

# EXHIBIT K

**Las Vegas Sun**

copyright law:

# Some targets of Righthaven lawsuits fighting back

By [Steve Green](#) ([contact](#))

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The Righthaven lawsuits filed in U.S. District Court in Las Vegas at first glance seem pretty simple: They show bloggers, nonprofits and generally small-time websites around North America for years have been cutting and pasting entire Las Vegas Review-Journal stories on to their websites without authorization.

That seems like obvious copyright infringement. But, as defendants with and without attorneys fight back in some of the cases, Righthaven's claims don't appear to be so cut and dried.

The defense attorneys and some defendants without attorneys are making complex legal arguments about whether the Nevada court has jurisdiction over the out-of-state defendants, whether Righthaven itself has standing to sue and whether Righthaven failed to follow the law in filing no-warning lawsuits rather than first sending requests or takedown orders to the infringing websites.

"What makes this action frivolous is the baseless allegations pertaining to the existence of personal jurisdiction over me, when it should have been crystal clear to Righthaven that I am not amenable to suit in Nevada. The complaint is replete with false averments in an attempt to mislead the court, which is a blatant abuse of process," said Dean Mostofi, who was sued after an R-J story about a lawyer being reprimanded allegedly was posted on his website deanmostofi.com.

"To fight this frivolous lawsuit I have filed, pro se (without an attorney), a well-researched motion to dismiss for lack of personal jurisdiction, and I want to encourage all out-of-state defendants to file similar motions and to force Righthaven to litigate these actions in the proper venues," said Mostofi, of Potomac, Md.

Righthaven, however, fills its lawsuits with paragraph after paragraph hoping to establish jurisdiction by showing the defendant websites aimed to reach Nevada residents — sometimes by merely posting a story of interest to Nevadans.

Complicating the issue is that some website owners are denying liability, saying the R-J stories were posted — without their knowledge or authorization — by message board users.

Most of the infringing stories credit the R-J for the information. When the infringement doesn't credit the R-J, the posting amounts to plagiarism, one of the most serious offenses in the profession of journalism. Those cases, though, probably don't qualify for extra damages and the lack of credit to the R-J could have been caused by negligence or ignorance rather than ill will, media attorney Marc Randazza said.

Some of the defendants are arguing that Righthaven lacks standing to sue them because Righthaven didn't own the copyrights at the time of the initial infringement.

Righthaven's procedure has been to "troll" or find an infringement of an R-J copyright to a specific story. It then buys the copyright for that story from the R-J's owner, Stephens Media LLC, and then sues the infringer — all the while continuing to troll for additional violations.

At least five websites, for instance, had been sued through July 30 for posting the same four paragraphs of a six-paragraph blog by R-J Publisher Sherman Frederick about a Transportation Security Administration watch list of peeved travelers.

Buying the copyright is important for Righthaven because that gives it the authority to seek statutory damages. The assignment of the copyright covers past infringements, Righthaven says.

None of the contested Righthaven cases has advanced to the point where a trial has been scheduled. Judges through July 30 had not yet ruled on the motions for dismissal or the other legal arguments defendants are making.

Attorneys at the Las Vegas office of the law firm of Lewis and Roca, which has one of the biggest intellectual property practices in town, are contesting the legitimacy of at least two of Righthaven's lawsuits.

In one lawsuit, involving the website MajorWager.com, they said in court papers: "While this case masquerades as a legitimate copyright dispute, in reality, it is arguably frivolous and nothing more than a thinly disguised shakedown."

"Plaintiff Righthaven LLC knows that the costs of defending this action will far outweigh the value of this case, and is seeking to extract a settlement under the threat of protracted litigation and expense," their filing said. "Neither the federal courts nor the Federal Rules of Civil Procedure were established for this purpose."

MajorWager is an Ottawa, Canada, website that in the past has included links to stories involving sports and gambling from numerous sources including the Las Vegas Sun and the Review-Journal.

In responding to the suit, MajorWager CEO Russ Hawkins said in a court declaration that a user of the Internet site, "Clevfan," in Montreal, posted the R-J articles named in the lawsuit to the discussion forums section of MajorWager's website.

In another case involving the website emtcity.com, serving the paramedic and emergency medical technician community, the Lewis and Roca attorneys wrote: "This case is a frivolous and self-aggrandizing action that seeks enrichment for the plaintiff by abusing and subverting the legal process."

