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

15 RIGHTHAVEN, LLC,
16 Plaintiff,
17 v.
18 GARRY NEWMAN,
19 Defendant.

Case No.: 2:10-cv-01762-JCM -PAL

**DEFENDANT’S MOTION TO DISMISS
COMPLAINT FOR LACK OF SUBJECT
MATTER JURISDICTION & LACK OF
PERSONAL JURISDICTION**

1 Defendant Garry Newman moves to dismiss the Complaint filed by Plaintiff Righthaven,
2 LLC (“Righthaven”) pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil
3 Procedure. As set forth in the following Memorandum of Points and Authorities, this Complaint
4 must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) because: (a)
5 Righthaven lacks standing to bring this case, and (b) the Copyright Act does not apply
6 extraterritorially, and the alleged infringement in this case occurred in Great Britain.
7

8 Under Rule 12(b)(2), the Court also lacks personal jurisdiction over Newman for two
9 reasons: (a) he does not own or control the allegedly infringing website; rather, a limited
10 company organized under the laws of Great Britain does, and (b) he is a resident of Great
11 Britain, who has not purposefully availed himself of the rights and privileges of the State of
12 Nevada, and jurisdiction over him would be manifestly unreasonable.
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14
15 Dated: June 28, 2011

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3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. FACTUAL BACKGROUND**

5 This is a copyright infringement action brought by Plaintiff Righthaven, LLC
6 (“Righthaven”) against Defendant Garry Newman (“Newman”). Newman is a citizen and
7 resident of Great Britain. See Decl. of Garry Newman at ¶ 2, filed contemporaneously
8 herewith.¹ He was born in England and has resided there his entire life. Id. He has never been
9 to Nevada, and has never conducted or solicited business there. Id. at ¶¶ 3, 13-14.

10 Righthaven alleges that it owns the copyright in a newspaper article entitled: “‘Death ray’
11 scorched hair,” (the “Article”), attached to the Complaint as Exhibit 1. (Doc. 1 at ¶ 6).

12 The Article describes an architectural curiosity: a “concave reflective surface” on the
13 outside wall of a skyscraper – the Vdara Hotel at CityCenter on the Strip in Las Vegas – that
14 directs the suns rays toward guests at the hotel’s swimming pool, melting their plastic cups and
15 shopping bags, and singeing their hair. See Ex. 1 to Complaint. The phenomenon is so
16 powerful, apparently, that it has earned the nickname “Vdara death ray.” Id.

17 The Complaint alleges that Newman is the registrant and administrative contact for the
18 website facepunch.com (the “Website”). Doc. 1 at ¶ 4. It also alleges that Newman allowed the
19 Article to be reproduced on the Website (as demonstrated in Exhibit 2 to the Complaint), in
20 violation of the copyrights owned by Righthaven. Id. ¶¶ 6-8.

21 Although Newman concedes he is the individual listed at the domain registrar as the
22 contact for the Website, he does not personally own the Website or control it in his individual
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28 ¹ The Court may examine extrinsic evidence without converting the motion to dismiss into a
motion for summary judgment when determining subject matter jurisdiction, see Safe Air for
Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004), or personal jurisdiction. See Doe v.
Unocal Corp., 248 F.3d 915, 922 (9th Cir.2001).

1 capacity. Newman Decl. at ¶ 4. Rather, the Website is owned by Facepunch Studios Ltd., which
2 is registered as a Limited Company in the United Kingdom, organized under the laws of Great
3 Britain. Id. A certified copy of the Certificate of Incorporation of Facepunch Studios Ltd. (the
4 “Company”) is attached to Newman’s Declaration as Exhibit A. Newman merely has an
5 ownership interest in the Company and is one of two directors of the Company. Id. at ¶ 5. The
6 Company has no employees. Id.

8 The Website serves as a forum for online game users and enthusiasts. Id. at ¶ 6. It
9 provides a place for gamers to share their thoughts on various issues and topics. Id. The
10 Website has always been controlled out of the Company’s offices in England, and the Company
11 has no other offices. Id. at ¶ 7.

13 Exhibit 2 to the Complaint shows that the user who posted the alleged unauthorized
14 reproduction uses the name “Wii60.” Newman Decl. at ¶ 9. The user name “Wii60” does not
15 belong to Newman, the Company, or any director or owner of the Company. Id. Further,
16 Newman has never used “Wii60” to post content on the Website, nor has any director or agent of
17 the Company. Id. Newman does not direct or create content that third parties, such as Wii60,
18 post on the Website, id. at ¶ 10, nor does the Company or any other director or owner of the
19 Company. Id.

21 On October 12, 2010, Righthaven filed the instant Complaint. Prior to filing the
22 Complaint, Righthaven never sent a cease & desist letter requesting removal of the alleged
23 unauthorized reproduction. Id. at ¶ 11. Immediately upon learning of Righthaven’s allegations,
24 Newman, acting in his corporate capacity with the Company, disabled the thread to the posting
25 that is referenced in Exhibit 2 of the Complaint. Id. at ¶ 12. He did this from the Company’s
26 offices in England on November 4, 2010. Id.

1 Newman has never been to Nevada or conducted business there. Id. at ¶¶ 3, 13. Further,
2 he has never solicited business in Nevada; designated an agent for service of process in Nevada;
3 held a license in Nevada; incorporated in Nevada; paid taxes in Nevada; or had a bank account in
4 Nevada. Id. at ¶¶ 3, 14. Moreover, none of the servers supporting the Website are located in
5 Nevada. Id. at ¶ 17.

