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13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF NEVADA**

15 RIGHTHAVEN, LLC, a Nevada limited liability  
16 company,

17 Plaintiff,

18 vs.

19 BILL HYATT, an individual

20 Defendant.

Case No. 2:10-cv-01736

**AMICUS CURIAE’S REPLY TO  
RIGHTHAVEN LLC’S RESPONSE  
TO MEDIA BLOGGERS  
ASSOCIATION’S AMICUS CURIAE  
BRIEF**

21 **AMICUS CURIAE’S REPLY TO RIGHTHAVEN LLC’S RESPONSE TO MEDIA  
22 BLOGGERS ASSOCIATION’S AMICUS CURIAE BRIEF**

23 *Amicus* Media Bloggers Association (hereinafter, “MBA,” or the “*Amicus*”), by and  
24 through counsel, replies to Plaintiff Righthaven, LLC’s (hereinafter “Righthaven[’s],” or the  
25 “Plaintiff[’s]”) Response to MBA’s *Amicus Curiae* Brief (Doc. # 35) filed on May 10, 2011 in  
26 opposition to MBA’s *Amicus Curiae* Brief (Doc. # 29), filed on April 14, 2011.

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## 1 I. Introduction

2 On May 10, 2011, Righthaven responded to MBA's *Amicus Curiae* Brief (Doc. # 35)  
3 and, almost simultaneously, executed a "Clarification" (hereinafter, the "Clarification") of the  
4 Strategic Alliance Agreement (hereinafter, the "Agreement") between Righthaven and Stephens  
5 Media LLC (hereinafter, "Stephens Media"). Decl. of Steve Gibson (Doc. # 36) at 3:13-24, Exh.  
6 3; Decl. of Mark Hinueber (Doc. # 37) at 3:10-21, Exh 3. This "Clarification," conveniently  
7 executed on the day Righthaven had to respond to Defendant's pending Motion (Doc. # 29),  
8 supposedly rectifies the defects in Righthaven's Agreement, which governs the terms on which  
9 Stephens Media assigns its copyrights to Righthaven. The "Clarification", however, does no  
10 such thing, and serves only as a cynical attempt to obfuscate the unlawful nature of Righthaven's  
11 enterprise: The "Clarification," along with the Agreement, is a mere adjustment of Righthaven's  
12 acquisition of the right to sue for copyright infringement without a true transfer of bona fide  
13 copyright as required by Title 17. As the assignment of a right to sue in copyright cases has  
14 already been deemed unlawful by this Circuit and others, what is happening here is clear:  
15 Righthaven's unlawful enterprise has been unmasked, and it is now making a desperate attempt  
16 to save its litigation business model. Unfortunately for Righthaven, but fortunately for free  
17 expression and the rule of law, this "Hail Mary pass" will not get Righthaven in the end zone.

18 The restructuring of the Agreement between Righthaven and Stephens Media supposedly  
19 effected by the "Clarification" does little more than rearrange the deck chairs on the Titanic. In  
20 both cases, no change of course is effected; as the rest of the Agreement, which remains in effect,  
21 provides, Righthaven exists for other purpose than to sue on copyrights that it "obtains" *only*  
22 *after* finding evidence of supposed infringement. A true and correct copy of this Agreement is  
23 attached hereto as Exhibit A. Exh. A §§ 3-5. This poorly worded, vague non-exclusive license to  
24 content that Stephens Media assigned to Righthaven in the first place (Doc. # 36 Exh. 3 § 1; Doc.  
25 # 37 Exh. 3 § 1) does not eliminate Stephens Media's legally fatal right of reversion (Doc. # 36  
26 Exh. 3 § 2; Doc. # 37 Exh. 3 § 2), and ultimately deprives Righthaven of exclusive rights in the  
27 copyright purportedly assigned (Doc. # 36 Exh. 3 §§ 1 and 2; Doc. # 37 Exh. 3 §§ 1 and 2). But  
28 exclusive rights are an essential component of Article III standing in copyright cases. *Sybersound*

1 *Records v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008); *Silvers v. Sony Pictures Entm't*,  
2 *Inc.*, 402 F.3d 881, 885, 890 (9th Cir. 2005). Without them, Righthaven is sunk.

3 This “Clarification” illuminates only one thing: the Righthaven copyright litigation  
4 factory actually has no lawful interest in or *bona fide* use for the copyrights it purports to acquire  
5 from Stephens Media. Otherwise it would not be necessary for Righthaven to give Stephens  
6 Media 30 days’ notice to use the works supposedly already infringed copyrights for any purpose  
7 other than litigation. (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.) Moreover, unlike the  
8 Agreement, as “clarified,” a legitimate assignment of exclusive rights would, axiomatically, not  
9 give Stephens Media the unilateral right to buy back the assigned copyright before Righthaven  
10 could use the any of the copyright’s exclusive rights under 17 U.S.C. § 106. (Doc. # 36 Exh. 3 §  
11 2; Doc. # 37 Exh. 3 § 2.) Righthaven’s CEO brings special attention to Section 15.1 of the  
12 Agreement, allowing the Court to “correct” the Agreement, or provide “direction” or  
13 “clarification.” (Doc. # 36 at 3:5-9, 15-21.) *Amicus* agrees that the Court has an important  
14 opportunity for rectification here, but not in the novel and improper role of crafting a legal  
15 solution for parties seeking an illegal end. Rather, and this correction should come from viewing  
16 the Agreement and its accompanying “Clarification” for what they are – a cynical attempt to turn  
17 copyrights into lawsuits, and nothing more.

