

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)  
[lpulgram@fenwick.com](mailto:lpulgram@fenwick.com)  
 2 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)  
[cwebb@fenwick.com](mailto:cwebb@fenwick.com)  
 3 FENWICK & WEST LLP  
 555 California Street, 12th Floor  
 4 San Francisco, California 94104  
 Telephone: (415) 875-2300  
 5 Facsimile: (415) 281-1350

6 KURT OPSAHL (CA State Bar No. 191303) (*pro hac vice*)  
[kurt@eff.org](mailto:kurt@eff.org)  
 7 CORYNNE MCSHERRY (CA State Bar No. 221504) (*pro hac vice*)  
[corynne@eff.org](mailto:corynne@eff.org)  
 8 ELECTRONIC FRONTIER FOUNDATION  
 454 Shotwell Street  
 9 San Francisco, California 94110  
 Telephone: (415) 436-9333  
 10 Facsimile: (415) 436-9993

11 CHAD BOWERS (NV State Bar No. 7283)  
[bowers@lawyer.com](mailto:bowers@lawyer.com)  
 12 CHAD A. BOWERS, LTD  
 3202 West Charleston Boulevard  
 13 Las Vegas, Nevada 89102  
 Telephone: (702) 457-1001  
 14 Attorneys for Defendant and Counterclaimant  
 DEMOCRATIC UNDERGROUND, LLC, and  
 15 Defendant DAVID ALLEN

16 **UNITED STATES DISTRICT COURT**  
 17 **FOR THE DISTRICT OF NEVADA**

18 RIGHTHAVEN LLC, a Nevada limited liability company,

19 Plaintiff,

20 v.

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

22 Defendants.

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

24 Counterclaimant,

25 v.

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

28 Counterdefendants.

Case No. 2:10-01356-RLH (GWF)

**DEFENDANTS' REPLY IN  
 SUPPORT OF  
 SUPPLEMENTAL MEMO  
 ADDRESSING RECENTLY  
 PRODUCED EVIDENCE  
 RELATING TO PENDING  
 MOTIONS**

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## INTRODUCTION

Production of the Strategic Alliance Agreement (“SAA”) revealed Righthaven’s relationship with Stephens Media to be what was always suspected: an illegitimate attempt to vest an entity with nothing more than the right to prosecute actions for copyright infringement. As the Ninth Circuit recognized in *Silvers*, Congress prohibited such arrangements under the Copyright Act. Righthaven makes a half-hearted argument that for it to agree in the SAA that Stephens Media “shall retain” an “exclusive license” to all rights under the copyright *other* than the right to sue, Righthaven must have first held, for a nanosecond, all the rights it licensed back. Hogwash. The exclusive license by which Stephens Media “retained” the real ownership in the copyright occurred *simultaneously* with its grant of any purported Assignment. The reality is inescapable: Stephens Media always retained the exclusive rights. When Righthaven filed this action against Defendants, it had no rights other than the right to sue, and accordingly no standing to pursue any claims of copyright infringement.

In an effort to paper over this hole, Righthaven and Stephens Media have attempted an 11th-hour gambit: on the same day they filed their brief, nine months after filing this lawsuit, they entered into a “Clarification and Amendment” of the SAA (the “Amendment”), attempting to create the illusion of ownership by Righthaven. But no Amendment could cure this defect. Jurisdictional facts establishing standing must exist at the outset of litigation. They cannot be subsequently invented. For these reasons, alone, rejection of Righthaven’s claims is warranted.

In any event, the Amendment’s efforts to “retroactively” recharacterize the SAA—as though all that matters is what the parties call their transaction, rather than its real effect—only reinforces the phony nature of Righthaven’s purported ownership. Recognizing that Stephens Media’s possession of an exclusive license meant that Righthaven had none of the rights required to sue, the Amendment collusively renames Stephens Media as a “non-exclusive licensee.” But just changing the label does not vest Righthaven with genuine ownership or control. Even under the Amendment, Stephens Media continues to dictate (i) whether any lawsuit can be filed by its agent, Righthaven; (ii) whether to reclaim the copyright at any time it wishes (for a nominal

1 payment of \$10); and (iii) whether Righthaven can enter any other license—which Righthaven  
2 has no demonstrated intention to do, and which the Amendment allows Stephens Media to veto.  
3 Stephens Media’s right to control any decision with respect to the copyright, including any  
4 license to anyone else, shows that, regardless of wordplay, it is still the exclusive licensee.

