and communications on behalf of the industry. The AAP represents the industry's priorities on policy, legislative, and regulatory issues regionally, nationally, and worldwide. These include the protection of intellectual property rights and worldwide copyright enforcement, digital and new technology issues, funding for education and libraries, tax and trade, censorship, and literacy. The AAP's members are responsible for turning ideas into entertainment, knowledge, public service, civil discourse, and inspiration. These companies are recognized as innovators and leaders in merging high-value content and cutting-edge technology as they redefine the timeless concept of "books."

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately eighty-five percent of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA protects the ability of the music business to invest in new bands and new music and, in the digital arena, to give online services space to continue to prosper.

Because strong and effective copyright laws enable publishers and recording companies to protect their investments in creative works and the marketing and distribution thereof, *Amici* have an interest in ensuring that courts apply copyright laws consistently and carefully. As both copyright owners and users of copyrighted materials, *Amici*’s members also have an interest in promoting a balanced and pragmatic approach to fair use as an important affirmative defense to copyright infringement.

Below, the district court granted the defendant’s motion under Federal Rule of Civil Procedure 12(b)(1) because the court concluded that the plaintiff, who

owns no exclusive rights in the work at issue, lacked standing to sue the defendant for copyright infringement. The district court thus lacked subject matter jurisdiction over the plaintiff's alleged claims and should not have considered, much less granted, the plaintiff's summary judgment motion based on fair use. The court's fair use analysis was flawed because the parties before the court, lacking any authority to exploit the copyrighted work, were in no position to present relevant arguments on the critical issue of the impact of the defendant's use upon such exploitation. If this Court affirms the district court's decision with respect to standing, *Amici* ask this Court to vacate the portion of the district court's order that granted the defendant's motion for summary judgment on fair use.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Act of 1976 permits only “the legal or beneficial owner of an exclusive right under a copyright ... to institute an action for any infringement of that particular right” 17 U.S.C. § 501(b). In addition to this statutory standing requirement, a person with no ownership interest in a copyrighted work has no constitutional standing to bring an infringement action because a non-owner cannot prove any “injury in fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, if any person other than a legal or beneficial owner of an exclusive right brings an infringement action, it must be dismissed for lack of subject matter jurisdiction.

Appellant Righthaven, LLC claims to own copyrights in numerous newspaper articles first published in the Las Vegas Review-Journal (the “Journal”).¹ *Righthaven, LLC v. Hoehn*, 99 U.S.P.Q.2d (BNA) 1104, 1105 (D. Nev. 2011). The District Court analyzed two agreements between the Journal’s owner and Righthaven, and a subsequent amendment to one of them, and concluded that none of these agreements successfully assigned any exclusive right of a copyright owner to Righthaven. *Id.* at 1109.

Assuming that the district court correctly concluded that Righthaven did not own an exclusive right in the work at issue,² it was correct to grant the defendant’s motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Had the district court stopped there, *Amici* would have no quarrel with the decision below. Instead, the district court considered and granted the defendant’s motion for summary judgment under Federal Rule of Civil Procedure 56 based on the affirmative defense of fair use, which is set forth in 17 U.S.C. § 107. *Id.* at 1109-12. In so doing, the court reached a question it had no power to consider.

¹ Stephens Media owns the Journal.

² *Amici* take no position on whether the agreements at issue successfully transferred any exclusive rights from Stephens Media to Righthaven.

In order to reach the separate Rule 56 motion, the district court attempted to assume, in the alternative, that “Righthaven was found to have standing in [the] action,” (*id.* at 1109) but the court instead erred by rendering a mere advisory opinion. *See Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (“[A] federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits.”); Charles Allan Wright & Arthur R. Miller, *et al.*, 13A Federal Practice & Procedure § 3531 (3d ed. 2011) (“The simplest theoretical perspective on standing draws directly from our tradition that unnecessary judicial decisions should be avoided.”).

Where subject matter jurisdiction is lacking, federal courts cannot adjudicate claims. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010) (“‘Jurisdiction’ refers to ‘a court’s adjudicatory authority.’”) (internal citation omitted). Thus, if this Court affirms the district court’s order on the defendant’s Rule 12(b)(1) motion, the Court should vacate the district court’s order on the defendant’s Rule 56 motion.³

³ In fact, questions regarding the presence of subject matter jurisdiction are so fundamentally important that a court of appeals must raise them *sua sponte* even where a lower court decided the case at hand on the merits and where the parties below did not contest the issue. *See California v. United States*, 215 F.3d 1005, 1009 (9th Cir. 2000) (“An appellate court is under a ‘special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. . . . [or] make no contention concerning it.’ If the district court lacked jurisdiction, we have

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Because no copyright owner, nor any party with authority to exploit the work, was before the court, the district court's analysis of the critical fourth fair use factor – the effect of the use on existing or potential markets for the work – was inescapably flawed. The court incapacitated itself from receiving an adversarial illumination of the issue by relying on Righthaven – whom the court had just found had no right or interest in *any* market for the work – to rebut the defendant's assertions. Without evidence of potential market harm in the record, the court could not properly balance the equities involved.

