

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

**APPELLEE THOMAS A. DIBIASE'S
SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME I OF II – Pages SER 1 – SER 33**

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RIGHTHAVEN, LLC,

Plaintiff,

v.

WAYNE HOEHN,

Defendant.

2:11-CV-00050-PMP-RJJ

ORDER

Presently before the Court is Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #16), filed on April 17, 2011. Plaintiff filed a Response (Doc. #23), on May 9, 2011. Defendant filed a Reply (Doc. #26), on May 15, 2011. Also before the Court is Defendant’s Motion for Summary Judgment (Doc. #8), filed on February 11, 2011. Plaintiff filed a Response (Doc. #13), on March 7, 2011. Defendant filed a Reply (Doc. #14), on March 24, 2011. This Court held a hearing on the Motion for Summary Judgment on May 3, 2011. (Mins. of Proceedings (Doc. #19).)

I. BACKGROUND

This is a copyright infringement action brought by Plaintiff Righthaven LLC (“Righthaven”) against Defendant Wayne Hoehn (“Hoehn”), who is and was at all relevant times a registered user and content contributor to the website <madjacksports.com> (the “Website”). (Pl.’s Resp. To Mot. For Summ. J. [“Resp.”] (Doc. #13).) Hoehn has never been employed by the Website’s owner and operator. (Id.) On or about November 29, 2010, Hoehn displayed an unauthorized reproduction of a copyrighted literary work entitled

1 “Public Employee Pensions. We Can’t Afford Them” (the “Work”) as part of the content
2 contributed by him to the Website. (Id.) In his reproduction, Hoehn attributed the source of
3 the Work to the Las Vegas Review Journal (“LVRJ”). (Compl. (Doc. #1).) Hoehn avers
4 that he did not post the Work for profit and that there was no mechanism for him to profit
5 by posting the Work on the website. (Def.’s Mot. For Summ. J. [“MSJ”] (Doc. #8), Hoehn
6 Decl., Ex. A.) Hoehn states he removed the Work from the Website on January 6, 2011.

7 (Id.)

8 At the time of the posting, Righthaven was not the owner of the Work, rather the
9 Work was owned by Stephens Media. (Gibson Decl. (Doc. #24), Ex 1.) In January 2010,
10 Righthaven and Stephens Media entered into the Strategic Alliance Agreement (the
11 “SAA”), governing the ongoing relationship between Righthaven and Stephens Media
12 regarding assignment of copyrights originally owned by Stephens Media. (Gibson Decl.)
13 Section 3.3 of the SAA governs the rights and responsibilities of Righthaven and Stephens
14 Media with respect to pursuing alleged infringers and states in part:

15 If Righthaven chooses in the Remediation Option Notice to not pursue
16 an Infringement Action (the “Remediation Declination”), then
17 Righthaven shall reassign the Assigned Copyright to Stephens Media
18 that is the subject of the Remediation Declination
19 Notwithstanding any other provision of this Agreement, Stephens
20 Media shall have the right to Notify Righthaven, within five (5)
21 Business Days after receipt of a respective Remediation Option Notice,
22 that Righthaven should not take any Infringement Action with respect
23 to a particular putative infringer as indicated in any Remediation
24 Option Notice (the “Declination Notice”) and upon receipt of a
25 Declination Notice, Righthaven shall not take any Infringement Action
26 with respect to the particular putative infringer set forth in any
Declination Notice; provided, however, that Stephens Media shall only
send any Declination Notice on a reasonable basis with the grounds of
reasonability being that a particular infringer is a charitable
organization, is likely without financial resources, is affiliated with
Stephens Media directly or indirectly, is a present or likely future
valued business relationship of Stephens Media or otherwise would be
a Person that, if the subject of an Infringement Action, would result in
an adverse result to Stephens Media.

(Gibson Decl., Ex. 2.)

1 Section 7.2 of the SAA states in part:

2 Despite any such Copyright Assignment, Stephens Media Shall retain
3 (and is hereby granted by Righthaven) an exclusive license to Exploit
4 the Stephens Media Assigned Copyrights for any lawful purpose
5 whatsoever and Righthaven shall have no right or license to Exploit or
6 participate in the receipt of royalties from the Exploitation of the
7 Stephens Media Assigned Copyrights other than the right to proceeds
8 in association with a Recovery. To the extent that Righthaven's
9 maintenance of rights to pursue infringers of the Stephens Media
10 Assigned Copyrights in any manner would be deemed to diminish
11 Stephens Media's right to Exploit the Stephens Media Assigned
12 Copyrights, Righthaven hereby grants an exclusive license to Stephens
13 Media to the greatest extent permitted by law so that Stephens Media
14 shall have unfettered and exclusive ability to Exploit the Stephens
15 Media Assigned Copyrights.

16 (Id.)

17 Section 8 of the SAA is titled "Stephens Media's Right of Reversion." Section 8
18 states in part:

19 Stephens Media shall have the right at any time to terminate, in good
20 faith, any Copyright Assignment (the "Assignment Termination") and
21 enjoy a right of complete reversion to the ownership of any copyright
22 that is subject of a Copyright Assignment. . . . In order to effect
23 termination of the [sic] any Copyright Assignment, Stephens Media
24 shall be required to provided Righthaven with thirty (30) days prior
25 written notice. Within thirty (30) days after receipt of termination of
26 the [sic] any Copyright Assignment, Righthaven shall commence
documentation to effect reassignment of the Stephens Media Assigned
Copyrights to Stephens Media.

(Id.)

On December 6, 2010, Stephens Media, the original owner of the Work, assigned
all rights, title, and interest in and to the Work, including the right to seek redress for all
past, present, and future infringements, to Plaintiff Righthaven (the "Assignment").

(Gibson Decl.) The Assignment states in part:

Assignor hereby transfers, vests and assigns the work described in Exhibit A,
attached hereto and incorporated herein by this reference (the "Work"), to
Righthaven, subject to the Assignor's rights of reversion, 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

1 for past, present and future infringements of the copyright, both accrued and
2 unaccrued, in and to the Work.

3 (Gibson Decl., Ex. 1.)

4 Plaintiff Righthaven brought the present suit against Hoehn on January 11, 2011,
5 based on Hoehn's posting of the Work on the Website. (Compl. (Doc. #1).) The suit seeks
6 a permanent injunction prohibiting Hoehn from posting the Work and an award of statutory
7 damages.

8 On April 17, 2011, Hoehn filed a Motion to Dismiss for lack of subject matter
9 jurisdiction, arguing that Righthaven did not have the requisite standing to bring a copyright
10 infringement suit because it was not the owner of an exclusive right. On May 9, 2011,
11 Stephens Media and Righthaven entered into the Clarification and Amendment to Strategic
12 Alliance Agreement (the "Clarification"). (Gibson Decl., Ex. 3.) The Clarification states
13 that the intent of the parties when they entered into the SAA was "to grant Stephens Media
14 a license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose
15 whatsoever without in any way hindering the right of Righthaven to seek redress for any
16 past, present or future infringements of such copyright." (Id.) The Clarification amends
17 section 7.2 of the SAA and replaces it with the following:

18 Automatically upon execution of a Copyright Assignment, Stephens
19 Media is granted a non-exclusive license to Exploit the Stephens
20 Media Assigned Copyright to the greatest extent permitted by law in
21 consideration for payment in the amount of One Dollar and Zero Cents
22 (\$1.00) per year to Righthaven as a license or royalty for each Stephens
23 Media Assigned Copyright as Consideration for the license granted
24 herein (the "License Fee"). Any License Fee required under this
25 amended and revised Section 7.2 shall be retroactive to the Effective
26 Date. In the event that Righthaven decides to Exploit or participate in
receipt of royalties from Exploitation of a Stephens Media Assigned
Copyright other than in association with a Recovery, Righthaven shall
give Stephens Media 30 days prior written notice. The 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.