## 18 **II. Legal Standards**

19 Subject matter jurisdiction is an essential element to every lawsuit and must be  
20 demonstrated “at the successive stages of the litigation.” *Chapman v. Pier 1 Imports (U.S.), Inc.*,  
21 631 F.3d 939, 954 (9th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561  
22 (1992)). A central component to subject matter jurisdiction is the question of standing, which  
23 requires that the party experience actual or imminent harm. *Lujan*, 504 U.S. at 561 (citing  
24 *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)). A party’s standing to bring a case is not subject to  
25 waiver, and can be used to dismiss the instant action at any time. Fed. R. Civ. P. 12(h)(3); *U.S. v.*  
26 *Hays*, 515 U.S. 737, 742 (1995); *Chapman*, 631 F.3d at 954. Within the realm of copyright law,  
27 subject matter jurisdiction is defined by 17 U.S.C. 501(b), which allows only the legal or

28

1 beneficial owner of an exclusive right in a copyright, specified in 17 U.S.C. § 106, to sue for  
2 infringement. *Silvers*, 402 F.3d at 884.

### 3 **III. Argument**

4 *Amicus* does not seek to contest the validity of the Agreement or “Clarification” as  
5 contracts between Righthaven and Stephens Media, but contests the premise of this lawsuit, i.e.,  
6 the copyright Righthaven claims to by operation of those written contracts. *See Silvers*, 402 F.3d  
7 at 884 (forbidding transfer of the bare right to sue), *compare Magnuson v. Video Yesteryear*, 85  
8 F.3d 1424, 1428-29 (9th Cir. 1996) (precluding defendant from attacking the transfer of the  
9 copyrights used to sue for infringement) and *Sabroso Publ’g, Inc. v. Caiman Records Am., Inc.*,  
10 141 F. Supp. 2d 224, 227-28 (D. P.R. 2001) (preventing a defendant from attacking the  
11 contractual validity of a copyright transferee from the transferor to the transferee plaintiff).  
12 Framed in these terms, the Court is presented with an inquiry of what rights Righthaven obtains  
13 as a result of the transfer as opposed to a probe into the transaction itself. *Amicus* respectfully  
14 submits that the answer to the question of what rights Righthaven has acquired by these  
15 instruments is “none.” This is relevant not only to the question of standing – which is  
16 considerable indeed – but also to what damages Righthaven would be entitled to receive from  
17 Hyatt in the event of any award, because, as the holder of a spurious right to sue and nothing  
18 more, Righthaven cannot claim *any* harm, let alone \$150,000 worth. Surely the Emperor is  
19 revealed now to have no clothes.

20 *Amicus* nether represents Hyatt nor seeks to have this case dismissed for a lack of subject  
21 matter jurisdiction on his behalf. Righthaven, however, raised – and very extensively briefed –  
22 the all-important issue of standing (Doc. # 35 at 2-11) and, as the lynchpin to Righthaven’s  
23 claimed entitlement to damages, *Amicus* is compelled to address it in that light. While *Amicus*  
24 briefly raised the issue of standing and subject matter jurisdiction in its original Brief (Doc. # 29  
25 at 2-6), the MBA addresses the issue thoroughly in this briefing at Righthaven’s initiative, due to  
26 the contents of its Response (Doc. # 35) essentially forcing *Amicus* to follow Righthaven down  
27 the rabbit hole. In fact, under the Agreement, even with the “Clarification,” Righthaven lacks  
28 standing to bring this case. Accordingly, this Court lacks subject matter jurisdiction over the

1 dispute.

2 Righthaven deceptively cites three cases in which it was the plaintiff for the proposition  
3 that Righthaven's assignments are legal under *Silvers: Righthaven LLC v. Vote For The Worst,*  
4 *LLC, et al.*, Case No. 2:10-cv-01045- KJD-GWF (D. Nev. March 30, 2011); *Righthaven LLC v.*  
5 *Majorwager.com, Inc.*, 2010 WL 4386499 at \*2 (D. Nev. Oct. 28, 2010); *Righthaven LLC v. Dr.*  
6 *Shezad Malik Law Firm P.C.*, 2010 WL 3522372 at \*2 (D. Nev. Sept. 2, 2010). Righthaven's  
7 reliance on these above-cited District of Nevada cases is doubly flawed. These cases considered  
8 only a one-page assignment between Righthaven and Stephens Media, and not the underlying  
9 Agreement and "Clarification" that set forth the terms that govern that transaction and which,  
10 under the law, make it ineffective.

11 Indeed, in those three cases, Righthaven appears to have purposely hidden the Agreement  
12 from the defendants and the Court. Now that the Agreement and "Clarification" are a matter of  
13 record and are before this Court, it has before it the full set of facts determining Righthaven's  
14 lack of standing. The fact that Righthaven fought mightily to keep the Agreement from coming  
15 to light demonstrates not only that the Righthaven scheme is unlawful, but that Righthaven and  
16 its principals were fully aware of that fact, i.e., that they would be undone by consideration of the  
17 Agreement. Now they seek to be rewarded for their "creativity," ginning up a "Clarification"  
18 that does nothing to cure the underlying lack of rights and lack of standing.