For these reasons and for the reasons discussed below, the Court should vacate the portion of the district court's opinion that granted summary judgment for the defendant on the affirmative defense of fair use.

ARGUMENT

THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY GRANTING HOEHN'S SUMMARY JUDGMENT MOTION AFTER CONCLUDING THAT RIGHTHAVEN WAS NOT A COPYRIGHT OWNER

The district court concluded that, with respect to the work at issue, Righthaven did not own any of the exclusive rights provided by the Copyright Act.

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jurisdiction on appeal to correct the jurisdictional error, but not to entertain the merits of the dispute.”), *quoting Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935, 943 (9th Cir. 1999). *See also Righthaven LLC v. Center For Intercultural Organizing*, No. 11-16358 (9th Cir. 2011) (ruling on fair use appealed without subject matter jurisdiction issue presented).

See Hoehn, 99 U.S.P.Q.2d (BNA), at 1109; *see also* 17 U.S.C. § 106 (listing exclusive rights of reproduction, adaptation, distribution, public performance, and public display). Based on this conclusion, the district court granted the defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *Hoehn*, 99 U.S.P.Q.2d (BNA), at 1109. If the court's conclusion with respect to Righthaven's lack of ownership was correct, the court properly granted the motion.

The Copyright Act expressly states that only legal and beneficial owners of exclusive rights in works can sue for infringement thereof. 17 U.S.C. § 501(b). Under this provision, a non-owner lacks standing. *See United Intn'l Fabrics, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011) (calling satisfaction of § 501(b) "an element that is essential to all copyright infringement actions"); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc) ("a party that has no ownership interest has no standing to sue"), *cert. denied*, 546 U.S. 827 (2005).

The statutory standing limitation of § 501(b) is consistent with the "case or controversy" requirement of Article III of the U.S. Constitution. As this Court recently stated in *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (internal citations omitted), *cert. granted*, 131 S. Ct. 3022 (2011):

"The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" "Essentially,

the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.”⁴

Article III prevents a plaintiff who has suffered no “injury in fact” from accessing the federal courts. *See Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (“If ... a litigant who commences suit fails to show actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision, the Federal Judiciary cannot hear the claim.”). When standing is absent, a district court lacks subject matter jurisdiction over the plaintiff's claim. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2824 (2009) (“A party invoking federal jurisdiction has the burden of establishing that it has satisfied the ‘case-or-controversy’ requirement of Article III of the Constitution; standing is a ‘core component’ of that requirement.”) (internal citations omitted); *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (linking Article III standing with subject matter jurisdiction of federal courts).⁵

⁴ Intellectual property statutes fit within the category of statutes that confer standing by creating legal rights. *See Silvers*, 402 F.3d at 887 (discussing *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24 (1923)).

⁵ Even assuming that constitutional standing was present, a plaintiff in a copyright infringement suit who did not own any exclusive right would fail to satisfy the test for establishing “prudential standing.” *See On the Green Apts. L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1239 (9th Cir. 2001) (A plaintiff “must satisfy the prudential component of standing; that is, its ‘complaint must ‘fall within the zone (...continued)

““At bottom, ‘the gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’”” *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (Kleinfeld, J.) (internal citations omitted), *cert denied*, 131 S. Ct. 2875 (2011). Where a plaintiff has not been harmed directly, the plaintiff is unlikely to be able to present all of the relevant evidence to the court: such a plaintiff cannot provide the court with necessary factual support or fully present advantageous legal arguments because it is a stranger to the rights at issue.

[The injury in fact requirement] preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Massachusetts v. EPA, 549 U.S. 497, 517 (2007), *quoting Lujan*, 504 U.S. at 581 (Kennedy, J. concurring).

The opinion below confirms this common sense precept. The need for “concrete adverseness” is at its maximum when courts are faced with resolving

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of interests to be protected or regulated by the statute or constitutional guarantee in question.’””) (internal citations omitted).

issues, such as those that arise while applying the fair use defense, which are intensely fact-specific. *See* James W. Moore, *et al.*, 15-101 Moore’s Federal Practice § 101.40[1][a] (3d. ed. 2011) (“One rationale for the injury-in-fact requirement is to ensure that the court will have the benefit of an adversary presentation with full development of the relevant facts.”); *see also Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“[Since] the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”), *quoting* H.R. Rep. No. 94-1476, at 65 (2d Sess. 1976).

As the Supreme Court has instructed, fair use analysis “is not to be simplified with bright-line rules, for the statute ... calls for case-by-case analysis. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 569, 577 (1994) (internal citations omitted).