1 (Id.)

2 Additionally, the Clarification amends section 8 of the SAA and replaces it with
3 sections 8.1 and 8.2, including the following:

4 At any time, within its sole discretion, Stephens Media shall have the
5 option, within 14 days of providing notice of the exercise of such
6 option, to purchase all right and title to the Stephens Media Assigned
7 Copyright in consideration for payment in the amount of Ten Dollars
8 and Zero Cents (\$10.00) (“Exercised Option”).

9 (Id.) The Clarification states it is to be retroactively effective to the original date of the
10 SAA. (Id.)

11 Also on May 9, 2011, Righthaven filed the Declarations of Steven A. Gibson
12 (“Gibson”), CEO of Righthaven, and Mark Hinueber (“Hinueber”), General Counsel of
13 Stephens Media. (Gibson Decl.; Hinueber Decl. (Doc. #25).) Both Gibson and Hinueber
14 state that it was the parties’ intent to grant all ownership rights in the Work to Righthaven
15 together with the right to sue for all past, present, and future copyright infringement. (Id.)
16 Hinueber also states that it was not the intent of Stephens Media “to divest or otherwise
17 impair Righthaven’s ability to file or otherwise maintain copyrighted infringement actions
18 based on content . . . specifically assigned to Righthaven through the license-back rights
19 described in the SAA. Rather it was [the parties’] intent in this regard to acknowledge
20 Stephens Media’s ability to continue to use the assigned content as a licensee.” (Hinueber
21 Decl.)

22 Hoehn now moves to dismiss, arguing this Court does not have subject matter
23 jurisdiction over this matter because Righthaven does not own any exclusive rights in the
24 copyright necessary to bring suit. Hoehn further contends that the May 9, 2011
25 Clarification to the SAA does not correct these deficiencies and ultimately deprives
26 Righthaven of any exclusive rights in the assigned copyright. Righthaven responds that it
has standing to bring this suit, and in any event, the May 9, 2011 Clarification cures any
alleged defect in standing. Further, Righthaven argues the SAA reflects promises made

1 between Righthaven and Stephens Media with regard to future transactions, but itself does
2 not cause an assignment of rights. Rather, Righthaven argues, the assignment of rights is
3 governed by the Assignment entered into on December 6, 2010.

4 Additionally, Hoehn moves for summary judgment, arguing that his use of the
5 Work is protected as fair use. Righthaven responds that summary judgment on fair use is
6 premature as Plaintiff has not been permitted to engage in discovery and, in any case,
7 Defendant fails to establish that his conduct is protected as fair use. Defendant replies that
8 Plaintiff was given the opportunity to engage in discovery and did not do so. Additionally,
9 Defendant states that because both parties agree as to the facts of the case, there is no
10 genuine issue of material fact and summary judgment is appropriate.

11 **II. MOTION TO DISMISS FOR LACK OF JURISDICTION**

12 To hear a case, a federal court must have subject matter jurisdiction over the
13 matter at hand. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Central to
14 the issue of subject matter jurisdiction is the issue of standing, requiring the party invoking
15 jurisdiction to establish actual or imminent harm. Id. at 560. The invoking party bears the
16 burden of establishing standing with the same burden of proof “required at the successive
17 stages of the litigation.” Id. at 561. If a court does not set a hearing on a motion to dismiss,
18 “a plaintiff must make only a prima facie showing of jurisdictional facts through the
19 submitted materials in order to avoid a defendant’s motion to dismiss.” Data Disc, Inc. v.
20 Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977).

21 “[O]nly copyright owners and exclusive licensees of copyright may enforce a
22 copyright.” Sybersound Records v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).
23 Exclusive rights in a copyright are enumerated in 17 U.S.C. § 106 and include the exclusive
24 rights:

- 25 (1) to reproduce the copyrighted work in copies or phonorecords;
- 26 (2) to prepare derivative works based upon the copyrighted work; [and]
- (3) to distribute copies or phonorecords of the copyrighted work to the public by

1 sale or other transfer of ownership, or by rental, lease, or lending.
2 Id. “The right to sue for an accrued claim for infringement is not an exclusive right under
3 § 106.” Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 884 (2005). “Exclusive rights
4 in a copyright may be transferred and owned separately, but . . . [there are] no exclusive
5 rights other than those listed in §106.” Id. at 885. While the right to sue is not an exclusive
6 right, it may be transferred to another party if accompanied with an exclusive right. Id. at
7 890 n.1. Additionally, the right to sue for past infringement can be transferred to another
8 party so long as it is expressly included in the assignment along with an exclusive right. Id.
9 at 889-90.

10 Plaintiff Righthaven alleges it has presented evidence in the form of the
11 Assignment that Stephens Media transferred to Righthaven exclusive rights in the Work
12 coupled with the right to sue based on infringement of the copyrighted Work. Additionally,
13 Righthaven argues that to the extent the Court finds the Assignment ambiguous, the Court
14 should look to the parties’ intent, evidenced by the Gibson and Hinueber declarations, that
15 the parties intended to transfer the exclusive rights in the Work along with the right to sue
16 based on past, present, and future infringement of the copyrighted Work.

17 Ownership of the exclusive right to reproduce the copyrighted work is necessary
18 to bring a suit for infringement based on reproduction of the copyrighted work.
19 Sybersound, 517 F.3d at 1144. The language of the Assignment transfers “all copyrights
20 requisite to have Righthaven recognized as the copyright owner of the Work for purposes of
21 Righthaven being able to claim ownership as well as the right to seek redress for past,
22 present and future infringements of the copyright.” Additionally, Hinueber states that
23 “Stephens Media assigned all rights, title and interest in and to the Work, including the right
24 to seek redress for all past, present and future infringements of the Work to Righthaven on
25 December 6, 2010.” (Hinueber Decl.)

26 ///

1 However, the Assignment cannot be read in isolation. The SAA governs the
2 parties' relationship with respect to Copyright Assignments. (Gibson Decl., Ex. 2 at 7.1.)
3 Additionally, the blank form Assignment is incorporated as an attachment to the SAA,
4 indicating that the two documents together govern the transfer of Copyright Assignments
5 rather than the Assignment alone. (Id., Ex. 1.) The Assignment together with the SAA are
6 unambiguous.

7 The Court finds the SAA in its original form qualifies the Assignment with
8 restrictions or rights of reversion, such that in the end, Righthaven is not left with
9 ownership of any exclusive rights. Under Section 3.3 of the SAA, Righthaven is obligated
10 to reassign the rights to the Work if it does not pursue an infringement action within 60 days
11 of the Assignment. Additionally, this section gives Stephens Media the right to direct
12 Righthaven not to pursue an action against an alleged infringer. Further, under Section 7.2,
13 Righthaven has "no right of license to Exploit or participate in the receipt of royalties from
14 the Exploitation of the Stephens Media Assigned Copyrights" Stephens Media has the
15 unilateral right, at any time, to terminate the Copyright Assignment and enjoy a complete
16 right of reversion. These carveouts deprive Righthaven of any of the rights normally
17 associated with ownership of an exclusive right necessary to bring suit for copyright
18 infringement and leave Righthaven no rights except to pursue infringement actions, a right
19 which itself is subject to Stephens Media's veto.