19 **A. Despite Its "Clarification," Righthaven Still Does Not Have the Right to Sue for  
20 Infringement, and Thus Has Not Experienced Any Damage.**

21 Contrary to Righthaven's ostensible hopes, though, the "Clarification" (Doc. # 36 Exh.  
22 3; Doc. # 37 Exh. 3) serves only to make Righthaven's naked use of its acquired copyrights as  
23 the basis of lawsuits – and only as the basis of lawsuits – even clearer.

24 The "Clarification," even if it could salvage Righthaven's scheme, could not retroactively  
25 remedy Righthaven's lack of standing. While a subsequently executed agreement provides  
26 clarification regarding the parties' intent to cure standing defects in copyright cases, it does not  
27 retroactively confer standing that previously did not exist. *See Billy-Bob Teeth, Inc. v. Novelty,*  
28 *Inc.*, 329 F.3d 586, 591 (7th Cir. 2003); *Imperial Residential Design, Inc. v. Palms Dev. Group,*  
*Inc.*, 70 F.3d 96, 99 (11th Cir. 1995); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29

1 F.3d 1529, 1532 (11th Cir. 1994); *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830 F.  
2 Supp. 614, 620 (N.D. Ga. 1993). In each of these cases, cited by Righthaven in its opposition, a  
3 clarification was allowed to put a previously executed oral transfer into writing, or to include  
4 previously accrued causes of action in the assignment. *See Infodek*, 830 F. Supp. at 620. None of  
5 these cases support the proposition that parties may cure a prior, ineffective attempt to transfer a  
6 copyright. Here especially there can be no “cure” where the only purpose of the transaction is to  
7 transfer Stephens Media’s copyrights to Righthaven solely for the purpose of litigation in an  
8 effort to circumnavigate this Circuit’s holding in *Silvers*. 402 F.3d at 890.

9 ***1. The “Clarification” Denies Righthaven of Substantially All Ability to Use Its  
Assigned Copyrighted for Anything – Except Lawsuits.***

10 Despite the May 9, 2011 “Clarification,” Righthaven’s Agreement with Stephens Media  
11 provides it with nothing more than the bare right to sue. An important component of  
12 Righthaven’s “Clarification” is the revision of Agreement § 7.2 (Exh. A § 7.2) to no longer give  
13 Stephens Media an exclusive license to Exploit (defined in *id.* at Schedule 1) the copyrighted  
14 works for “any lawful purpose” (*id.* § 7.2). In its place, as the putative owner of the copyright,  
15 Righthaven has granted Stephens Media a non-exclusive license to Exploit the copyrighted work  
16 “to the greatest extent permitted by law” on condition that 1) Stephens Media pay Righthaven  
17 \$1.00 per year for this right, and 2) Righthaven give Stephens Media 30 days notice if it decides  
18 to Exploit the copyrighted work or receive any royalties from the copyright’s use other than in  
19 connection with lawsuits, with failure to do so constituting a material breach of the Agreement.  
20 (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.)

21 This aspect of the “Clarification” is problematic for numerous reasons. First,  
22 Righthaven’s non-exclusive license to Stephens Media contains no definitions as to duration,  
23 geography or media covered. Rather, it haphazardly lets Stephens Media use the copyright  
24 assigned to Righthaven “to the greatest extent permitted by law.” (*Id.*) This vague language  
25 impairs the markets and interests of other licensees to which Righthaven could license its  
26 copyrighted works, such as those that better serve markets in which Stephens Market is  
27 permitted to compete, and especially in light of Righthaven’s infringement litigation arrangement  
28 with Stephens Media evinced in Exhibit A §§ 3-5, and unchanged by the “Clarification.”

1           Moreover, under the “Clarification,” Righthaven’s unilateral use of the assigned  
 2 copyright would constitute a material breach of the Agreement, allowing Stephens Media to seek  
 3 injunctive relief against Righthaven – for using what is ostensibly its own copyright. (Doc. # 36  
 4 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.) Such an extreme limitation by the assignor of a copyright is  
 5 inimical to ownership of a copyright. Righthaven, however, is so desperate to retain the right to  
 6 extort money from alleged infringers of “its” copyrights such as Hyatt that it dishonestly insists it  
 7 is the owner of the assigned Stephens Media copyrights. (Doc. # 36 Exh. 3 § 3; Doc. # 37 Exh. 3  
 8 § 3.) This dishonesty must not be rewarded.