5 This Court is obligated to look at the practical reality of the transaction, not merely the  
6 labels employed in an attempt to evade the *Silvers* rule. *See Nafal v. Carter*, 540 F. Supp. 2d  
7 1128 (C.D. Cal. 2007), *aff’d* 388 Fed. Appx. 721 (9th Cir. 2010); *accord Righthaven v.*  
8 *Majorwager.com*, 2010 WL 4386499, at \*2 n.2 (D.Nev. Oct. 28, 2010) (“Regardless of the  
9 assignment’s assertions, if only a right to sue was transferred; Plaintiff may lack standing.”). The  
10 very machinations orchestrated in the Amendment reveal Righthaven’s “ownership” to be a sham.

#### 11 **I. RIGHTHAVEN HAS NO STANDING UNDER THE ORIGINAL SAA**

12 A plaintiff’s standing is “an essential and unchanging part of the case-or-controversy  
13 requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As such,  
14 standing must be considered by the court in all cases, even where the parties fail to raise it.  
15 *United States v. Hays*, 515 U.S. 737, 742 (1995). Standing is not determined in the abstract, but  
16 rather by the specific claims that a party brings. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

17 Only the “legal or beneficial owner of an exclusive right under a copyright is entitled . . .  
18 to institute an action for any infringement.” 17 U.S.C. § 501(b). Section 501(b) limits standing  
19 to pursue infringement actions to only those who possess one of the exclusive rights under 17  
20 U.S.C. § 106. *See Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (*en*  
21 *banc*). *Silvers* explicitly rejected the notion that bare assignment of the right to sue, without even  
22 one of the exclusive rights under Section 106, is sufficient. *Id.* In so doing, the Ninth Circuit  
23 continued longstanding practice, reaching back to the 1909 Copyright Act, of unifying the right to  
24 sue for infringement and ownership of some or all of the rights under copyright. *Id.* at 886.

#### 25 **A. There Was Never Any Transfer of Rights Under the SAA to Righthaven**

26 Righthaven’s argument that it ever legitimately possessed any exclusive rights under the  
27 Assignment ignores both the clear language of the SAA and the practical reality of the  
28 transaction. Prior to the execution of any purported Assignment, Stephens Media held all of the

1 exclusive rights under Section 106 and the right to sue. After the purported Assignment, as  
2 defined by the SAA, Stephens Media continued to own these rights, and all that changed is that  
3 Righthaven now claimed to have a right to sue for infringement. No matter how Righthaven tries  
4 to spin the transaction, in real terms it is still nothing but a bare assignment of the right to sue, a  
5 transaction that *Silvers* specifically forbids. *Silvers*, 402 F.3d at 890.

6 Righthaven’s Response tries to push these facts under the rug by focusing almost  
7 exclusively on the Assignment itself in isolation, claiming that “[a]t the moment of the  
8 Assignment, Righthaven became the owner of the Work.” *See* Dkt. 100 (“Response”) at 6. This  
9 is pure misdirection, as the SAA, by its terms, governs all assignments from Stephens Media to  
10 Righthaven. Hinueber Decl. Ex. 2 (“SAA”) § 7.1. The SAA makes clear that Righthaven never  
11 obtained *any* rights under *any* Assignment, other than the right to sue. Section 7.2 simultaneously  
12 provides that Stephens Media “*shall retain*” “an exclusive license” to Exploit the work  
13 purportedly assigned, and denies Righthaven any rights to Exploit the assigned works other than  
14 by litigation. SAA § 7.2 (emphasis added). Under this structure, no rights under Section 106  
15 ever actually change hands, not even for a nanosecond.