20 In Nafal v. Carter, the court faced a similar disconnect between the parties' label
21 of a transfer of exclusive rights in a copyright assignment and the reality of their transfer.
22 540 F. Supp. 2d 1128 (C.D. Cal. 2007). The Nafal court found that despite an assignment
23 purporting to give the plaintiff "an undivided one-half (50%) of [assignor's] rights, title and
24 interest [in the work]," this label could not subvert summary judgment where the reality of
25 the assignment left the plaintiff with little to no rights in the copyrighted work. Id. at 1141-
26 42. The court found that the assignment did not make the plaintiff a "co-exclusive

1 licensee” with the right to sue for infringement because the assignment gave the plaintiff no
2 discretion in deciding when to sue an alleged infringer; the plaintiff’s interest in the
3 copyrighted work would be terminable if the plaintiff did not bring an infringement lawsuit
4 within a certain time period; nearly every effort by the plaintiff to exploit the copyrighted
5 work had to be approved in advance; and the plaintiff did not offer facts that would permit
6 the inference that he had rights to do anything beyond negotiating “compulsory mechanical
7 licenses, which does not confer Plaintiff with the power to exploit any exclusive rights.”¹ Id.
8 at 1143.

9 Although the Court is evaluating Righthaven’s standing at the dismissal stage,
10 rather than summary judgment as in Nafal, similar factors lead the Court to the same
11 conclusion. Stephens Media retains discretion over when to bring suit for infringement and
12 Righthaven’s rights will be terminated if it does not bring suit within a specified time
13 period. Righthaven has no right to exploit or profit from the work in any way other than
14 that associated with recovery from an infringement action. The Copyright Assignment is
15 fully terminable by Stephens Media at any time. Righthaven has no meaningful rights other
16 than the bare right to sue, something that is not transferable under Silvers. 402 F.3d at 884.

17 Similarly, in Lahiri v. Universal Music & Video Distrib. Corp., the Court found
18 that an assignment that used ownership language but was too restrictive to convey such a
19 right could not transfer an exclusive right. 606 F.3d 1216, 1222 (9th Cir. 2010). The
20 assignment the plaintiff relied on to establish a right in the copyrighted work transferred
21 only an interest in the recovery based on copyright infringement and no interest in the work
22 itself. Here, the rights in the copyrighted Work retained by Stephens Media deprive
23 Righthaven of everything except the right to pursue alleged infringers, a right that is still

24
25 ¹ A mechanical license “grants third parties the non-exclusive right to reproduce a musical
26 composition on phonorecords, provided that the copyright owner has already authorized the use of such
work,” during the manufacture and sale of phonorecords. Nafal, 540 F. Supp. 2d at 1143.

1 subject to Stephens Media's oversight. Accordingly, Righthaven does not possess an
2 exclusive right in the Work and therefore does not have standing to bring a suit for
3 infringement.

4 Even assuming that the May 9, 2011 Clarification can change the jurisdictional
5 facts as they existed at the time of the filing of the suit, it still does not correct the
6 deficiencies with respect to lack of standing. The May 9, 2011 Clarification offers recitals
7 stating the parties' intent "to convey all ownership rights in and to any identified Work to
8 Righthaven . . . so that Righthaven would be the rightful owner of any identified Work and
9 entitled to seek copyright registration." However, it does not provide Righthaven with any
10 exclusive rights necessary to bring suit.

11 The May 9, 2011 Clarification provides Righthaven with only an illusory right to
12 exploit or profit from the Work, requiring 30 days advance notice to Stephens Media before
13 being able to exploit the Work for any purpose other than bringing an infringement action.
14 Stephens Media has, in its sole discretion, the option to repurchase the Copyright
15 Assignment for a nominal amount within 14 days, thereby retaining the ability to prevent
16 Righthaven from ever exploiting or reproducing the Work. Stephens Media's power to
17 prevent Righthaven from exploiting the Work for any purpose other than pursuing
18 infringement actions is further bolstered by the Clarification's provision that every
19 exploitation of the Work by Righthaven other than pursuing an infringement action without
20 first giving Stephens Media notice constitutes irreparable harm to Stephens Media.
21 Stephens Media may obtain injunctive relief against Righthaven to prevent such
22 "irreparable harm" and, pursuant to the Clarification, Righthaven has no right to oppose
23 Stephens Media's request for injunctive relief. Accordingly, Righthaven does not have any
24 exclusive rights in the Work and thus does not have standing to bring an infringement
25 action. The Court therefore will grant Defendant's Motion to Dismiss for lack of standing.

26 ///

1 **III. SUMMARY JUDGMENT**

2 Assuming Righthaven was found to have standing to bring this action, the Court
3 nonetheless finds Hoehn is entitled to summary judgment on the ground of fair use of the
4 Work. Summary judgment is appropriate if the pleadings, depositions, answers to
5 interrogatories and admissions, and affidavits demonstrate “there is no genuine dispute as to
6 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
7 56(a). A fact is “material” if it “might affect the outcome of the suit under the governing
8 law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if
9 “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
10 Id. Where a party fails to offer evidence sufficient to establish an element essential to its
11 case, no genuine issue of material fact can exist, because “a complete failure of proof
12 concerning an essential element of the nonmoving party’s case necessarily renders all other
13 facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

14 The party “seeking summary judgment bears the initial responsibility of
15 informing the district court of the basis for its motion, and identifying those portions of ‘the
16 pleadings . . .’ which it believes demonstrate the absence of a genuine issue of material
17 fact.” Id. at 323. The burden then shifts to the non-moving party to go beyond the
18 pleadings and set forth specific facts demonstrating there is a genuine issue of material fact
19 for trial. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000). The
20 Court views all evidence in the light most favorable to the non-moving party. County of
21 Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

22 Under Federal Rule of Civil Procedure 56(b) “a party may file a motion for
23 summary judgment at any time until 30 days after the close of all discovery.” “If a
24 nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present
25 facts essential to justify its opposition, the court may” defer consideration of a motion or
26 deny it, allow the parties time to complete additional discovery, or grant other appropriate

1 relief. Fed. R. Civ. P. 56(d). The party requesting additional time to conduct discovery to
2 oppose summary judgment must present an affidavit stating the specific facts it hopes to
3 elicit from further discovery, that the facts exist, and that the facts are essential to oppose
4 summary judgment. Family Home & Fin. Ctr, Inc. v. Fed. Home Loan Mortg. Corp., 525
5 F.3d 822, 827 (9th Cir. 2008). If the nonmovant does not satisfy these requirements, the
6 court may proceed to rule on summary judgment without granting additional discovery. Id.

7 Fair use is a defense to use of a copyrighted work which otherwise would be
8 copyright infringement if the work is used “for purposes such as criticism, comment, news
9 reporting, teaching . . . , scholarship, or research.” 17 U.S.C. § 107. Factors to be
10 considered when determining fair use include-

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

15 Id.

16 Fair use is evaluated on a case-by-case basis. Campbell v. Acuff-Rose Music,
17 Inc., 510 U.S. 569, 577 (1994). “Fair use is a mixed question of law and fact. If there are
18 no genuine issues of material fact, . . . and a reasonable trier can reach only one conclusion,
19 a court may conclude as a matter of law whether the challenged use qualifies as a fair use of
20 the copyrighted work.” Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119,
21 1120 (9th Cir. 1997) (quotation omitted). “Where material facts are not in dispute, fair use
22 is appropriately decided on summary judgment.” Mattel, Inc. v. Walking Mountain Prods.,
23 353 F.3d 792, 800 (9th Cir. 2003).

24 As an initial matter, Righthaven argues that summary judgment is premature
25 because Righthaven has not conducted discovery. Hoehn responds that Righthaven has had
26 the opportunity to conduct discovery and has failed to do so. Additionally, Hoehn argues

1 that all facts necessary to decide summary judgment are undisputed and before the Court.