9           Stephens Media’s \$1.00-per-year license and royalty fee (Doc. # 36 Exh. 3 § 1; Doc. # 37  
 10 Exh. 3 § 1) is also misleading. While a nominal fee for licensing back the copyright Stephens  
 11 Media originally assigned to Righthaven, this sum is vastly outweighed by the revenues Stephens  
 12 Media receives from Righthaven’s litigation on the assigned copyright, as the Agreement –  
 13 unaltered by the “Clarification” in this respect – entitles Stephens Media to 50% of any recovery  
 14 Righthaven obtains from litigation. (Exh. A § 5). With all of the components taken together,  
 15 Stephens Media assigns its copyright to Righthaven and pays \$1.00 in order to receive 50% of  
 16 Righthaven’s litigation recovery.<sup>1</sup> Based on what little public information is available about  
 17 Righthaven’s settlements, Stephens Media’s recovery entitlement per copyright assignment has  
 18 been orders of magnitude greater than \$1.<sup>2</sup> Indeed, without the recovery clause in § 5 of the  
 19 Agreement (Exh. A. § 5), this entire arrangement would fail to be profitable for Stephens and  
 20 Righthaven and make no sense for either party, as Stephens assigns only copyrights that have  
 21 been – or it believes have been – infringed. (*See* Exh. A. § 3.) It makes no sense for Stephens  
 22 Media to assign only its infringed copyrights to Righthaven, just to license them back and give  
 23 Righthaven the sole “right” to sue for infringement,<sup>3</sup> unless Righthaven’s only purpose is to sue  
 24 on these assigned copyrights.

25 \_\_\_\_\_  
 26 <sup>1</sup> This presumably includes sharing any attorneys’ fees award with Stephens Media, potentially violating Fed. R.  
 27 Civ. P. 54(d)(2).

<sup>2</sup> *See* Righthaven Lawsuits, <http://righthavenlawsuits.com/> (*last accessed* May 10, 2011) (providing Righthaven’s  
 28 estimated revenues based on lawsuit settlements).

<sup>3</sup> The right to sue for copyright infringement is not one of the exclusive copyright rights provided under 17 U.S.C. §  
 106.

1 Righthaven and Stephens Media also used the “Clarification” to amend the reversion  
2 provisions of its Agreement. Instead of allowing Stephens Media to have a complete reversion  
3 of the copyright (Exh. A § 8), the “Clarification” allows Stephens Media to, at any time, give  
4 Righthaven 14 days notice that it will repurchase the previously assigned copyright for \$10.  
5 (Doc. # 36 Exh. 3 § 2; Doc. # 37 Exh. 3 § 2.) What’s more, upon exercising this option,  
6 Stephens Media must repay Righthaven the costs Righthaven had undertaken to pursue  
7 infringement actions on that assigned copyright. (*Id.*) This new, revised section 8.2 goes into  
8 considerable detail governing how Righthaven will be compensated and disputes settled in the  
9 event of Stephens Media exercising its unilateral right to repurchase its assigned copyright from  
10 Righthaven, even at the cost of terminating Righthaven’s pending litigation (*id.*) – a profound  
11 issue that belies Righthaven’s claim as the true, legal and beneficial owner of the assigned  
12 copyrights.

13 Operating together, sections 1 and 2 of the “Clarification” make it clear that Stephens  
14 Media retains full ownership of the copyrights that Righthaven claims to own. (Doc. # 36 Exh. 3  
15 §§ 1 and 2; Doc. # 37 Exh. 3 §§ 1 and 2.) If Righthaven wants to exploit or otherwise license the  
16 assigned copyright, it must give Stephens Media 30 days’ notice before doing so. (Doc. # 36  
17 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.) Yet, once given notice of Righthaven’s intent to use the  
18 copyright it supposedly owns, Stephens Media may exercise its rights under new § 8.1 to  
19 repurchase the copyright with 14 days’ notice and the payment of \$10. As set out above, this  
20 arrangement creates a potential loop whereby, if Righthaven were to even try to use Stephens  
21 Media’s assigned copyrights for a purpose other than litigation, Stephens Media could snatch  
22 them back before Righthaven could actually use them. Any characterization of this arrangement  
23 as “ownership” of the copyrights is bizarre.

24 Substantively, this is not a non-exclusive license, but an exclusive license to Stephens  
25 Media. This mislabeled exclusive license permits Stephens Media supposedly to use the  
26 assigned copyright “to the greatest extent permitted by law” (*id.*) up to and until the time  
27 Righthaven uses or licenses the copyright for a purpose other than infringement litigation. (*Id.*)  
28 Should Righthaven provide Stephens Media notice that it intends to use the copyright for non-

1 litigation purposes, though, Stephens Media can buy back its rights before anyone else can use  
2 the copyrights supposedly owned by Righthaven. (Doc. # 36 Exh. 3 §§ 1 and 2; Doc. # 37 Exh. 3  
3 §§ 1 and 2.) This arrangement defeats the rights Righthaven claims here as its basis for  
4 recovery. *See, Sybersound*, 517 F.3d at 1150-51 (holding that only exclusive licensees may use  
5 or enforce the rights they possess); *Davis*, 505 F.3d at 101 (observing that “no one other than the  
6 exclusive licensee may exercise the right” where there is an exclusive license).

7 ***2. Taken Together, the Terms of Righthaven’s Agreement and “Clarification”***  
8 ***Show that Righthaven is not the Owner of the Assigned Copyrights, but has***  
9 ***Merely Been Assigned a Right to Sue.***

10 Righthaven’s and Stephens Media’s “Clarification” describes Righthaven as the  
11 copyright “owner,” but it is a word without meaning in this circumstance. (Doc. # 36 Exh. 3 § 3;  
12 Doc. # 37 Exh. 3 § 3.) A child lacking understanding may call a dog a “cat,” but that does not  
13 make it so. Righthaven and Stephens Media are not children, but have called Righthaven the  
14 owner of Stephens Media’s assigned copyrights in § 3 of the “Clarification” (*id.*) although it  
15 obviously is not so either, in light of the excessive restrictions on Righthaven’s use of the  
16 assigned copyrights contained within the Agreement (Exh. A) and amplified in the  
17 “Clarification” (Doc. # 36 Exh. 3; Doc. # 37 Exh. 3).

