

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

**MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS
& THE RECORDING INDUSTRY ASSOCIATION OF AMERICA
FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF
NEITHER PARTY PURSUANT TO FRAP 29(B)**

MITCHELL SILBERBERG & KNUPP LLP

Steven J. Metalitz
J. Matthew Williams
1818 N Street, NW, 8th Floor
Washington, D.C. 20036
Telephone: (202) 355-7900
Facsimile: (202) 355-7899

Attorneys for Amici Curiae
The Association of American Publishers &
The Recording Industry Association of America

Pursuant to Federal Rule of Appellate Procedure 29(b), the Association of American Publishers (the “AAP”) and the Recording Industry Association of America (the “RIAA”) respectfully move this Court for leave to file their concurrently submitted *Amici Curiae* brief supporting neither party. *Amici* submit this Motion because counsel for Appellee Wayne Hoehn refused to consent to *Amici* filing a brief. *See* Williams Declaration, ¶¶ 3 & 4. Counsel for Appellant Righthaven LLC, on the other hand, consented. *See* Williams Declaration, ¶ 2.

The AAP and the RIAA believe that their brief will assist the Court in its analysis of the issues presented by the appeal. Consideration of the brief by the Court is particularly desirable because the appeal involves important questions related to the application of the U.S. Copyright Act, 17 U.S.C. § 101, *et seq.*, and the U.S. Constitution, the resolution of which will significantly impact the industries that the AAP and the RIAA represent. Moreover, *Amici* are well positioned to provide insight on matters relevant to the disposition of the appeal given their long-time involvement in the development of copyright law, and the importance of copyright protection to their members’ businesses.

The 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 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.

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 the affirmative defense of fair use. The court's fair use analysis was inescapably 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. This case therefore presents a classic example of why parties who lack standing fail to provide the courts with sufficient illumination of the issues.

As associations representing companies in the business of creating and exploiting copyrighted works, *Amici* believe that their views will be helpful to the Court. *Amici* respectfully submit that their brief should be filed. *Amici* have no affiliation with either party, and neither party authored any portion of *Amici*'s brief or contributed monetarily to the preparation thereof.

Dated: December 5, 2011 Respectfully submitted:

MITCHELL SILBERBERG & KNUPP LLP
STEVEN J. METALITZ
J. MATTHEW WILLIAMS

By: s/ J. Matthew Williams
J. Matthew Williams
Attorneys for *Amici Curiae*
The Association of American Publishers &
The Recording Industry Association of America

CORPORATE DISCLOSURE STATEMENT

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.

Dated: December 5, 2011

Respectfully submitted:

MITCHELL SILBERBERG & KNUPP LLP
STEVEN J. METALITZ
J. MATTHEW WILLIAMS

By: s/ J. Matthew Williams
J. Matthew Williams
Attorneys for *Amici Curiae*
The Association of American Publishers &
The Recording Industry Association of
America

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 **MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS & THE RECORDING INDUSTRY ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF OF *AMICI CURIAE* 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

Attorney for *Amici Curiae*

The Association of American Publishers
& The Recording Industry Association of
America