2 Hoehn's motion complies with the time strictures set by Rule 56(b). Righthaven
3 has not presented an affidavit showing the specified reasons it needs to conduct discovery to
4 oppose summary judgment, or, the types of facts it hopes to elicit, that these facts exist, and
5 that these facts are necessary to oppose summary judgment. Accordingly, the Court will
6 deny additional discovery on this matter and decide Hoehn's motion on the facts before the
7 Court.

8 1) The Purpose and Character of the Use

9 The first factor of fair use is the purpose and character of the use. 17 U.S.C.
10 § 107. Noncommercial, nonprofit use is presumptively fair. Sony Corp. of Am. v.
11 Universal City Studios, Inc., 464 U.S. 417, 449 (1984). "The crux of the profit/nonprofit
12 distinction is not whether the sole motive of the use is monetary gain but whether the user
13 stands to profit from exploitation of the copyrighted material without paying the customary
14 price." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). "This
15 factor focuses on whether the new work merely replaces the object of the original creation
16 or instead adds a further purpose or different character. In other words, this factor asks
17 whether and to what extent the new work is transformative." A & M Records, Inc. v.
18 Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (quotation omitted). If the character of
19 the use differs from the original usage, the use may be considered fair. Worldwide Church
20 of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000) (duplicating a
21 church's religious book for use by a different church was not transformative and was not
22 protected by fair use). However, mere transmission of a copyrighted work in a different
23 medium is likely not fair use. Napster, 239 F.3d at 1015.

24 It is undisputed that Hoehn did not and could not profit from posting the Work.
25 Under Sony, noncommercial/nonprofit use is presumptively fair. Additionally, this factor
26 focuses on the purpose or character of the new work. Here, Hoehn posted the Work as part

1 of an online discussion. Hoehn avers he posted the Work to foster discussion in a specific
2 interactive website forum regarding the recent budget shortfalls facing state governments.
3 This purpose is consistent with comment, for which 17 U.S.C. § 107 provides fair use
4 protection. There is no genuine issue of material fact that Hoehn's noncommercial use of
5 the Work for comment favors a finding that the use was fair.

6 2) The Nature of the Copyrighted Work

7 The second factor is the nature of the copyrighted work. 17 U.S.C. § 107.
8 Generally, "creative works are closer to the core of intended copyright protection than
9 informational and functional works." Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.,
10 109 F.3d 1394, 1402 (9th Cir. 1997) (quotation omitted). "The scope of fair use is greater
11 when informational as opposed to creative works are involved." Hustler Magazine Inc. v.
12 Moral Majority Inc., 796 F.2d 1148, 1153-54 (9th Cir. 1986). The types of works deemed
13 to be creative to tilt this factor against a finding of fair use have been complete works of
14 fiction, song lyrics, and Barbie Dolls. Dr. Seuss, 109 F.3d at 1402; Leadsinger, Inc. v.
15 BMG Music Publ'g, 512 F.3d 522, 531 (9th Cir. 2008); and Mattel, 353 F.3d at 803.
16 However, "this factor [is] not terribly significant in the overall fair use balancing." Dr.
17 Seuss, 109 F.3d at 1402.

18 The Work is an editorial originally published in the LVRJ. The Work is a
19 combination of an informational piece with some creative elements. Roughly eight of the
20 nineteen paragraphs of the Work provide purely factual data, about five are purely creative
21 opinions of the author, and the rest are a mix of factual and creative elements. While the
22 Work does have some creative or editorial elements, these elements are not enough to
23 consider the Work a purely "creative work" in the realm of fictional stories, song lyrics, or
24 Barbie dolls. Accordingly, the Work is not within "the core of intended copyright
25 protection." Dr. Seuss, 109 F.3d at 1402. Rather, because the Work contains a significant
26 informational element, the scope of fair use is greater than it would be for a creative work,

1 but likely less than it would for a purely informational work. However, this factor is not
2 terribly relevant in the overall fair use balancing, and the lesser creative element of the
3 Work lessens the impact further. Accordingly, this factor must be balanced with the other
4 fair use factors to determine if Hoehn's use of the Work was fair.

5 3) The Amount Used

6 The third factor of fair use is the amount of the use of the copyrighted work. 17
7 U.S.C. § 107. "[T]he extent of permissible copying varies with the purpose and character
8 of the use." Campbell, 510 U.S. at 586-87. "While wholesale copying does not preclude
9 fair use per se, copying an entire work militates against finding a fair use." Napster, 239
10 F.3d at 1016 (quotation omitted). However, copying of an entire copyrighted work has
11 been deemed justified where the purpose of the new work differs from the original. Kelly
12 v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003); see also Sony, 464 U.S. at 449-50
13 (videotaping whole broadcast television programs for later private viewing constituted fair
14 use).

15 It is undisputed that Hoehn posted the entire work in his comment on the
16 Website. Posting an entire work generally "militates against finding a fair use." Napster,
17 239 F.3d at 1016. However, while wholesale copying of the Work shifts this factor against
18 finding fair use, wholesale copying does not preclude a finding of fair use. Id. The three
19 other factors need to be balanced to determine if fair use is appropriate.

20 4) The Effect Upon the Potential Market for the Work

21 The final factor to be weighed is the effect on the potential market for or value of
22 the copyrighted work. 17 U.S.C. § 107. "Fair use, when properly applied, is limited to
23 copying by others which does not materially impair the marketability of the work which is
24 copied." Harper, 471 U.S. 566-67 (quotation omitted). Additionally, "[a] challenge to
25 noncommercial use of a copyrighted work requires proof either that the particular use is
26 harmful, or that if it should become widespread, it would adversely affect the potential

1 market for the copyrighted work.” Napster, 239 F.3d at 1016 (quotation omitted).

2 It is undisputed that Hoehn’s use of the Work is noncommercial. Challenges to
3 noncommercial use require a showing that the particular use is harmful or negatively
4 impacts the potential market for the copyrighted work. Id. Righthaven has not presented
5 evidence raising a genuine issue of material fact that Hoehn’s use is harmful. Rather,
6 Righthaven contends that because Hoehn replicated the entirety of the Work “[s]uch
7 circumstances warrant the conclusion that [Hoehn’s] infringement has likely caused a
8 substantial impairment on the potential market for the Work and that [Hoehn’s] infringing
9 copy of the Work fulfilled the demand for the original.” (Resp. (Doc. #13) at 12-13.)

10 Additionally, Righthaven argues that the market for the Work was impacted negatively
11 because potential readers are able to read the Work on the Website and would have no
12 reason to view the Work at its original source of publication. However, Righthaven has not
13 presented any evidence of harm or negative impact from Hoehn’s use of the Work on the
14 Website between November 29, 2010 and January 6, 2011. Merely arguing that because
15 Hoehn replicated the entirety of the Work the market for the Work was diminished is not
16 sufficient to show harm. Therefore, Righthaven has not presented evidence raising a
17 genuine issue of material fact that the fourth factor favors a finding of fair use.

18 There is no genuine issue of material fact that the above factors favor a finding of
19 fair use. Of the four factors, only the fact that Hoehn replicated the entire Work weighs
20 against a finding of fair use. Hoehn used the Work for a noncommercial and nonprofit use
21 that was different from the original use. The copyrighted Work was an informational work
22 with only some creative aspects, and the Work was used for an informational purpose.
23 Righthaven did not present any evidence that the market for the Work was harmed by
24 Hoehn’s noncommercial use for the 40 days it appeared on the Website. Accordingly, there
25 is no genuine issue of material fact that Hoehn’s use of the Work was fair and summary
26 judgment is appropriate.