"Plaintiff Righthaven LLC knows that the costs of defending this action will far outweigh the value of this case, and is seeking to extract a settlement under the threat of protracted litigation and expense. The purported amount of actual damages, if any, is de minimis (minimal) compared to the filing costs and their own in-house legal fees that they have heaped onto this matter in an effort to derive a greater recovery through settlement or judgment. (The defendant) asserts that this is an effort to bully him into submission and payment," the attorneys wrote.

Another case is being defended by attorney Allen Lichtenstein, who has had plenty of experience working on ACLU First Amendment lawsuits.

In that case, a website about the potential harmful effects of wind energy posted a story from Northern Nevada's Ely Times newspaper — a story Righthaven later obtained the copyright for. The R-J and the

Ely Times are both owned by Stephens Media LLC.

Righthaven also complained the website had posted stories from Stephens Media's Daily World newspaper in Aberdeen, Wash., along with some 75 stories from various sources in Nevada since 2006, including several from the Review-Journal.

The operator of the nonprofit website, [www.windaction.org](http://www.windaction.org), Lisa Linowes, publishes it from her home in New Hampshire, with her husband providing technical support. Lisa Linowes was obviously surprised to be sued by Righthaven.

"At the time of the posting of the article, I did not believe that infringed on anyone's copyright. One reason for not believing that the posting of the article would infringe on anyone's copyright is that, over the past five years, we have posted somewhere between 28,000 and 29,000 articles on the passive, noncommercial website and we have never been subject to any lawsuit for copyright infringement for any of those articles until now," Lisa Linowes said in court papers. "Nor am I aware of any similar passive noncommercial website that has been sued for copyright infringement merely for posting news articles from around the United States and the rest of the world, concerning a matter of public policy and interest."

Lichtenstein noted in court papers the nonprofit website and its owner aren't a financial threat to Stephens Media.

"Defendants are not in the business of producing a local newspaper in Ely. They are not in competition with the Ely Times, and certainly not in competition with Righthaven LLC, which is a company specifically set up and 'grubstaked' by Stephens Media for the sole purpose of bringing this lawsuit and others like it," Lichtenstein wrote.

"No one can seriously maintain that the limited reach and circulation of the Ely Times was diminished by the appearance of one of its articles on a website that acts as a clearinghouse for information concerning wind energy. If anything, the posting might have helped rather than hurt the Ely Times by exposing the paper to people across the United States and the world who had never heard of that newspaper," Lichtenstein wrote.

In another case, attorneys with the firms Gordon Silver in Las Vegas and Freund & Brackey in Beverly Hills, Calif., are defending a suit involving the Louisville, Ky.-based website [www.southerngaming.com](http://www.southerngaming.com), which serves gamblers in the Southern United States.

They also accused Righthaven of running a shakedown operation.

Righthaven's business model is to acquire copyrights and then troll around the Internet to "identify and sue anyone posting the articles," the Southern Gaming attorneys complained.

"Righthaven has advanced upwards of 50 separate lawsuits based wholly on this ill-conceived scheme, which is nothing more than a massive shakedown focusing not on a legitimate effort to protect copyrights but rather to extract settlements from (out of state) defendants faced with the prospect of defending an action outside their homes states," these attorneys wrote.

The attorneys asked the court to dismiss "this frivolous action" and "put an end to at least one of Righthaven's dubious lawsuits, ostensibly rooted in intellectual property law but more clearly founded on an abuse of that very federal law."

Righthaven and its CEO and lead attorney, Steven Gibson, deny the lawsuits are frivolous. Gibson has done work for the R-J for years and with his law firm Gibson Lowry Burris LLP last year represented the R-J in trademark litigation unrelated to the current copyright lawsuits.

Gibson said Righthaven is operating as a successful and growing business that through late July had settled or resolved about 30 of the lawsuits, and it will keep filing suits because “new infringements occur every day.”

Some of the Righthaven defendants have told the Sun their only option is to settle, because that would cost less than to litigate — even if they win.

Crete, Ill.-based Odds on Racing offered to settle a Righthaven lawsuit for \$5,000, including costs and attorneys’ fees, an offer accepted by Righthaven.

“That is not insignificant,” Gibson said.

Gibson didn’t disclose whether the \$5,000 is within the usual range of settlements being negotiated by Righthaven. The only other publicly disclosed settlement of a Righthaven lawsuit involved the National Organization for the Reform of Marijuana Laws, which agreed to pay \$2,185.

Gibson has heard the criticism about Righthaven suing bloggers with apparently innocent motives like Allegra Wong in Boston. When it comes time to assessing damages, he said, Righthaven may show some leniency in her case.