16 Righthaven misreads the SAA in arguing that it was granted, if only for a moment, rights  
17 in the work—rights that it concedes it simultaneously transferred back to Stephens Media. *See*  
18 Response at 8. Ignoring the word “retain[s],” Righthaven hangs its hopes on the fiction of a  
19 nanosecond of ownership, contending that “there can be no license [granted back to Stephens  
20 Media] until *after* the assignment of ownership rights and the right to sue.” *Id.* (emphasis in  
21 original). Of course, since the “Assignment” and Stephens Media’s retaining of its right to  
22 exploit occurred *simultaneously* through the SAA, not even a nanosecond passed. But whether a  
23 nanosecond passed or not, that is not the kind of unity of exclusive rights and the right to sue  
24 required under American copyright law for the last century. *See Silvers*, 402 F.3d at 886. If  
25 anything, such a construct only thumbs its nose at the *Silvers* rule.<sup>1</sup>

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26 <sup>1</sup> In arguing that it had a nanosecond of ownership, Righthaven effectively concedes that, after all the Section 106  
27 rights are transferred “back” to Stephens Media, Stephens Media is by definition the exclusive owner, leaving  
28 Righthaven nothing left of the exclusive rights under Section 106. *See* 17 U.S.C. § 101 (definition of “transfer of  
copyright ownership” as including a transfer of exclusive license); *see also Campbell v. Trustees of Stanford Univ.*,  
817 F.2d 499 (9th Cir. 1987); *US Naval Institute v. Charter Comm’s*, 936 F. 2d 692, 695 (2d Cir. 1991).

1           The SAA is also littered with confirmation that even any ephemeral ownership by  
2 Righthaven would be a fiction. After an “Assignment,” Stephens Media still has: the “unfettered  
3 and exclusive ability” to “use, make, sell, or otherwise exploit in any manner whatsoever” the  
4 work “for any lawful purpose” (SAA § 7.2); the sole right to “receipt of royalties from the  
5 Exploitation” (*id.*); the right to “sell, grant any Encumbrance on or in or assign, any of Stephens  
6 Media Assigned Copyrights to any third Person” (*id.* § 9.3); the right to choose whether or not an  
7 alleged infringer will be sued at all (*id.* § 3.3); and a right or automatic reversion should  
8 Righthaven decide *not* to pursue an infringement action. *Id.* § 3.3. Perhaps most starkly,  
9 Stephens Media maintains “the right at any time to terminate, in good faith, any Copyright  
10 Assignment . . . and enjoy a right of complete reversion to the ownership.” *Id.* § 8.<sup>2</sup> These rights  
11 are, by their nature, incidents of ownership. Their investment in Stephens Media undermines any  
12 suggestion that Righthaven is the real owner.

13           The bogus nature of this set up goes deeper than just the SAA, however. Righthaven’s  
14 Operating Agreement (“RHOA”), part of an “integrated transaction” with the SAA that governs  
15 Righthaven’s operation as an LLC (SAA § 2), describes its “Focus”—that is, the *only* activity it  
16 may engage in (absent a vote of the members—which has not been asserted here). Declaration of  
17 Laurence Pulgram (“Pulgram Decl.”) Ex. 1 (“RHOA”) at § 3. Pursuant to the RHOA,  
18 Righthaven was created “to receive a limited, revocable assignment (with a license-back) of  
19 copyrights from third Persons in order to enable the Company to recover damages associated with  
20 Identified Infringements.” *Id.* § 3.2(c). While Righthaven would submit copyright registration  
21 applications that identify itself as the owner, its charter provides that any “customer that  
22 respectively assigned said copyrights would ultimately enjoy the copyright registration upon  
23 revocation of the assignment.” RHOA § 3.2(d); *see also* SAA § 8 (referencing “registrations of  
24 copyrights made and/or procured by Righthaven for the benefit of Stephens Media.”). This Focus  
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26 <sup>2</sup> Righthaven contends that Stephens Media’s right of reversion “has no impact on Righthaven’s current ownership  
27 status . . . unless and until Stephens Media exercises its right of reversion . . . [and] that there is nothing *in the record*  
28 to suggest it will.” Response at 7 (emphasis added). While Section 3.2(d) of the Righthaven’s Operating Agreement  
was not then “in the record,” it clarifies that the entire plan was always that Stephens Media would revoke the  
assignment and enjoy the benefit of any copyright registration that Righthaven secures.

1 on bringing lawsuits reconfirms that Righthaven’s purported “ownership” served no purpose  
2 other than to litigate, thereby precluding its standing to sue when this case was filed.