18 It is not uncommon for courts to encounter, and reject, restrictive agreements that purport  
19 to transfer ownership of a copyright but, in reality, convey no such right. In *Lahiri v. Universal*  
20 *Music & Video Distribution Corporation*, 606 F.3d 1216, 1222 (9th Cir. 2010) the appeals court  
21 found that a settlement agreement purportedly recognizing a party in the litigation as an “owner”  
22 of a copyright was too restrictive to convey such a right, holding that “[t]he record demonstrates  
23 [the attorney] misled the district court by use of a settlement agreement that deceptively used  
24 ownership language, but did not convey or recognize [the assignee’s ownership].” This  
25 language should be of great instructive value for this Court, as the record in this case  
26 demonstrates the same thing.

27 Similarly, in *Nafal v. Carter*, the court held that the plaintiff’s description in the putative  
28 assignment as a “co-owner” was not properly dispositive of the plaintiff’s ownership rights. 540  
F. Supp. 2d 1128, 1141 (C.D. Cal. 2007). Instead, the court held that the relevant test to

1 determine proper ownership of a copyright was “Whether an agreement transfers rights that are  
2 exclusive or nonexclusive is governed by the substance of what was given to the licensee and not  
3 the label that the parties put on the agreement.” *Id.* at 1141-42, citing *Althin v. W. Suburban*  
4 *Kidney Ctr.*, 874 F. Supp. 837, 843 (N.D. Ill. 1994).

5 In *Nafal*, the document allegedly giving the plaintiff an ownership interest in the  
6 copyright prohibited him, much as the Agreement and Clarification do for Righthaven, from  
7 “exercising any decision-making authority over almost every portion of the License Agreement.”  
8 540 F. Supp. 2d at 1142. Accordingly, the court found that Nafal was not the owner of the work,  
9 lacked Article III standing to pursue a copyright infringement claim, and disposed of the case at  
10 summary judgment. *Id.* at 1144. Similarly, in *Althin*, the trial court found that the plaintiff  
11 company lacked standing to bring its copyright infringement claims. 874 F. Supp. at 837. Upon  
12 review, the court found that the assignment agreement that putatively made the company an  
13 exclusive copyright right holder merely conveyed a non-exclusive license to the plaintiff  
14 company. *Id.* Specifically, the court found that the rights transferred by the parties’ agreement  
15 under the 1976 Copyright Act were “governed by the substance of what was given to the licensee  
16 and not the label that the parties put on the agreement.” *Id.* As the licensor gave the licensee no  
17 right to transfer or assign the license agreement, with only a very narrow exception, the court  
18 held that Althin did not acquire sufficient rights to have standing to enforce them against others’  
19 infringement, and thus dismissed the case on the defendant’s Fed. R. Civ. P. 12(b)(1) Motion to  
20 Dismiss. *Id.*

21 As set forth above, Righthaven has extraordinarily limited rights for a copyright “owner.”  
22 Righthaven’s fundamental rights to dispose of its copyrights are so limited and crippled that  
23 cannot even use them for non-litigation purposes without seeking Stephens Media’s approval,  
24 lest it “materially breach” its Agreement. (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.)  
25 Whenever Stephens Media wishes, with minimal notice, it may, without opposition, repurchase  
26 its assigned copyrights for \$10 apiece. (Doc. # 36 Exh. 3 § 2; Doc. # 37 Exh. 3 § 2.) At the end  
27 of the day, under the Agreement, the only thing Righthaven has any authority to do is to pursue  
28 infringement litigation. (Exh. A §§ 3-5.)

1 A number of other provisions in the Agreement that are not affected by the  
2 “Clarification” further deny Righthaven ownership of the copyright, and reserve rights to  
3 Stephens Media far beyond those due to a non-exclusive licensee. As part of its copyright  
4 assignments to Righthaven, Stephens Media is entitled to:

5 maintain Encumbrances on Stephens Media Assigned Copyrights as part of an  
6 overall funding securitization whereby all or substantially all of Stephens Media's  
7 assets are Encumbered as part of said funding securitization and Stephens Media  
8 Assigned Copyrights are not singled-out as or part of a particularized group of  
9 Encumbered assets.

9 (Exh. A § 9.3.) This provision entitles Stephens Media, putatively the non-exclusive licensee of  
10 the assigned copyrights under the “Clarification”, to mortgage the copyrights ostensibly owned  
11 by Righthaven. Thus, despite Righthaven being the apparent owner of these copyrights,  
12 Stephens Media is entitled to use them as security for funding and other financial obligations.  
13 This is inconsistent with the tale that Righthaven now weaves before this Court.