1 **IV. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss for Lack of
3 Jurisdiction (Doc. #16) and Defendant's Motion for Summary Judgment (Doc. #8) are
4 hereby GRANTED, and Plaintiff's Complaint is hereby DISMISSED.


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6 DATED: June 20, 2011.

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PHILIP M. PRO
United States District Judge

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

RIGHTHAVEN LLC, a Nevada limited-liability company,

Plaintiff,

vs.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company, and DAVID ALLEN, an individual,

Defendants.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company,

Counterclaimant,

vs.

RIGHTHAVEN, LLC, a Nevada limited-liability company; and STEPHENS MEDIA LLC, a Nevada limited-liability company,

Counterdefendants.

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Case No.: 2:10-cv-01356-RLH-GWF

ORDER

(Motion for Voluntary Dismissal with Prejudice-#36; Motion to Dismiss or Strike-#38; Motion for Summary Judgment-#45)

1 Before the Court is Plaintiff/Counterdefendant Righthaven LLC's **Motion for**
2 **Voluntary Dismissal with Prejudice** (#36, filed Aug. 10, 2010). The Court has also considered
3 Defendant/Counterclaimant Democratic Underground, LLC and David Allen's (collectively
4 "Democratic Underground") Opposition (#44, filed Dec. 7, 2010), and Righthaven's Reply (#57,
5 filed Jan. 7, 2011).

6 Also before the Court is Counterdefendant Stephens Media LLC's **Motion to**
7 **Dismiss or Strike** (#38, filed Nov. 17, 2010). The Court has also considered the Democratic
8 Underground's Opposition (#46, filed Dec. 7, 2010), and Stephens Media's Reply (#56, filed Jan.
9 7, 2011).

10 Also before the Court is Democratic Underground's **Motion for Summary**
11 **Judgment** (#45, filed Dec. 7, 2010). The Court has also considered Righthaven's Opposition
12 (#58, filed Jan. 8, 2011), and Democratic Underground's Reply (#62, filed Jan. 28, 2011).

13 Finally, the Court allowed and ordered supplemental briefing relevant to the three
14 motions under consideration because of important evidence that only came to light after these
15 motions were fully briefed. Accordingly, the Court has considered Democratic Underground's
16 Supplemental Memorandum Addressing Recently Produced Evidence (#79, filed Mar. 9, 2011),
17 Stephens Media's Response (#99, filed May 9, 2011), Righthaven's Response (#100, filed May 9,
18 2011), and Democratic Underground's Replies (##107 and 108, filed May 20, 2011).

19 BACKGROUND

20 This dispute arises out of Democratic Underground's allegedly copyright infringing
21 conduct. About May 13, 2010, a Democratic Underground user posted a comment on Democratic
22 Underground's website which included a portion of a Las Vegas Review-Journal ("LVRJ") article
23 about Nevada politics, particularly about the Tea Party effect on Sharon Angle's senatorial
24 campaign (the "Work"). The posting included a link to the full article and the LVRJ's website.
25 As such, Democratic Underground displayed this selection from the article on its website and
26 Righthaven claims that this infringed on the copyright.

1 Righthaven claims that after the Work was posted on Democratic Underground's
2 website, it purchased the copyright to the Work from Stephens Media, the owner of the LVRJ,
3 along with the right to sue for past infringement. (Dkt. #102, Decl. of Steve Gibson, Ex. 1,
4 Copyright Assignment (hereinafter referred to as the "Assignment").) Righthaven then registered
5 the copyright with the United States Copyright office. Thereafter, Righthaven sued Democratic
6 Underground alleging copyright infringement. Democratic Underground, in turn, filed a
7 counterclaim for a declaratory judgment of non-infringement against both Righthaven and
8 Stephens Media, which was not originally a party to this case. Righthaven has since filed a motion
9 for voluntary dismissal with prejudice due to an adverse fair use ruling by the Honorable Larry R.
10 Hicks, United States District Judge for this district (Righthaven is appealing that decision),
11 Stephens Media has filed a motion to dismiss or strike the counterclaim and a partial joinder to
12 Righthaven's motion, and Democratic Underground has filed a motion for summary judgment on
13 Righthaven's claim.

14 After these motions were fully briefed, Stephens Media disclosed to Democratic
15 Underground the Strategic Alliance Agreement ("SAA") between Stephens Media and
16 Righthaven. The SAA defines their relationship and governs all future copyright assignments
17 between them (including the assignment at issue here). (Dkt. #79, Supplemental Mem. Ex. 1,
18 SAA, dated Jan. 18, 2010.) After learning the details of this agreement, Democratic Underground
19 sought leave to file a supplemental memorandum addressing this newly discovered evidence and
20 its effect on the outstanding motions. The Court allowed the supplemental briefing as it too
21 considered the SAA highly relevant to Righthaven's standing in this and a multitude of other
22 pending Righthaven cases. After considering the supplemental brief and for the reasons discussed
23 below, the Court dismisses Righthaven for lack of standing and, therefore, denies both
24 Righthaven's motion and Democratic Underground's motion as moot. The Court also denies
25 Stephens Media's motion.

26 /

1 **DISCUSSION**

2 **I. Righthaven's Standing to Assert Copyright Claims**

3 As stated above, before the Court are two motions to dismiss and a motion for
4 summary judgment. However, the Court must first address the supplemental briefing addressing
5 the SAA and the question of Righthaven's standing to pursue this copyright infringement claim.
6 The Court will then address the outstanding motions.

7 **A. Background - The Strategic Alliance Agreement**

8 Months prior to purportedly assigning the Work to Righthaven, Stephens Media
9 and Righthaven signed a Strategic Alliance Agreement governing future copyright assignments
10 between them. (Dkt. #79, Ex. 1, SAA, dated Jan. 18, 2010.) The SAA details the relationship
11 between Righthaven and Stephens Media, explains the rights and responsibilities of each party,
12 and limits and defines future copyright assignments between them. (*See generally, id.*) As such, it
13 limits and explains the intent behind the Assignment, which was executed in July 2010.

14 Critically, the SAA expressly denies Righthaven any rights from future assignments
15 (including the Assignment of the Work) other than the bare right to bring and profit from copyright
16 infringement actions. This conclusion is clearly expressed in Section 7.2 of the SAA:

17 **7.2 Despite any such Copyright Assignment, Stephens Media shall**
18 **retain** (and is hereby granted by *Righthaven*) an exclusive license to
19 Exploit the Stephens Media Assigned Copyrights for any lawful
20 purpose whatsoever and **Righthaven shall have no right or**
21 **license to Exploit or participate in the receipt of royalties from**
22 **the Exploitation of the Stephens Media Assigned Copyrights**
23 **other than the right to proceeds in association with a Recovery.**

24 To the extent that Righthaven's maintenance of rights to pursue
25 infringers of the Stephens Media Assigned Copyrights in any manner
26 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. . . .

1 (*Id.*, Section 7.2 (bold emphasis added, italicization in original)). The plain and simple effect of
2 this section was to prevent Righthaven from obtaining, having, or otherwise exercising any right
3 other than the mere right to sue as Stephens Media *retained* all other rights. Even Righthaven's
4 right to sue is not absolute. The SAA gives Stephens Media the right to prevent Righthaven from
5 suing an alleged copyright infringer for various specific reasons, including that the lawsuit might
6 "result in an adverse result to Stephens Media." (*Id.*, Section 3.3.) Other sections also give
7 Stephens Media a right to reversion and other rights which, collectively, destroy Righthaven's
8 supposed rights in the Work. (*See generally, id.*) Now that the SAA has shed light upon
9 Righthaven's true interest in the copyright to the Work, Democratic Underground asserts that
10 Righthaven lacks standing to maintain this lawsuit.