3 **II. BECAUSE RIGHTHAVEN HAD NO STANDING WHEN IT FILED ITS**  
4 **COMPLAINT, ITS CLAIM MUST BE DISMISSED**

5 Regardless of the Amendment’s terms, the fact that Righthaven had no standing to pursue  
6 this action at the time it filed its complaint disposes of its claim. In determining standing, the  
7 existence of federal jurisdiction ordinarily depends on the facts as they exist at the time the  
8 complaint is filed. *Lujan*, 504 U.S. at 569. While a court may allow the amendment of a  
9 defective *allegation* of jurisdiction, it cannot allow an amendment of defects in the jurisdictional  
10 *facts* themselves; if the underlying facts when filed cannot create jurisdiction, the case must be  
11 dismissed regardless of whether jurisdiction is manufactured later. *See, e.g., Gaia Techs., Inc. v.*  
12 *Reconversion Techs., Inc.*, 93 F.3d 774, 779-80 (Fed. Cir. 1996).

13 Accordingly, a decision remarkably similar to the present case rejected an attempt to  
14 sidestep *Silvers’* ban on the assignment of the bare right to sue, holding that a later transfer of  
15 Section 106 rights could not cure the lack of standing at the outset. *Benchmark Homes, Inc. v.*  
16 *Legacy Home Builders LLC*, 2006 U.S. Dist. LEXIS 53879, at \*16 (D. Neb. Jan. 26, 2006).  
17 Likewise with patents and trademarks, where a plaintiff initiates an action without rights in the  
18 intellectual property, even where they subsequently obtain those rights, their lack of standing  
19 cannot be cured and the case should be dismissed. *See, e.g. Gaia Techs.*, 93 F.3d at 779-80  
20 (reversing trial court’s failure to dismiss where a party lacked ownership of a patent and  
21 trademark at outset of litigation but subsequently executed a *nunc pro tunc* assignment); *Enzo*  
22 *Apa & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090, 1092-94 (Fed. Cir. 1998) (granting summary  
23 judgment where the plaintiff had initiated the suit as a non-exclusive patent licensee with no  
24 standing, despite subsequent grant of an exclusive licensee purporting to have retroactive effect).<sup>3</sup>

25 <sup>3</sup> The cases cited by Righthaven do not dictate a contrary result. The majority address the situation where an oral  
26 assignment of rights was later ratified by the required written agreement (*Billy-Bob Teeth, Inc v. Novelty, Inc.*, 329  
27 F.3d 586 (7th Cir. 2003); *Imperial Residential Design, Inc. v. The Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir.  
28 1995); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532 (11th Cir. 1994)); or address a  
situation in which an assignment was simply silent on the matter of the right to sue for past infringement. *Intimo,*  
*Inc. v. Briefly Stated, Inc.*, 948 F. Supp. 315 (S.D.N.Y. 1996); *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830  
F. Supp. 614 (N.D. Ga. 1993). Crucially, none deal with the type of situation here where a plaintiff initially enters an  
illegitimate transaction and later tries to back fill its lack of any semblance of rights to pursue an action.

1           Because Righthaven definitively lacked any exclusive rights at the time the complaint was  
2 filed, as in *Benchmark*, it cannot cure this defect by later machinations.<sup>4</sup>

3           **III.    RIGHTHAVEN’S AMENDMENT DOES NOT PROVIDE IT STANDING, BUT**  
4           **MERELY RECONFIRMS THE SHAM NATURE OF ITS “OWNERSHIP”**

5           In a tacit acknowledgement of the flaws inherent in the SAA, Righthaven and Stephens  
6 Media signed the Amendment to the SAA on the very day Righthaven’s Response was filed, May  
7 9, 2011. *See* Hinueber Decl. Ex. 3. Righthaven claims that the purpose of the Amendment is to  
8 “cure any possible doubt as to whether Righthaven has full ownership in an assigned copyright,”  
9 and, accordingly, standing to pursue this and its hundreds of other suits. Response at 3. The  
10 Amendment fails in its purpose for at least three reasons. First, as explained above, regardless of  
11 the Amendment’s effect now, Righthaven had no standing at the time the complaint was filed, a  
12 defect that cannot be fixed *nunc pro tunc*. Second, as explained below, the Amendment’s  
13 cosmetic rewording does not change the reality that Stephens Media is still the holder of all of the  
14 exclusive rights in the copyright with full control over Righthaven’s actions. Finally, even  
15 assuming the Amendment technically sufficed to vest some indicia of ownership in Righthaven,  
16 an inquiry beneath that window dressing reveals its entirely sham nature.