⁶ As set forth in 17 U.S.C. § 107, the four statutory fair use factors are:
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The district court focused on the fourth statutory factor, the effect on actual or potential markets for the plaintiff's work, because "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Hoehn*, 99 U.S.P.Q.2d (BNA), at 1112, quoting *Harper & Row*, 471 U.S. at 566-67. However, because Righthaven had no right to market or exploit the work in any way, it was incapable of making any showing of any harm to actual or potential markets for the work. See *Hoehn*, 99 U.S.P.Q. 2d (BNA) at 1112 ("Righthaven has not presented any evidence of harm or negative impact from Hoehn's use of the Work on the Website."). Thus, the gravamen of the district court's fair use decision exemplifies the problematic nature of assuming jurisdiction where it is lacking.⁷ Possessing only naked rights

⁷ The district court compounded its initial error of exceeding its authority by proceeding to mishandle multiple aspects of its fair use analysis. See *Hoehn*, 99 U.S.P.Q.2d (BNA), at 1109-1112. For example, the court was wrong to place the burden of proof on Righthaven under the fourth factor. See *Campbell*, 510 U.S. at 590 (describing fair use as an affirmative defense to copyright infringement, as to which the defendant bears the burden of proof). In addition, the court erroneously labeled the defendant's use non-commercial. This ruling was inconsistent with prior cases, including *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001), where this Court held that making an entire work available on the Internet constituted an infringing commercial use because it enabled anyone with access to the Internet to consume the work without compensation to the copyright owner. See also *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (users of Internet bulletin board service engaged in commercial use of works by posting copies of videogames such that other users could access and download the works), clarified by, 948 F. Supp. 923 (N.D. Cal. 1996).

to sue for infringement, and no control over any exclusive rights in the work, Righthaven could not be expected to marshal evidence of market harm or even to understand how existing or potential markets for works are impacted by acts of infringement. Righthaven possessed no “actual stake in the outcome,” and its lack of standing made it impossible to achieve the needed “concrete adverseness” to permit an informed ruling on the merits of the fair use claim.

The district court should not have considered the merits of the defendant’s motion for summary judgment due to Righthaven’s lack of standing. *See Giddings v. Vision House Productions, Inc.*, 584 F. Supp. 2d 1222, 1229 (D. Ar. 2008) (declining to address the merits of summary judgment motion where plaintiff did not own copyrights at issue); *see also* Charles Allan Wright & Arthur R. Miller, *et al.*, 13A Federal Practice & Procedure § 3531 (3d ed. 2011) (“The fear that unnecessary decisions will prove unwise is deepened by the belief that the functional needs of the adversary system require litigants who will be affected tangibly by the decision.”). In the absence of subject matter jurisdiction, the court did not have the authority to adjudicate the claim. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“Hypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.”). This Court should vacate the portion of the district court’s order that granted the defendant’s

motion for summary judgment. *See Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2005) (where subject matter jurisdiction was lacking, district court orders were vacated as “nullities”), *aff’d*, 545 U.S. 596 (2005); *California*, 215 F.3d at 1014 (vacating district court judgment in favor of defendant due to lack of subject matter jurisdiction).⁸

Amici appreciate that the outcome of this case will be the same, even if this Court simply affirms the district court. But such a disposition of the case risks setting a disturbing precedent that fair use controversies may be adjudicated, not between users and copyright owners, but between users and strangers to the work, and that the courts may safely rely on the latter to marshal the evidence about markets in which they cannot participate and have no incentive to understand.

⁸ This case is distinct from *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247 (2010). There, the Supreme Court held that 17 U.S.C. § 411(a), which requires copyright owners to register their works with the U.S. Copyright Office prior to bringing actions for infringement, did not impose a jurisdictional limitation on federal courts because § 411(a) was a “claim-processing” rule. *See Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (defining a claim-processing rule as a “rule[] that seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”). In contrast, § 501(b) is jurisdictional. *See Reed Elsevier v. Muchnick*, 509 F.3d 116, 130-34 (2d Cir. 2008) (Walker, J. dissenting) (explaining that § 411(a) is not jurisdictional because a copyright *owner* suffers an injury in fact regardless of whether the owner’s work is registered). Unlike § 411(a), § 501(b) is not negotiable: it applies to all plaintiffs without exception. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 868-69 (9th Cir. 2010) (applying *Muchnick* and holding statute was non-jurisdictional because, *inter alia*, the statute included congressionally crafted exceptions to its application).

Indeed, the risk of collusive litigation to “establish” sweeping fair use pronouncements cannot be ruled out, once courts deviate from the constitutional (and, in this case, statutory as well) principle that difficult legal issues that depend heavily on the specific facts of the case can only be addressed through the adversarial presentations of parties with a real “stake in the outcome.”

CONCLUSION

For the reasons stated, *Amici* urge the Court to vacate the portion of the district court’s order that granted the defendant’s motion for summary judgment on the issue of fair use.

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CERTIFICATE OF SERVICE VIA CM/ECF

I hereby certify under penalty of perjury that on December 5, 2011, I electronically filed the foregoing document entitled **BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PUBLISHERS & THE RECORDING INDUSTRY ASSOCIATION OF AMERICA IN SUPPORT OF NEITHER PARTY** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system.

All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

s/ J. Matthew Williams

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