11 **B. Legal Standard**

12 Pursuant to Section 501(b) of the 1976 Copyright Act, 17 U.S.C. § 101, *et. seq.*,
13 (the "Act") only the legal or beneficial owner of an exclusive right under copyright law is entitled,
14 or has standing, to sue for infringement. *Silvers v. Sony Pictures Entm't Inc.*, 402 F.3d 881, 884
15 (9th Cir. 2005) (*en banc*). In so holding, the Ninth Circuit followed the Second Circuit's decision
16 in *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982), *superseded by rule*
17 *and statute on other grounds. See also, ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d
18 971, 980 (2d Cir. 1991) (citing *Eden Toys*, "the Copyright Act does not permit copyright holders to
19 choose third parties to bring suits on their behalf.") Section 106 of the Act defines and limits the
20 exclusive rights under copyright law. *Id.* at 884–85. While these exclusive rights may be
21 transferred and owned separately, the assignment of a bare right to sue is ineffectual because it is
22 not one of the exclusive rights. *Id.* Since the right to sue is not one of the exclusive rights,
23 transfer solely of the right to sue does not confer standing on the assignee. *Id.* at 890. One can
24 only obtain a right to sue on a copyright if the party also obtains one of the exclusive rights in the
25 copyright. *See id.* Further, to obtain a right to sue for past infringement, that right must be
26 expressly stated in the assignment. *See generally, id.*

1 **C. Analysis**

2 **1. Contract Construction**

3 Righthaven argues that the SAA's provisions, which necessarily include Section
4 7.2, do not alter the unambiguous language of the Assignment or limit the rights it obtained from
5 Stephens Media in the Assignment. This conclusion is flagrantly false—to the point that the claim
6 is disingenuous, if not outright deceitful. The entirety of the SAA was designed to prevent
7 Righthaven from becoming “an *owner of any exclusive right* in the copyright. . . .,” *Silvers*, 402
8 F.3d at 886 (emphasis in original), regardless of Righthaven and Stephens Media's *post hoc*,
9 explanations of the SAA's intent or later assignments, (*see generally* Dkt. #101, Decl. of Mark A.
10 Hineuber; Dkt. #102, Decl. of Steven A. Gibson). Prior to the Assignment, Stephens Media
11 possessed all of the exclusive rights to the Work and, therefore, the right to sue. Because the SAA
12 limited the language of the Assignment, the Assignment changed nothing save for Righthaven's
13 claim to have the right to sue. The companies' current attempt to reinterpret the plain language of
14 their agreement changes nothing. In reality, Righthaven actually left the transaction with nothing
15 more than a fabrication since a copyright owner cannot assign a bare right to sue after *Silvers*. To
16 approve of such a transaction would require the Court to disregard the clear intent of the
17 transaction and the clear precedent set forth by the *en banc* Ninth Circuit in *Silvers*.

18 **2. Stephens Media and Righthaven's Intent**

19 Righthaven contends that the Court should construe the SAA to grant Righthaven
20 whatever rights are necessary for it to have standing in a copyright infringement action. First,
21 Righthaven argues that the Court should construe the contract in this manner because in situations
22 where a contract is ambiguous, the Court should look to the parties' intent. *Sheehan & Sheehan v.*
23 *Nelson Malley and Co.*, 117 P.3d 219, 223–24 (Nev. 2005). Accordingly, Righthaven argues that
24 the plain intent of the SAA is to give Righthaven all rights necessary to bring a copyright
25 infringement action. The Court, however, disagrees with Righthaven's premise because the SAA
26 is not ambiguous. Righthaven and Stephens Media went to great lengths in the SAA to be sure

1 that Righthaven did not obtain any rights other than the bare right to sue. Thus, the Court finds
2 that the plain language of the SAA conveys the intent to deprive Righthaven of any right, save for
3 the right to sue alleged infringers and profit from such lawsuits. As such, the SAA is not
4 ambiguous and the Court shall not read any ambiguity into it.

5 Second, Righthaven argues that Section 15.1 of the SAA gives the Court authority
6 to correct any provision of the SAA that is deemed void or unenforceable to approximate the
7 manifest intent of the parties. The problem is that this argument requires a provision of the SAA
8 to be void or unenforceable. However, Righthaven's problem is not that any provision of the SAA
9 is void or unenforceable but that the SAA simply does not grant Righthaven any of the exclusive
10 rights defined in Section 106 of the Act required for standing. Therefore, the SAA is not void or
11 unenforceable, it merely prevents Righthaven from obtaining standing to sue from the Assignment.
12 Accordingly, the Court need not and shall not amend or reinterpret the SAA to suit Righthaven's
13 current desires.

14 **3. Righthaven and Stephens Media's Amendment to the SAA**

15 Notwithstanding the actual transaction that occurred, Righthaven argues that the
16 amendment it executed with Stephens Media on May 9, 2011, the day that they filed their response
17 to the supplemental memorandum validates or fixes any possible errors in the original SAA that
18 would prevent Righthaven from having standing in this matter. (Dkt. #102, Gibson Decl. Ex. 3,
19 Clarification and Amendment to SAA.) However, this amendment cannot create standing because
20 "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the*
21 *complaint is filed.*" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (quoting
22 *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)) (emphasis in *Lujan*).
23 Although a court may allow parties to amend defective allegations of jurisdiction, it may not allow
24 the parties to amend the facts themselves. *Newman-Green*, 490 U.S. at 830. As an example, a
25 party who misstates his domicile may amend to correctly state it. This is an amendment of the
26 allegation. However, that party is not permitted to subsequently move in order to change his

1 domicile and amend accordingly. This would be an amendment of the jurisdictional facts, which
2 is not allowed. *See id.* Here, Righthaven and Stephens Media attempt to impermissibly amend the
3 facts to manufacture standing. Therefore, the Court shall not consider the amended language of
4 the SAA, but the actual transaction that took place as of the time the complaint was filed.¹

5 Regardless of this legal principle, Righthaven argues that courts routinely allow
6 parties to a copyright transfer to subsequently clarify or amend their agreements in order to express
7 their original intent to grant the assignee the right to sue for infringement. Righthaven's assertion
8 is not entirely wrong, but the cases Righthaven cites in support of its proposition are all
9 distinguishable as they deal with matters significantly different than those presently before the
10 Court. For instance, Righthaven cites multiple cases where courts allowed an oral assignment
11 made prior to initiation of a lawsuit to be confirmed in writing after the initiation of the lawsuit.
12 *See Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003) (allowing an oral
13 assignment to be confirmed in a later writing).² These cases are all distinguishable in that the
14 assignor and assignee in these cases had agreements to transfer the necessary, exclusive rights
15 prior to the initiation of a lawsuit. The only thing lacking was the written document necessary for
16 a court to recognize the transfer. In each of these cases, the courts merely gave effect to what the
17 parties had actually done, i.e. recognized rights already actually transferred. Here, Righthaven
18 does not ask the Court to recognize an oral transfer with a late made written memorandum of the
19 deal, but to fundamentally rewrite the agreement between Righthaven and Stephens Media to grant
20 Righthaven rights that it never actually received.

21
22 ¹ The Court does not determine whether or not the amended SAA would transfer sufficient rights to
23 Righthaven for it to have standing in suits filed after amendment as the Court need not make that determination
24 to rule on these motions. Nonetheless, the Court expresses doubt that these seemingly cosmetic adjustments
change the nature and practical effect of the SAA.