And as for suing the R-J’s sources, like gaming industry Publisher Anthony Curtis, he said that as Righthaven refines its procedures, it may be less likely they’ll be sued.

“But I’m not giving them a blanket waiver,” Gibson said.

Gibson also disputes contentions by critics that instead of suing website operators, the R-J and Righthaven should be requesting they take down the infringing material. That would require contacting thousands of people, which wouldn’t be effective, he said.

Many of the Righthaven defendants have said that a simple phone call or e-mail from the R-J would have been all that was necessary for them to removing the infringing material. But Righthaven has noted in court papers that those same defendants didn’t bother to contact the R-J for advance permission to post the stories at issue.

Gibson and other copyright attorneys say there is a misconception that in every case, under the federal Digital Millennium Copyright Act (DMCA), Righthaven is required to send a “DMCA takedown” order to website operators.

That only applies in specific circumstances where the website operator has complied with provisions in the DMCA, including the posting of information on where the DMCA notices are to be sent.

Righthaven watchers also wondered this summer if a major copyright ruling involving the DMCA would affect the Righthaven cases.

The ruling came in a lawsuit pitting entertainment giant Viacom — owner of MTV, Paramount Pictures and other brands — against Google’s YouTube subsidiary. A federal judge threw out Viacom’s \$1 billion copyright infringement lawsuit claiming YouTube wasn’t doing enough to discourage illegal posting of Viacom material on YouTube.

U.S. District Judge Louis Stanton found the DMCA doesn't require YouTube to check people's material before it's posted and that YouTube had been responsive to requests from Viacom that it remove infringing content from the site.

"I'm in the same position as Google v. Viacom. I'm a source provider and protected under the law. I did not post the article. I did not commission it. I did not direct anyone to produce it," said Larry Johnson, who was sued by Righthaven after an R-J story about Nevada's U.S. Senate race appeared on Johnson's noquarterusa.net website.

But Ryan Gile, an intellectual property attorney at the Las Vegas law firm Weide & Miller, said the YouTube ruling may be of little assistance to some defendants, particularly small website operators that can't afford to litigate against Righthaven.

"For those websites where the R-J articles were posted by third parties, the DMCA was always going to be their best defense against copyright infringement liability. But in order to successfully invoke the DMCA safe harbor, the defendant website may still have to endure months of discovery by Righthaven to show that the website meets the specific criteria for protection under the DMCA. If the defendant is a corporate entity and must hire a lawyer to represent it in court or if the defendant is an out-of-state individual and must hire a local lawyer to represent them in court, then just proving that you are completely immune from any liability is still a large financial burden that most little guys simply can't afford," Gile said.

Gibson, in the meantime, says critics are off the mark when they suggest Righthaven's typical \$75,000 statutory damage claim is excessive given the apparently minor infringements in some of the cases. Statutory damages are those in which the plaintiff doesn't have to show economic loss and they serve as a deterrent to infringement, he said.

And while Righthaven typically asks in its lawsuits that the infringing Web site's domain name be transferred to Righthaven, Gibson said Righthaven hasn't actually pursued that legal option. But it's something available to deter infringements, he said.

Despite the protests of critics who want a more freewheeling, largely unregulated Internet, it's well established that copyright and trademark law apply to the Internet.

One of the early cases to establish this, ironically, involved one of the current Righthaven defendants, the conservative news-sharing site [www.freerepublic.com](http://www.freerepublic.com) in Fresno, Calif.

Free Republic was sued for copyright infringement in the 1990s by the Los Angeles Times and The Washington Post in a case that was closely watched because, at the time, it wasn't clear if copyright law applied to the nascent Internet sphere.

In 1999, a federal judge sided squarely with the newspapers, finding [freerepublic.com](http://www.freerepublic.com) had no "fair use" exemption to post thousands of the newspapers' stories online so readers could comment on them.

On July 20, the [freerepublic.com](http://www.freerepublic.com) message board was filled with "here we go again" comments after users of the site learned it had been sued again, this time by Righthaven. In the new Righthaven case, the stories weren't posted directly by [freerepublic](http://www.freerepublic.com), but by users on its message boards.

Around the country, copyright attorneys and some media players are questioning the Righthaven troll-and-sue strategy, and some have likened it to controversial campaigns by the music and movie industries

to sue illegal downloaders.

John Paton, CEO of the Journal Register Co. newspaper chain and Editor & Publisher magazine's publisher of the year in 2009, was among those surprised to learn of Righthaven's lawsuit campaign.