17           **A.    Stephens Media Still Retains Actual Ownership Under the Amendment**

18           The most substantial, and at the same time most transparent, change is the Amendment to  
19 Section 7.2. As noted, Section 7.2 of the original SAA provided that, simultaneously with  
20 execution of an assignment from Stephens Media to Righthaven, Stephens Media would “retain  
21 (and Righthaven hereby grants) an exclusive license” to exploit the assigned work. SAA § 7.2.  
22 Amended Section 7.2 now reads that, simultaneously with assignment, “Stephens Media is  
23 granted a non-exclusive license to Exploit [the work] to the greatest extent permitted by law in  
24 consideration of payment [of] \$1.00.” Amendment § 7.2. This artful wordplay and token grant  
25 of consideration attempts to manufacture the illusion of some transfer of interest greater than the  
26 original SAA. But analysis of the Amendment reveals the insertion of the “non” before

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27 <sup>4</sup> Righthaven’s suggestion that Democratic Underground cannot challenge its standing to sue as a non-party to the  
28 SAA finds its answer and rebuttal in *Silver* and the other cases cited above, like *Gaia Technologies* or *Benchmark*,  
which necessarily allowed such challenges either by the parties or the court itself.

1 “exclusive” to be a change in optics only. Stephens Media still controls all exclusive rights, and  
2 the Righthaven shakedown will continue to operate exactly as it has before, with Righthaven’s  
3 interest remaining only pursuit of litigation, and nothing more.

4 Even in defining the rights that Righthaven receives, Section 7.2 of the Amendment  
5 effectively nullifies them. Specifically, although Righthaven now purportedly holds some rights  
6 to “Exploit” the work beyond litigation, it cannot do so in any manner without giving Stephens  
7 Media 30 days notice and opportunity to object. *Id.* § 7.2. Transparently, this provision preserves  
8 Stephens Media’s authority to make all decisions about exploitation of the work, since it may  
9 “within 14 days of providing notice” reclaim “all right, title and interest” in the copyright through  
10 payment of a nominal \$10 fee to Righthaven. *Id.* § 8.1. Righthaven lacks even the option to  
11 license in breach of Stephens Media’s right to pre-approve and to pay contract damages. Rather,  
12 consistent with its status as the true owner, Stephens Media has an uncontestable right to enjoin  
13 such use. *Id.* (Righthaven’s failure to give notice is “a material breach of this Agreement and  
14 would cause Stephens Media irreparable harm,” remedial by an injunction). In reality, Stephens  
15 Media remains that exclusive licensee even after the Amendment: it not only has unlimited rights  
16 to use the work, it retains the *exclusive* rights to the work until *it decides to approve* exploitation  
17 by another—an event not even alleged to have happened.

18 Moreover, any attempt by Righthaven to exploit the work on its own behalf would be  
19 inconsistent with its own charter. The only provision of the RHOA that authorizes non-litigation  
20 conduct allows Righthaven to license other person’s works on a commission basis, not to license  
21 works on its own behalf. *See* RHOA § 3.2(g) (third parties may “repose” rights in Righthaven for  
22 it to collect royalties, only under a structure whereby Righthaven would “receive a percentage of  
23 said royalties in consideration of the Company’s service in this regard”). Righthaven has neither  
24 authority nor legal capacity to exploit any rights without Stephens Media’s approval.

25 Perhaps as significant as what the Amendment did change is what it did not. It did not  
26 alter Stephens Media’s absolute authority to decide whether or not to sue (SAA §3.3); to receive  
27 reversion of the assignment if Righthaven declines to sue (*id.*); to halt any litigation and reclaim  
28 the copyright at any time (*id.* § 8.2); and to encumber the copyright it purportedly does not own.