25 ² *See also, Imperial Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995)
26 (“[A] copyright owner’s later execution of a writing which confirms an earlier oral agreement validates the
transfer ab initio.”); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir. 1994);
Sabroso Publ’g, Inc. v. Caiman Records Am., Inc., 141 F. Supp. 2d 224, 228 (D.P.R. 2001).

1 Righthaven cites three other district court cases from other circuits which deal with
2 matters other than oral assignments later ratified by written agreements. First is a district court
3 case, *Intimo Inc. v. Briefly Stated, Inc.*, 948 F. Supp. 315 (S.D.N.Y. 1996), wherein the court
4 allowed the parties to the assignment agreement to amend the agreement to include the right to sue
5 for pre-assignment copyright violations. Notably, the plaintiff in that case would have maintained
6 standing as not all claims were based on pre-assignment copyright violations. *Id.* at 318–19.
7 Nonetheless, the *Intimo* court allowed amendment to correct what it found was merely an
8 oversight on the part of the parties because the agreement was silent on pre-assignment copyright
9 violations despite the parties intent to transfer the right to sue on those violations. Here,
10 Righthaven and Stephens Media may have wanted Righthaven to be able to sue, but the SAA was
11 anything but silent in making sure that Stephens Media *retained* complete control over the Work
12 rather than actually effectuate the necessary transfer of rights. The entirety of the SAA is
13 concerned with making sure that Righthaven did not obtain any rights other than the right to sue.
14 This careful exclusion of rights made even that transfer ineffectual under *Silvers*.

15 The other two cases are also distinguishable. The second case, *Infodek, Inc. v.*
16 *Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614 (N.D. Ga. 1993), is based on facts largely
17 similar to *Intimo* and the same analysis distinguishes it from the present case. The third is an
18 unreported district court case, *Gondinger Silver Art Co., Ltd. v. Int'l Silver Co.*, No. 95 CIV. 9199,
19 1995 WL 702357 (S.D.N.Y. Nov. 28, 1995), that dealt with a later assignment because there was a
20 dispute as to whether the relevant work was a work made for hire or whether the plaintiff was a co-
21 author of the work. The *Gondinger* court did not expressly determine the issue, finding that it was
22 irrelevant as there was another basis for standing. *Id.* at *4–5. In sum, not one of the cases cited
23 by Righthaven persuade, much less require, the Court to find standing based on Righthaven and
24 Stephens Media's Amended SAA.

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1 **4. Democratic Underground's Standing to Challenge the SAA**

2 Righthaven also contends that Democratic Underground lacks standing to challenge
3 the validity of the SAA. However, Democratic Underground does not actually attack the SAA's
4 validity, Democratic Underground only contends that the SAA prevented the Assignment from
5 transferring the rights Righthaven and Stephens Media currently argue the Assignment transferred.
6 In essence, Democratic Underground simply argues that, under the SAA, the Assignment only
7 transferred one particular right, which failed to have the effect Righthaven wishes it had.
8 Democratic Underground does not contest the SAA's validity or argue that it should be undone in
9 any way. Further, the *Sylvers* court necessarily allowed the defendant to challenge whether the
10 necessary rights were transferred from the rights holder to the plaintiff in that action. Otherwise
11 the Ninth Circuit would not have been able address the plaintiff's lack of standing in *Sylvers* and
12 hold that a mere right to sue is insufficient to bring a copyright infringement action.

13 **5. Prior Rulings within this District**

14 Finally, Righthaven contends that multiple courts within this district have already
15 determined that Righthaven has standing to bring claims for past infringement under the *Silver*
16 standard based on the plain language of the copyright assignment. At best, this argument is
17 disingenuous. As the undersigned issued one of the orders Righthaven cites for this argument, the
18 undersigned is well aware that Righthaven led the district judges of this district to believe that it
19 was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the
20 true nature of the transaction by disclosing the SAA or Stephens Media's pecuniary interests. As
21 the SAA makes abundantly clear, Stephens Media *retained* the exclusive rights, never actually
22 transferring them to Righthaven regardless of Righthaven's and Stephens Media's current
23 contentions. Further, Righthaven also failed to disclose Stephens Media in its certificates of
24 interested parties, despite Stephens Media's right to proceeds from these lawsuits. (Dkt. #79, Ex.
25 1, SAA Section 5 (granting Stephens Media a fifty percent interest in any recovery, minus costs).)

26 /

1 Since those orders were tainted by Righthaven's failure to disclose the SAA and Stephens Media's
2 true interest, those decisions are not persuasive and do not support standing here.

3 **D. Righthaven Lacks Standing to Bring this Action**

4 Because the SAA prevents Righthaven from obtaining any of the exclusive rights
5 necessary to maintain standing in a copyright infringement action, the Court finds that Righthaven
6 lacks standing in this case. Accordingly, the Court dismisses Righthaven from this case. However,
7 Righthaven requests that upon such a finding, the Court grant it leave to join Stephens Media as a
8 plaintiff to cure the jurisdictional defect. Adding Stephens Media, however, would not cure the
9 jurisdictional defect as to Righthaven. *Eden Toys*, 697 F.2d at 32 n.3 ("While [Federal Rule of
10 Civil Procedure] 17(a) ordinarily permits the real party in interest to ratify a suit brought by
11 another party, the Copyright Law is quite specific in stating that only the owner of an exclusive
12 right under a copyright may bring suit." (internal citations and quotations omitted).) Also, as
13 Stephens Media has already been brought into this suit as a counter-defendant to a declaratory
14 judgment claim, the Court finds it unnecessary to join Stephens Media as a plaintiff. If Stephens
15 Media wishes to assert claims against Democratic Underground, it may do so separately.

16 **II. Righthaven's Motion and Democratic Underground's Motion are Both Moot**

17 Because the Court has dismissed Righthaven for lack of standing, the Court denies
18 both Righthaven's motion for voluntary dismissal with prejudice and Democratic Underground's
19 motion for summary judgment on Righthaven's claim as moot. Since Righthaven has been
20 dismissed, its complaint is also dismissed. This, of course, does not affect Democratic
21 Underground's right to bring a motion for attorney fees under the Act. Also, the counterclaim
22 against Stephens Media remains and so the Court now turns its attention to Stephens Media's
23 motion.

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1 **III. Stephens Media’s Motion to Dismiss or Strike**

2 **A. Legal Standard**

3 **1. Motion to Dismiss Standard**

4 “In this action, as in all actions before a federal court, the necessary and
5 constitutional predicate for any decision is a determination that the court has jurisdiction—that is
6 the power—to adjudicate the dispute.” *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998).
7 The purpose of a complaint is two-fold: to give the defendant fair notice of the basis for the court’s
8 jurisdiction and of the factual basis of the claim. *See* Fed. R. Civ. P. 8; *Skaff v. Meridien North*
9 *Am. Beverly Hills, LLC.*, 506 F.3d 832, 843 (9th Cir. 2007). Rule 12(b)(1) of the Federal Rules of
10 Civil Procedure allows defendants to seek dismissal of a claim or action for a lack of subject
11 matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in
12 its entirety, fails to allege facts on its face that are sufficient to establish subject matter jurisdiction.
13 *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th
14 Cir. 2008). Although the defendant is the moving party in a motion to dismiss brought under Rule
15 12(b)(1), the plaintiff is the party invoking the court’s jurisdiction. As a result, the plaintiff bears
16 the burden of proving that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264
17 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178,
18 189 (1936)).