14 Stephens Media retains a number of other rights in the copyrights Righthaven claims to  
15 own. In Agreement § 3.3 (*id.* § 3.3), Stephens Media retains the right to reassign the copyright,  
16 despite Righthaven’s ownership, if Righthaven declines to sue for its infringement. If  
17 Righthaven were the sole and true owner of the assigned copyright, Stephens Media would have  
18 no such rights, yet this section of the Agreement gives Stephens Media the right to reassign a  
19 copyright that it insists is owned by Righthaven. (*Id.*) Righthaven further reveals the flimsiness  
20 of its “ownership” claim in Agreement § 3.4, pursuant to which it does not even have the  
21 exclusive right to conduct litigation, and which grants Stephens Media – a mere non-exclusive  
22 licensee under the “Clarification,” which normally would not have standing to sue for  
23 infringement – the right to pursue infringement litigation on its own, without Righthaven. (*Id.* §  
24 3.4.)

25 In sum, all of Righthaven’s rights to the works assigned to it by Stephens Media are  
26 beholden to Stephens Media’s unfettered whims: From Righthaven’s ability to exploit or license  
27 the work to a party other than Stephens Media and Stephens Media’s right to re-purchase any  
28 assigned copyright for \$10 without Righthaven having any ability to oppose, to Righthaven’s

1 sole pre-authorized use of the assigned copyright being for copyright infringement under  
2 Agreement §§ 3.1-3.4 and Stephens Media’s ability to pursue its own copyright infringement  
3 lawsuits. Stephens Media’s rights and privileges permeate the Agreement and “Clarification” so  
4 completely and thoroughly that Righthaven’s “ownership” of the assigned copyright is little  
5 more than a cruel joke at the expense of Hyatt and hundreds of other defendants who have been  
6 sued under this unlawful arrangement, to say nothing for those who have given in to  
7 Righthaven’s extortionate demands in cases resolve before Righthaven was forced to admit the  
8 true nature of its “rights.”

9 To the extent this Court must examine this Agreement, and correct it as Righthaven has  
10 encouraged the Court to do in § 15.1 of its Agreement (*id.* § 15.1) in order to effect the parties’  
11 “manifest intent” (Doc. # 36 at 3:8-12, 18-24; Doc. # 37 at 3:10-14, 15-21), it should find that it  
12 is nothing more than a vehicle to unlawfully transfer the right to sue, and no other rights, under  
13 the guise of copyright ownership. Indeed, the Agreement and its “Clarification” haphazardly  
14 consider Righthaven’s ability to use and protect its copyright rights in all arenas except its  
15 meticulously detailed scheme to pursue infringement litigation on the assigned copyrights in  
16 Agreement §§ 3-5. (Exh. A. §§ 3-5.) The very inclusion of § 15.1 (*id.* § 15.1) in the Agreement,  
17 and its retention in the “Clarification,” demonstrates that Righthaven and Stephens Media knew  
18 their arrangement was a sham, yet they couldn’t find a way to make the Righthaven model work  
19 – predominantly because such operations are prohibited by *Silvers* and other law in this Circuit –  
20 and want the Court to change the parties’ agreement to effectuate its unlawful scheme. Not only  
21 is the Agreement and “Clarification” between Stephens Media and Righthaven unlawful, so too  
22 is the parties’ intent – to transfer the right to sue to Righthaven, with no other rights – and the  
23 Court cannot cure what ails Righthaven and its business model.

24 The operation of this Agreement and its “Clarification” is nothing more than the transfer  
25 of an accrued right to sue without any exclusive rights. This practice has been held unlawful in  
26 every jurisdiction to consider it, including the controlling Court of Appeals for the Ninth Circuit.  
27 *Hyperquest, Inc. v. N’Site Solutions, Inc.*, 632 F.3d 377, 383 (7th Cir. 2011); *U.S. v. Chalupnik*,  
28 514 F.3d 748, 753 (8th Cir. 2008); *Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007); *Silvers*, 402

1 F.3d at 885; *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991);  
2 *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27 (2d Cir. 1982); *see also*  
3 *Sybersound*, 517 F.3d at 1144. No matter what Righthaven calls the rights it supposedly obtains,  
4 substantive analysis reveals them to be little more than the bare right to sue – something that not  
5 only is not provided for in 17 U.S.C. § 106, but has been specifically held to be unlawful in case  
6 after case, and runs directly contrary to the Copyright Act’s entire purpose.

7 **B. This Court’s Award of Nominal Damages is the Most that Righthaven can**  
8 **Justifiably Receive, and Still More than Righthaven is Entitled to Under its**  
9 **Agreement and “Clarification” with Stephens Media.**

10 As illustrated in the foregoing sections, Righthaven has acquired nothing more than the  
11 bare right to sue for infringement – which, under the exclusive list of copyright rights  
12 enumerated in 17 U.S.C. § 106 – is not a “right” at all. *Silvers*, 402 F.3d at 884. To the extent  
13 Righthaven even has standing to bring this suit and recover damages, its entitlement to damages  
14 is minimal – arising only from the statutory minimum damages allowed in 17 U.S.C. § 504(c).  
15 The actual damages suffered by Righthaven are so remote and infinitesimally small that even an  
16 award of statutorily minimum damages - \$750 – will wildly exceed the value that Stephens  
17 Media and Righthaven seem to have assigned to the work – a single dollar. (Doc. # 36 Exh. 3 §  
18 1; Doc. # 37 Exh. 3 § 1.)