"Such a bad idea for newspapers. I'm speechless," Paton said on a Twitter post.

His reaction wasn't surprising. Instead of suing bloggers, Journal Register has embraced them, announcing initiatives this year to provide local bloggers with tools and training to grow news coverage — part of his company's push to grow revenue through local digital partnerships in its markets in the Northeast.

Ron Coleman, a lawyer in New York, noted on his Likelihood Of Confusion blog that there's a key difference between lawsuits over movie and music downloading and suits over copying and pasting newspaper stories: People generally are willing to pay for music and movies, but not news.

"There's barely any market for fresh news at all — i.e., people really don't expect or want to pay for it, and they don't," he wrote. "That's not because they can steal it, but because there are so many free or very low cost substitutes for mainstream media available today. And that's going to be even more true for the mainly warmed over or in some cases really old newspaper stories that seem to be the subject of this (Righthaven) copyright 'enforcement' sweep."

Coleman also took a swipe at Gibson's business plan.

"When an infringing blogger gets served with a summons and complaint, he's going to have to pay to make it go away, and the only thing Gibson's going to want to know is how much-a-you-got. What kind of business plan is that?" Coleman asked.

Another attorney suggested an alternative to the Righthaven and similar "copyright troll" tactics. Such cases could be handled through an arbitration or administrative process much the same way employment discrimination complaints must be filed before they turn into lawsuits, Philadelphia attorney Maxwell Kennerly wrote on his blog.

Kennerly pointed to a typical Righthaven case, satirically calling it "a recent suit against those scourges of American society, the American Society of Safety Engineers (ASSE)."

In that case, an R-J story about safety legislation allegedly was posted to the website of a Florida chapter of the ASSE.

Kennerly said he believes the allegations, if true, would constitute copyright infringement. But he questions the need make a federal lawsuit out of them.

"Just taking that ASSE case as an example, all the (proposed) agency would really need, other than the complaint filed, is an answer from the defendant admitting or denying the material facts about the extent and nature of republication," Kennerly wrote. "And that would be it; the investigator or arbitrator could then look at those documents, the core of which would be fewer than 20 pages, and start discussing with the parties a reasonable settlement. That would obviate the need to bring on attorneys for hundreds of dollars an hour, and would keep these small potatoes matters from clogging our federal courts."

Sam Bayard, at Harvard's Citizen Media Law Project, said a ruling in another media copyright case this summer may serve to limit damages against copyright infringers with innocent intentions.

In a closely-watched case in Boston, a federal judge slashed by 90 percent the \$675,000 in damages a jury awarded record companies against a student who had illegally downloaded and shared 30 songs.

The \$67,500 Joel Tenenbaum has to pay is still a hefty amount for violating record labels' copyrights. But in drastically reducing the damages, U.S. District Judge Nancy Gertner found: "This [\$675,000] award is far greater than necessary to serve the government's legitimate interests in compensating copyright owners and deterring infringement."

Gertner wrote that the Constitution's Due Process Clause has served to protect large corporations from "grossly excessive punitive awards" but also applies to "ordinary people like Joel Tenenbaum."

As the lawsuits proceed or are settled, it's clear Righthaven's lawsuit campaign has already had some effect.

At least three people in Las Vegas have told the Sun that in response to Righthaven's initiative, they have removed R-J stories from their websites because they have been sued or were afraid of being sued.

- An anti-Righthaven Facebook page has been created, criticizing the initiative and serving as a resource for those who have been sued.

- Some websites have vowed to stop sending traffic to the R-J. Officials at a website called abovetopsecret.com said that after they were sued, they would immediately stop allowing users to post R-J stories and links. "It's ludicrous. We'll never settle with them," Mark Allin, a partner at the company, said after his company was sued.

- A website called [www.thearmedcitizen.com](http://www.thearmedcitizen.com) shut down after its operators in Idaho were sued. The owners said they didn't want to worry about any more litigation over the noncommercial site covering the use of weapons in self-defense.

- Critics say R-J reporters are now in a conflict of interest situation because their paper in many cases is suing their sources including the state Democratic Party, Progressive Leadership Alliance of Nevada, Citizens for Responsibility and Ethics in Washington, real estate brokerages and agents and Anthony Curtis, a gaming industry observer and publisher.

"How are the Review-Journal's reporters supposed to now fairly cover the groups this LLC has sued?" asked a post on the anti-Review Journal website [www.lvjournalreview.com](http://www.lvjournalreview.com).

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