19 Attacks on jurisdiction pursuant to Rule 12(b)(1) can be either facial, confining the
20 inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the
21 complaint. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). “In
22 a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient
23 on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes
24 the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe*
25 *Air for Everyone v. Myer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A “factual” attack made pursuant
26 to Rule 12(b)(1) may be accompanied by extrinsic evidence. *Whitethorn v. F.C.C.*, 235 F. Supp.

1 2d 1092, 1095–96 (D. Nev. 2002) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.
2 1989). Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered
3 in its entirety, fails to allege facts that are sufficient to establish subject matter jurisdiction. *In re*
4 *Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir.
5 2008).

6 2. Motion to Strike Standard

7 Under Rule 12(f) a “court may strike from a pleading ... any redundant, immaterial,
8 impertinent, or scandalous matter.” Matter is “immaterial” if it has no bearing on the controversy
9 before the court. *In re 2TheMart.com, Inc Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).
10 Allegations are “impertinent” if they are not responsive to the issues that arise in the action and
11 that are admissible as evidence. *Id.* “Scandalous” matter is that which casts a cruelly derogatory
12 light on a party or other person. *Id.* A court need not wait for a motion from the parties; it may act
13 on its own to strike matter from a pleading. Fed. R. Civ. P. 12(f)(1).

14 B. Analysis

15 Stephens Media’s motion essentially relies on two separate arguments for its
16 position that there is no justiciable case or controversy: (1) that Stephens Media assigned all of the
17 rights in and to the Work to Righthaven, thus negating the possibility of any case or controversy
18 between Stephens Media and Democratic Underground, and (2) that Democratic Underground’s
19 counterclaim will necessarily be adjudicated by a decision on the original complaint and, therefore,
20 should be stricken. The Court dispelled Stephens Media’s first argument in the analysis above.
21 Stephens Media expressly avoided transferring the exclusive rights to the Work to Righthaven by
22 neutering future assignments in the SAA. As to Stephens Media’s second argument, setting aside
23 the fact that Stephens Media was never a party to Righthaven’s complaint, that argument is now
24 moot as the Court has dismissed Righthaven’s complaint. Since the complaint has been dismissed,
25 the issues raised by the counterclaim can only be adjudicated by litigating the counterclaim, not the
26 now defunct complaint.

1 **1. Justiciable Case or Controversy**

2 Stephens Media’s principle contention for why there is no justiciable case or
3 controversy between Stephens Media and Democratic Underground relied on the Assignment of
4 rights to Righthaven. Though the Court has refuted this particular argument, the Court will,
5 nonetheless, quickly address the case or controversy requirement for a declaratory judgment action
6 as it still pertains to this case.

7 The Supreme Court has held that declaratory judgment claims must arise from
8 disputes that are “‘definite and concrete, touching the legal relations of parties having adverse
9 legal interests,’ . . . ‘real and substantial,’” and beget “specific relief through a decree of a
10 conclusive character, as distinguished from an opinion advising what the law would be upon a
11 hypothetical state of facts.” *MedImmune, Inc. v. Genentech, Inc.* 549 U.S. 118, 127 (2007).
12 Nonetheless, a party need not “bet the farm” and always actually engage in planned conduct that
13 would result in threatened legal action before bringing a declaratory judgment suit. *Id.* at 133–34.

14 Contrary to its assertions in its moving papers, Stephens Media has threatened
15 Democratic Underground with litigation because, according to the SAA, Stephens Media approved
16 or consented to suit against Democratic Underground. (Dkt. #79, Ex. 1, SAA Section 3.3.)
17 Additionally, Stephens Media’s then CEO, Sherman Frederick, generally threatened potential
18 defendants that he would send his “little friend called Righthaven” after them. (Dkt. #13, Answer
19 and Countercl. ¶ 33.) Here, Stephens Media actually did send Righthaven after Democratic
20 Underground. Further, Democratic Underground desires to re-post the allegedly infringing
21 material to maintain a full archive of prior posts on its website. This could result in new copyright
22 infringement litigation against Democratic Underground if the Court does not declare that the post
23 did not infringe the copyright in the first instance. This threat of suit is sufficiently real and
24 substantial that an actual case and controversy exists between these parties and warrants a
25 declaratory judgment suit. Accordingly, and because the Court dismissed Righthaven and its
26 complaint, the Court denies Stephens Media’s motion.

1 **IV. Order to Show Cause**

2 As shown in the preceding pages, the Court believes that Righthaven has made
3 multiple inaccurate and likely dishonest statements to the Court. Here, however, the Court will
4 only focus on the most factually brazen: Righthaven's failure to disclose Stephens Media as an
5 interested party in Righthaven's Certificate of Interested Parties. (Dkt. #5.) Rule 7.1-1 of the
6 Local Rules of Practice for the District of Nevada requires parties to disclose "all persons,
7 associations of persons, firms, partnerships or corporations (including parent corporations) which
8 have a direct, pecuniary interest in the outcome of the case." This Local Rule requires greater
9 disclosure than Federal Rule 7.1, which only requires non-governmental corporate parties to
10 disclose parent corporations or corporations owning more than 10% of the party's stock. Frankly,
11 if receiving 50% of litigation proceeds minus costs (Dkt. #79, SAA Section 5) does not create a
12 pecuniary interest under Local Rule 7.1-1, the Court isn't sure what would.

13 Making this failure more egregious, not only did Righthaven fail to identify
14 Stephens Media as an interested party in this suit, the Court believes that Righthaven failed to
15 disclose Stephens Media as an interested party in any of its approximately 200 cases filed in this
16 District. Accordingly, the Court orders Righthaven to show cause, in writing, no later than two (2)
17 weeks from the date of this order, why it should not be sanctioned for this flagrant
18 misrepresentation to the Court.

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CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Righthaven is dismissed from this case for lack of standing. As such, Righthaven's complaint is dismissed in its entirety.

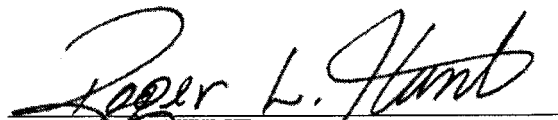
IT IS FURTHER ORDERED that Righthaven's Motion for Voluntary Dismissal with Prejudice (#36) is DENIED as moot.

IT IS FURTHER ORDERED that Stephens Media's Motion to Dismiss or Strike (#38) is DENIED.

IT IS FURTHER ORDERED that the Democratic Underground's Motion for Summary Judgment (#45) is DENIED as moot.

IT IS FURTHER ORDERED that Righthaven show cause, in writing, no later than two (2) weeks from the date of this order, why it should not be sanctioned.

Dated: June 14, 2011.


ROGER L. HUNT
Chief United States District Judge

CERTIFICATE OF SERVICE

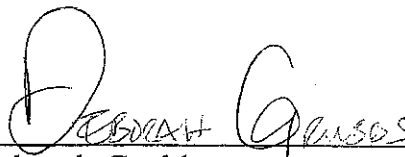
U.S. Court of Appeals Case No.: 11-16776

I hereby certify that on January 13, 2012, I served copies of Appellee Thomas A. DiBiasie's Supplemental Excerpts of Record Volumes I and II on the person(s) listed below by overnight service for next day delivery, following the ordinary business practice at Wilson Sonsini Goodrich & Rosati.

Mr. Shawn A. Mangano
SHAWN A. MANGANO, LTD
8367 West Flamingo Road
Suite 100
Las Vegas, Nevada 89147

Four copies of the foregoing were also dispatched to the Clerk of the U.S. Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103 by hand delivery on this date.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Palo Alto, California on January 13, 2012.



Deborah Grubbs