19 The extraordinarily limited scope of Righthaven’s ownership rights in the copyrights it  
20 receives from Stephens Media, to the extent Righthaven receives any such rights, reveals that the  
21 copyrights are ostensibly transferred for one purpose only: litigation. Even if they were not, the  
22 \$1 per year licensing fee seems to demonstrate that even \$750 in damages might be excessive –  
23 and \$150,000 most certainly is off the charts with respect to its level of impropriety. Righthaven  
24 cannot reliably or even realistically license or otherwise use the assigned copyrights for a  
25 purpose other than Stephens Media’s purported non-exclusive license – making its copyrights  
26 worth, at most, \$1.00 per year. Indeed, while Righthaven’s “Clarification” fails in many regards,  
27 it makes crystal clear the fact that Righthaven – to the extent it can bring these lawsuits – incurs  
28 laughably small damages due to the infringement of Hyatt and others. In turn, these puny

1 pecuniary losses make Righthaven appear all the more ridiculous in pursuing a large default  
2 judgment award.

3 As discussed above, Righthaven breaches its Agreement with Stephens Media if it tries to  
4 license or otherwise use the content Righthaven supposedly owns without 30 full days' notice, a  
5 time period within which Stephens Media can buy back the copyrights it purportedly assigned to  
6 Righthaven. Within this timeframe, Stephens Media receives the value of its content in the only  
7 way Righthaven is authorized to deliver it under the Agreement (Exh. A), which is by filing  
8 infringement lawsuits. One cannot suspend disbelief long or hard enough to think that Stephens  
9 Media gave its sole and most important asset – its content – to Righthaven for the stated sum of  
10 \$1.00 per year as laid out in the “Clarification”. (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.)  
11 Instead, Stephens gets 50% of any litigation recovery Righthaven obtains (Exh. A) as a reward  
12 for purporting to give its copyrights to Righthaven. Meanwhile, Stephens Media obtains no  
13 other benefit from allowing Righthaven to “own” its copyrights.

14 The true operation of this Agreement, even with a “Clarification” makes it clear that  
15 Righthaven is not seriously participating in the market for content or licensing. In fact, with the  
16 shackles placed on it by Stephens Media’s many restrictions on how the copyrights can be used,  
17 Righthaven is not participating any markets *at all* save the one foreclosed to it by *Silvers*. As  
18 argued in *Amicus*’ opening brief (Doc. # 29), Righthaven exists solely for the purpose of  
19 litigating these copyrights, and cannot claim that Hyatt’s use of the article at issue harmed its  
20 market. Righthaven produced no evidence that it is engaged in licensing or content production in  
21 any way, or that the infringing use of the article by Hyatt will damage Righthaven’s market for  
22 the overwhelmingly exclusive and one-sided right to obtain Stephens Media’s copyrights and use  
23 them to file lawsuits for infringements discovered before obtaining the copyrights.

24 In short, Righthaven is not a newspaper, newsletter, magazine, blog or any other entity  
25 that could be harmed by Hyatt’s actions. The only thing that could possibly hurt Righthaven’s  
26 illusory interests in the Stephens Media copyrights is if Hyatt somehow claimed ownership of  
27 those copyrights and set up a competing unlawful litigation mill to terrorize bloggers and  
28 webmasters across the country. As Hyatt has neither done so, nor has he used the copyright in

1 any way that would harm Righthaven's ability to illegally use these copyrights as a premise for  
2 litigation, Righthaven cannot credibly claim to have suffered one whit of damage in this case.

3 This complete and utter lack of damages, and Righthaven's total absence of any  
4 demonstration of the harm caused by Hyatt, point to the inescapable conclusion that Righthaven  
5 is not owed anything. (And that, of course, assumes that Righthaven is even entitled to *be* here  
6 and bring this lawsuit.) Righthaven had its opportunity to show damages, and was practically  
7 instructed to do so by *Amicus*' opening brief (Doc. # 29). Righthaven's complete failure to do so,  
8 instead focusing myopically on the question of Article III standing and subject matter  
9 jurisdiction for the preponderance of its Response to the *Amicus Curiae* Brief (Doc. # 35) is just  
10 another point of datum showing that Righthaven's damages are nothing. Recovery from Hyatt  
11 should be as close to that amount – zero – as possible.

12 **C. Substituting or Adding Stephens Media as Plaintiff in This Case is Improper, and**  
13 **Will Neither Remedy Righthaven's Lack of Standing, Nor Will It Remedy**  
14 **Righthaven's Lack of Damages.**

15 As a simple technical matter, under Local Rule 7.2, Righthaven's request to add or  
16 substitute Stephens Media as Plaintiff in this action is improper, as it should be brought before  
17 this Court as a separate motion. Such a request for substitution is improperly brought with  
18 Righthaven's brief. (Doc. # 35 at 11). Nevertheless, considering Righthaven's request at this  
19 time is in the interest of judicial economy.

20 While *Amicus* is agnostic as to the issue of Hyatt's liability, as he is in default, the  
21 circumstances of this case do not permit Righthaven to add or substitute Stephens Media as a  
22 plaintiff due to it being the proper party in interest. When a plaintiff has not suffered an injury  
23 and lacked standing since a lawsuit's inception, a proper party in interest cannot substitute for the  
24 plaintiff later in litigation. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23  
25 (9th Cir. 2007); *Blackwell v. Skywest Airlines*, 245 F.R.D. 453, 463 (S.D. Cal. 2007). As  
26 Righthaven never owned, nor was it ever the exclusive assignee, of a copyright right defined in  
27 17 U.S.C. § 106, it never had a claim against Hyatt, nor was there any confusion as to who the  
28 proper party-in-interest was.

