

# Exhibit G

2011 WL 2746315

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United States District Court,  
D. Nevada.

RIGHTHAVEN LLC, Plaintiff,  
v.  
Dean MOSTOFI, Defendant.

No. 2:10-CV-1066-KJD-GWF. July 13, 2011.

#### Attorneys and Law Firms

Joseph C. Chu, John Charles Coons, Righthaven LLC, Shawn A. Mangano, Shawn A. Mangano, LTD., Las Vegas, NV, for Plaintiff.

Dean Mostofi, Potomac, MD, pro se.

#### Opinion

#### ORDER

KENT J. DAWSON, District Judge.

\*1 Presently before the Court is Defendant Dean Mostofi's Motion to Dismiss (# 25). Plaintiff filed a response in opposition (# 29), to which Defendant replied (# 30).

#### I. Background

This dispute arises out of Defendant's alleged copyright infringing conduct. On April 20, 2010, Defendant displayed a Las Vegas Review-Journal ("LVRJ") article ("Work"), on his website, <<http://www.deanmostofi.com/>> ("Website"), regarding a Las Vegas, Nevada based lawyer who was reprimanded for false advertising by the Nevada Supreme Court. Defendant allegedly changed the original title of the Work: "Court Reprimands Lawyer Over Misleading Ads," to a different title: "Las Vegas Lawyer Reprimanded for False Advertising." (Complaint, ¶ 21). Plaintiff claims that this article infringes upon the copyright.

On June 24, 2010, approximately two months after Defendant displayed the article on his website, the Work was allegedly registered with the United States Copyright Office ("USCO"). (Complaint, ¶ 19).

On or about January 18, 2010, Plaintiff and Stephens Media LLC ("Stephens Media"), the original owner of the Work, entered into a Strategic Alliance Agreement ("SAA"). Plaintiff filed its Complaint (# 1) on June 30, 2010. Plaintiff alleges that Defendant willfully copied the Work, without authorization. Defendant raises this Motion to Dismiss for lack of subject matter jurisdiction, specifically asserting Plaintiff's lack of standing to bring the claim at the time the action was filed.

#### II. Standard for Motion to Dismiss

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

Attacks on jurisdiction pursuant to Rule 12(b)(1) can be either facial, confining the inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the complaint. See Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n. 2 (9th Cir.2003). In a facial attack "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Myer, 373 F.3d 1035, 1039 (9th Cir.2004). By contrast, "in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* A factual attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. Whitehorn v. F.C.C., 235 F.Supp.2d 1092, 1095-96 (D.Nev.2002) (citing St. Clair v. City of Chico, 880 F.2d

199, 201 (9th Cir.1989)). Dismissal for lack of subject matter jurisdiction is proper if the complaint, considered in its entirety, fails to allege facts that are sufficient to establish subject matter jurisdiction. DRAM Antitrust Litigation, 546 F.3d at 984–85.

### III. Analysis

\*2 Section 501(b) of the 1976 Copyright Act (“Act”) establishes who is legally authorized to sue for infringement of a copyright:

The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for an infringement of that particular right committed while he or she is the owner of it.

17 U.S.C. § 501(b). Therefore, to be entitled to sue for copyright infringement, the plaintiff must be the “legal or beneficial owner of an exclusive right under a copyright.” See Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 884 (9th Cir.2005). If the plaintiff “is not a proper owner of the copyright rights, then it cannot invoke copyright protection stemming from the exclusive rights belonging to the owner, including infringement of the copyright.” *Id.* (quoting 4 *Business and Commercial Litigation in Federal Courts*, at 1062 § 65.3(a)(4) (Robert Haig ed.)). Section 106 of the Act defines and limits the exclusive rights under copyright law.<sup>1</sup> *Id.* at 884–85. While these exclusive rights may be transferred and owned separately, the assignment of a bare right to sue is ineffectual because it is not one of the exclusive rights. *Id.* Since the right to sue is not one of the exclusive rights, transfer solely of the right to sue does not confer standing on the assignee. *Id.* at 890. Additionally, the “bare assignment of an accrued cause of action is impermissible under [the Act].” *Id.* One can only obtain a right to sue on a copyright if the party also obtains one of the exclusive rights in the copyright. See *id.*

- <sup>1</sup> “[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in

the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106.