1 *Id.* §9.3. Even under the Amendment, all incidents of ownership and control stay with Stephens  
2 Media, nullifying Righthaven’s contrary claim.<sup>5</sup> *See, e.g., In re Computer Eng’g Assoc., Inc.*, 337  
3 F. 3d 38, 46 (1st Cir. 2003) (“[t]o be an effective assignment, the assignor must divest itself of all  
4 right, interest, and control in the property assigned”).

5 **B. Even If the Amendment Were Technically Effective, It Only Confirms the**  
6 **Sham Nature of the Assignment and Cannot Confer Standing**

7 Even were this Court to conclude that the Amendment technically vested Righthaven with  
8 some exclusive rights under Section 106, this would not change the fact that the Amendment  
9 should be disregarded as a sham, created for the sole purpose of manufacturing standing. The  
10 Court has the duty to look behind an arrangement purporting to conform with *Silvers* to determine  
11 the actual substance of the transaction—a task best exemplified by Judge Wilson’s opinion in  
12 *Nafal v. Carter*, 540 F. Supp. 2d 1128 (C.D. Cal. 2007), *aff’d* 388 Fed. Appx. 721 (9th Cir. 2010).

13 Nafal claimed standing to sue to enforce a copyright in an Egyptian melody allegedly  
14 infringed in the song “Big Pimpin.” As here, Nafal had originally entered into an arrangement  
15 providing no standing to sue—a “Joint Venture” with the exclusive licensee of the melody to  
16 prosecute suits for its infringement. 540 F. Supp. at 1133. Several years later, Nafal entered an  
17 additional agreement, signed by the exclusive licensee and the original copyright holder,  
18 purportedly to become “co-exclusive licensee” in the copyright (a status that would confer the  
19 right to sue), receiving “an undivided one-half (50%) of [the] rights, title and interest.” *Id.* at  
20 1141. In fact, however, just as here, Nafal’s actual rights were substantially controlled by his  
21 grantor. Specifically, the court found that “(1) he has no discretion to decide when an alleged  
22 infringer should be sued; (2) . . . Plaintiff’s ‘interest’ in [the work] would have been terminable if  
23 a lawsuit had not been filed within 180 days; (3) [and] nearly every effort by Plaintiff to exploit  
24 [the work] must be approved in advance by [the assignor].” *Id.* at 1143.

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25 <sup>5</sup> Righthaven’s suggestion that its entitlement to \$1 per year from Stephens Media creates a beneficial ownership is  
26 specious. *See* Response at 10. A “beneficial owner” is “an author who had parted with legal title to the copyright in  
27 exchange for percentage royalties based on sales or license fees.” *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984)  
28 (*quoting*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 159, reprinted in 1976 U.S. Code Cong. & Ad. News 5659,  
5775). The beneficial owner, as assignor, is entitled to assert an equitable interest because its revenue will fall if the  
*assignee* does not take care of the copyright. Righthaven claims to be an owner, not an assignor. Nor does its  
interest depend on licensing by Stephens Media. It will get its right to a dollar no matter what. Amendment § 7.

1 Judge Wilson rejected this attempt to dodge the *Silvers* rule, finding the parties description  
2 of an “Assignment Agreement” as creating joint ownership of the exclusive license “not  
3 dispositive.” Instead, the nature of the transaction was “governed by the substance of what was  
4 given to the licensee and not the label that the parties put on the agreement.” *Id.* at 1141-42  
5 (quoting *Althin CD Med., Inc., v. West Suburban Kidney Ctr.*, 874 F. Supp. 837, 843 (N.D. Ill.  
6 1994)). Despite the purported grant of an “exclusive license,” the reality of the transaction was  
7 that “Plaintiff has no standing because he is at best a glorified non-exclusive licensee to whom  
8 [the grantor] may from time to time assign a cause of action.” *Nafal*, 540 F. Supp. 2d at 1143-44.  
9 “The Court is not required to accept the formalistic labels attached by [the contracting parties] to  
10 their agreement, which would permit them to massage the underlying effect of their contractual  
11 relationship.” The Ninth Circuit affirmed, agreeing that “the documents were a disguised  
12 assignment of a cause of action prohibited under *Silvers*.” *Nafal*, 388 Fed. Appx. at 723.