1 If there were some actual bona-fide confusion as to the copyright's ownership, there  
2 might be grounds under which Stephens Media could be substituted in as the plaintiff. *See*  
3 *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 308 (5th Cir. 2001); *Isbell v. DM Records, Inc.*,  
4 Case No. 4:07-cv-146, 2009 U.S. Dist. LEXIS 23735 at \*2-3 (E.D. Tex. 2009). However, the  
5 right to substitute a party is not a right granted to plaintiffs who get caught breaking the law, and  
6 who then want to save face. This right is there for parties who have an honest misunderstanding  
7 of the legal owner of certain rights. There is nothing honest about Righthaven, and it does not  
8 deserve such grace from this Honorable Court. Righthaven's "Clarification" to its Agreement  
9 with Stephens Media does not confer standing upon Righthaven, as the Agreement still operates  
10 just as it ever has – to grant Righthaven the bare right to sue for infringement, and nothing more.  
11 From the Agreement's construction and "Clarification's" added terms, there is no question that  
12 Righthaven still lacks these rights.

13 This Agreement and its desperately manufactured "Clarification" exist solely to serve  
14 whatever purpose is furthered by Stephens Media not being the plaintiff in the more than 250  
15 lawsuits filed by Righthaven. Ironically, if Stephens Media had acted as the plaintiff in these  
16 cases, it would obviate the need for its attempts to appear as if it had transferred some kind of  
17 copyright rights to Righthaven in an effort to masquerade its assignment of the bare right to sue.  
18 For whatever reason, Stephens Media chose to ignore *Silvers*, set up a copyright litigation entity,  
19 and attempted to dance around this Circuit's precedent forbidding exactly Righthaven's and  
20 Stephens Media's relationship *ex post*.

21 Of course, this does not change the fact that Stephens Media is paying a mere dollar for  
22 the right to use the article in question in this case. (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3 § 1.)  
23 Accordingly, if Stephens Media were to be substituted in as the Plaintiff, it could not claim that  
24 its damages were greater than the one dollar that it ostensibly is paying to Righthaven in order to  
25 use its own works. Therefore, whether the Plaintiff is Righthaven or Stephens Media, the  
26 damages are the same – one measly dollar. If Righthaven is entitled to anything, which it is not,  
27 then it is the bare statutory minimum available to it under the Copyright Act.

28 //



1 As such, Righthaven lacks, and has never possessed, standing to bring this action, and this Court  
2 therefore lacks subject matter jurisdiction over the dispute.

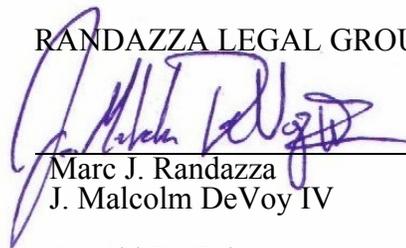
3 To the extent this dispute is properly before the Court, Righthaven has not proven that it  
4 has been harmed by Hyatt's use of the article at issue. Righthaven, in fact, has not shown any  
5 evidence of harm, but simply arguments that the statutory damages available under 17 U.S.C. §  
6 504(c) entitle it to an absurd level of damages when compared to the actual damage that could  
7 have theoretically been done by Hyatt – a single dollar. (Doc. # 36 Exh. 3 § 1; Doc. # 37 Exh. 3  
8 § 1.). To the extent Hyatt's posting of the article did any harm, it was not in Righthaven's illicit  
9 "market" of pre-infringed copyrights ripe for litigation.

10 Righthaven's proposed last-second joinder of Stephens Media will not cure Righthaven's  
11 many problems in this litigation – the least of which being that it has once again ignored this  
12 District's, the U.S. Supreme Court's and Congress' prohibition on domain name transfers as a  
13 remedy for copyright infringement. When Righthaven's arguments actually touch the issue of its  
14 Constitutionally permissible damages (versus Righthaven's standing to bring these cases), those  
15 arguments are dead upon arrival. While *Amicus'* position is that Righthaven is not entitled to  
16 *any* damages, this Court should not award Righthaven more than the minimum compelled by  
17 statute – if that.

18 Dated: May 16, 2011

Respectfully Submitted,

RANDAZZA LEGAL GROUP



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Media Bloggers Association*

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Randazza Legal Group and that on this 16th day of May, 2011, I caused documents entitled:

***AMICUS CURIAE'S REPLY TO RIGHTHAVEN LLC'S RESPONSE TO MEDIA BLOGGERS ASSOCIATION'S AMICUS CURIAE BRIEF***

to be served as follows:

by depositing same for mailing in the United States Mail, in a sealed envelope addressed to Steven A. Gibson, Esq., Righthaven, LLC, 9960 West Cheyenne Avenue, Suite 210, Las Vegas, Nevada, 89129-7701, upon which first class postage was fully prepaid; and/or

Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile as indicated; and/or

to be hand-delivered;

by the Court's CM/ECF system.

/s/ J. Malcolm DeVoy

J. Malcolm DeVoy