### A. Contract Interpretation

Furthermore, although the Act grants exclusive jurisdiction for infringement claims to federal courts, those courts construe copyrights as contracts and turn to the relevant state law to interpret them. See Automation By Design v. Raybestos Products Co., 463 F.3d 749, 753 (7th Cir.2006). The question of the interpretation of the contract is a question of law. See Shelton v. Shelton, 78 P.3d 507, 510 (Nev.2003). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Id.* A contract may be ambiguous if the paragraphs in question are reasonably susceptible to different constructions or interpretations. See Agric. Aviation Eng’g Co. v. Board of Clark County Com’rs, 749 P.2d 710, 712 (Nev.1990).

The SAA defines the relationship between Plaintiff and Stephens Media and governs all future copyright assignments between them (including the assignment at issue here). See (Defendant’s Motion to Dismiss, Doc. No. 25, p. 4 of 28). Plaintiff alleges that the SAA “envisions an assignment to Plaintiff of all right, title, and interest in and to potential copyrighted works.” (Plaintiff’s Opposition to Defendant’s Motion to Dismiss, Doc. No. 29, p. 8 of 14). This is an inaccurate conclusion. Here, the SAA is not ambiguous. The SAA expressly denies Righthaven any right from future assignments other than the bare right to bring and profit from a copyright infringement action.

\*3 This notion is clearly expressed in Section 7.2 of the SAA:

7.2 **Despite** any such Copyright Assignment, Stephens Media shall **retain** (and is hereby granted by Righthaven ) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and **Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.** To the extent that Right haven’s [sic] maintenance of rights to pursue infringers of the Stephens Media Assigned Copyrights in any manner 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 ...

(Defendant’s Motion to Dismiss, Doc. No. 25, Exhibit A, p. 9 of 22 (bold emphasis added, italicization in original)). It is clear from this section that Plaintiff is prevented from obtaining, having, or otherwise exercising any right other than the bare right to sue, which is expressly forbidden pursuant to *Silvers*. As a result, Defendant asserts that Plaintiff lacks standing to maintain this lawsuit. The Court agrees with this conclusion because it is clear that the entirety of the SAA was designed to prevent Righthaven from becoming “an *owner of any exclusive right in the copyright ...*,” *Silvers*, 402 F.3d at 886 (emphasis in original), regardless of Righthaven and Stephens Media’s *post hoc*, explanations of the SAA’s intent or later amendments.

### ***B. Amendment to the SAA***

Notwithstanding the actual transaction that occurred, Plaintiff argues that the amendment it executed with Stephens Media on May 9, 2011 fixes any possible errors in the original SAA that would prevent Plaintiff from having standing in this matter. *Righthaven LLC v. Vote For The Worst, LLC, et al.*, Case No. 2:10-cv-1045-KJD-GWF (Doc. No. 41 and 42). Specifically, Plaintiff alleges that this amendment further clarifies and effectuates, “to the extent not already accomplished, what has at all times been the intent of the parties—to transfer full ownership in copyright,” to Plaintiff. This amendment, however, cannot create standing because “[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint was filed.*” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n. 4 (1992) (quoting *Newman–Green, Inc. v. AlfonzoLarrain*, 490 U.S. 826, 830 (1989)) (emphasis in *Lujan* ). Although a court may allow parties to amend defective allegations of jurisdiction, it may not allow the parties to amend the facts themselves. *Newman–Green*, 490 U.S. at 830. As an example, a party who misstates his domicile may amend to correctly state it. This is an amendment of the allegation. However, that party is not permitted to subsequently move in order to change his domicile and amend accordingly. This would be an amendment of the jurisdictional facts, which is not allowed. *See id.* Here, Plaintiff and Stephens Media attempt to impermissibly amend the facts to manufacture standing. Therefore, the Court shall not consider the amended language of the SAA, but the actual assignment and language of the SAA as it existed at the time the complaint was filed.