13 The same analysis applies to the effort by Righthaven and Stephens Media to massage  
14 their own contractual relationship to disguise the assignment of a cause of action. This Court  
15 should see through the relabeling of an “exclusive license” as a lesser, “non-exclusive” license for  
16 which Stephens Media must, perversely, now pay an additional \$1 a year royalty. Even post-  
17 Amendment, Righthaven, like *Nafal*, cannot prosecute any infringement claim unless pre-  
18 approved by its “assignor.” SAA § 3.3; *see also Althin*, 874 F. Supp. at 843 (no standing to sue  
19 where original copyright owner, “retained the sole right to determine whether or not any  
20 infringement actions would be brought”). As in *Nafal*, the copyright will be “reassigned” to  
21 Stephens Media if Righthaven does not go forward with suit within 60 days. SAA § 3.3. And,  
22 going even further than in *Nafal*, Stephens Media can reclaim the copyright even *after* suit is  
23 brought for the nominal price of \$10. The “disguised assignment of a cause of action” here is at  
24 least as obvious, and no more enforceable, than in *Nafal*.<sup>6</sup>

25 <sup>6</sup> Democratic Underground notes that it has asserted an affirmative defense of champerty, though it did not  
26 affirmatively plead that cause of action in its Counterclaim. *See Del Webb Communities, Inc. v. Partington*, 2009  
27 WL 3053709, at \*3 (D. Nev. Sep. 18, 2009) (recognizing champerty cause of action in Nevada and describing it as  
28 “maintaining a suit in return for a financial interest in the outcome”); Patry on Copyright, Section 5:136 (champerty  
shown “where the assignment of the copyright was a sham designed to disguise the real intent of conveying the chose  
in action”). It intends to amend its Counterclaim following decision of the outstanding motions to state such a claim  
against Righthaven, and to the extent that leave to amend may be required, it respectfully so requests.

1 Remarkably, there is not even the pretense that, by relabeling Stephens Media’s rights as  
2 “non-exclusive,” Righthaven will now start granting additional licenses to others. To the  
3 contrary, the declarations of Mr. Hinueber and Mr. Gibson attest only that the SAA was intended  
4 to allow Righthaven to sue on Stephens Media’s behalf, and that the intent of the Amendment is  
5 to strengthen that possibility. But that testimony ultimately backfires: it merely reconfirms that  
6 the Amendment’s purported reconstruction of some rights in Righthaven *other* than a naked right  
7 to sue is slight of hand, designed to do nothing other than to skirt *Silvers*.

8 The very label of the Amendment as a purported “Clarification” evinces its disingenuity.  
9 No one suggests that, when the SAA was signed, the parties intended the “exclusive” license to  
10 Stephens Media actually to be “*non-exclusive*,” or that Stephens Media would relinquish, rather  
11 than “retain” all exclusive rights. Nor, when the SAA expressly prohibited all exploitation of the  
12 work by Righthaven, did the parties actually intend Righthaven to have the opposite rights. *See*  
13 RHOA § 3.2(c). No “clarification” was needed. What the Amendment actually does is *reverse*  
14 the language of the SAA, for no purpose other than to feign an ownership interest in Righthaven.

15 Examining the substance of this transaction, the sham is patent. While a peppercorn may  
16 be sufficient to constitute consideration for contract analysis, adding a nominal fee and the prefix  
17 “non” is not enough to evade the requirement of an actual ownership interest in a copyright.

### 18 CONCLUSION

19 For all of the foregoing reasons, Defendants respectfully request the entry of judgment in  
20 favor of Defendants on the Complaint and denial of the motion to dismiss the Counterclaim.<sup>7</sup>

21 Dated: May 20, 2011

FENWICK & WEST LLP

22  
23 BY: /s/ Laurence F. Pulgram

24 Laurence F. Pulgram

25 Attorneys for Defendants

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27 <sup>7</sup> To the extent the record is deemed not sufficient to grant judgment, Democratic Underground would be entitled to  
28 discovery regarding disputed facts, including those raised by the Hinueber and Gibson declarations. In all events,  
dismissal of its Counterclaim could not be warranted absent such discovery.