### ***B. Copyright Assignment***

\*4 Even if the Court were to consider the amendments, these cosmetic adjustments do not alter the fact that Plaintiff has failed to sufficiently allege whether or not Stephens Media *assigned* the copyrighted Work to Righthaven pursuant to the SAA, as amended or not.

Pursuant to Section 3.1 of the SAA, Stephens Media retains the right to assign copyrights that it owns and that it, among other things, considers a “material risk of infringement.” Once a copyright is designated as such, it is assigned to Righthaven. *See* (Defendant’s Motion to Dismiss, Doc. No. 25, Exhibit A, p. 7 of 22). Section 7 of the SAA establishes how Stephens Media assigns copyright content to Righthaven. Here, the SAA states:

Stephens Media shall effect the assignments to *Righthaven* of copyrights as required by [the SAA] ... by executing a **particularized assignment** with respect to **each** copyright and each consistent with (and in form and substance the same as) the scope of assignment as set forth in the form of copyright assignment as embodied in Exhibit 1 (each a “Copyright Assignment”). Stephens Media shall provide Notice to *Righthaven* of each copyright ... that is required to be the subject of a Copyright Assignment ... by no later than five (5) Business Days prior to the last day upon which each respective Copyright Assignment is required to be executed by Stephens Media as provided in Section 3.1.

(Defendant’s Motion to Dismiss, Doc. No. 25, Exhibit A, pp. 8–9 of 22) (Emphasis added).

The SAA clearly does not envision an all-encompassing assignment of all Stephens Media owned copyrights, as Plaintiff alleges. The SAA sets forth guidelines for the assignment of *each* copyright that Stephens Media identifies as a potential risk for infringement. Specifically, as stated above, Exhibit 1 of the SAA is the legal memorialization of the terms set forth in Section 7. Through this instrument, Stephens Media “transfers, vests and assigns,” all copyrights requisite to have Righthaven “recognized as the copyright owner of the work.” Accordingly, the work must be depicted as “Exhibit A,” and must be attached to Exhibit 1. Plaintiff acknowledges this fact because Plaintiff directs the Court to an entire section of the Opposition devoted to a “Written Assignment,” yet fails to provide a copy of the Assignment to the Work in question, pursuant to the SAA. Furthermore Plaintiff’s reference to the *Vote For The Worst* case works against Plaintiff because it provides a copy of the assignment pertaining to the work in that case. Additionally, Plaintiff acknowledges that the purpose of the SAA is not to “effectuate the assignment of any work;” rather, Exhibit 1 achieves this purpose. *See* (Plaintiff’s Opposition to Defendant’s Motion to Dismiss, Doc. No. 29, p. 7 of 14).

**C. Prior Rulings within this District**

Finally, Plaintiff contends that multiple courts within this district have already determined that Plaintiff has standing to bring claims for past infringement under the *Silver* standard based on the plain language of the copyright assignment. Again, this Court is unable to conclude whether or not the assignment confers standing upon Plaintiff because Plaintiff does not provide a copy of the assignment for the Court's consideration as it did in the prior cases within this district.

**D. Plaintiff Lacks Standing to Bring this Action**

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\*5 Because the SAA prevents Plaintiff from obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement action and because Plaintiff fails to sufficiently allege an assignment of rights from Stephens Media to Plaintiff, the Court finds that Plaintiff lacks standing in this case. Accordingly, the Court dismisses Plaintiff's cause of action.

**IV. Conclusion**

Accordingly, IT IS HEREBY ORDERED that Defendant Dean Mostofi's Motion to Dismiss is **GRANTED**.

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