6
7 Prior to receiving notice of the Complaint, Newman had never heard of Righthaven or the
8 *Las Vegas Review – Journal*. Id. at ¶ 15. As the Website’s readership is worldwide and not
9 focused on or limited to any particular geographic region, Newman disagrees with Righthaven’s
10 contention that reproduction of the Article on the Website was of specific interest to Nevada
11 residents. Id. at ¶ 16. To the contrary, his experience has been that interest in the Website is
12 based on visitors’ identity as a gamer, regardless of their residency. Id.

13
14 Given that Newman is a British citizen residing in England, defending this lawsuit in
15 Nevada would be extremely burdensome for him. Id. at ¶ 18. He has limited funds and cannot
16 afford to travel to Nevada for the multiple hearings and depositions that would be required. Id.
17 Participating by telephone would put Newman at a disadvantage to Plaintiff. Id. Having to
18 defend this lawsuit in Nevada would result in a substantial hardship for him. Id.

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21 **Righthaven’s Alleged Ownership of the Article is Under Attack**

22 Righthaven claims to own copyrights in the Article. Compl. at ¶ 6. The Copyright
23 Office records indicate that Stephens Media, LLC (“Stephens Media”) is the author of the
24 Article. (Copy of copyright registration information obtained from Copyright Office webpage
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1 attached hereto as **Exhibit A**.)² Righthaven is listed therein as the copyright claimant, by virtue
2 of a written assignment.³ Id. Righthaven did not register the Article until October 6, 2010, after
3 the Article was first published, on September 25, 2010.

4 In recent weeks, the veracity of Righthaven's allegation of ownership in the Article has
5 been undermined by Righthaven's filings in some of the 200 similar copyright infringement
6 cases that Righthaven has brought in this District.⁴ When pressed about its alleged ownership in
7 these other cases, Righthaven has pointed to several documents showing an alleged assignment
8 of rights from Stephens Media to Righthaven. After examining the primary agreement – the
9 “Strategic Alliance Agreement” or “SAA”)⁵ – that Righthaven filed in its case against
10 Democratic Underground, this Court held that Righthaven does not actually own any of the
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13 ² Pursuant to Fed. R. Evi. 201(d), the Court is requested to take judicial notice of facts obtained
14 from Righthaven's putative copyright registration of the Article, as obtained from the Copyright
15 Office website. The Court may take judicial notice because this is a matter “of public record”
16 and “readily verifiable.” Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th
17 Cir. 2006).

18 ³ Righthaven did not attach to the instant Complaint a copy of the specific assignment giving it
19 putative rights in the Article, but Righthaven would have no contractual right to bring the present
20 suit without such assignment, and the records from the Copyright Office (attached hereto as
21 **Exhibit A**) indicate that Stephens Media assigned certain putative rights to Righthaven. In
22 response to Newman's argument that Righthaven lacks standing, it is presumed that Righthaven
23 will need to produce a copy of the SAA, any amendments thereto, and any specific assignment
24 purporting to transfer rights in the Article from Stephens Media to Righthaven.

25 ⁴ Pursuant to Fed. R. Evi. 201(d), the Court is requested to take judicial notice of this fact and all
26 facts contained within the declarations Righthaven has previously filed with the District of
27 Nevada in similar cases, and the exhibits thereto. The Court may take judicial notice because
28 these facts are a matter “of public record” and “readily verifiable.” Reyn's, 442 F.3d at 746 n.6.

⁵ Righthaven LLC v. Democratic Underground LLC, No. 2:10-cv-01356-RLH-GWF, at Ex. 1 to
Doc. 79 thereto (D. Nev. Mar. 9, 2011) (copy of SAA dated Jan. 18, 2010, attached hereto as
Exhibit B). A duplicate copy of the SAA was filed in Righthaven LLC v. Hoehn, and was
authenticated by the Declaration of the CEO of Stephens Media, Steven Gibson. See No. 2:11-
cv-00050-PMP-RJJ, at Ex. 2 to Doc. 24 thereto (D. Nev. May 9, 2011) (attached hereto as
Exhibit E).

1 *underlying copyrights* belonging to Stephens Media, but merely owns the *right to sue* for
2 infringement of Stephens Media’s copyrights.⁶ Righthaven LLC v. Democratic Underground,
3 LLC, __ F. Supp. 2d __, 2011 WL 2378186, at *3 (D. Nev. June 14, 2011) (slip copy) (copy
4 attached hereto as **Exhibit D**). Pointing to Section 7.2 of the SAA, the Court found that the only
5 right that Righthaven is granted under the SAA is “the bare right to bring and profit from
6 copyright infringement actions.” Id. at *2. Finding that “the SAA prevents Righthaven from
7 obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement
8 action,” the Court dismissed Righthaven for lack of standing.⁷ Id. at *6. “As such, Righthaven’s
9 complaint is dismissed in its entirety.” Id. at *9.

11 On May 9, 2011, Righthaven amended the SAA. It filed a copy of the amendment with
12 the Court in a separate lawsuit against defendant Wayne Hoehn.⁸ Despite the amendment, this
13 Court held that Righthaven still lacked standing since the amendment continued to deprive
14 Righthaven of ownership over Stephens Media’s copyrights. Righthaven LLC v. Hoehn, No.
15 2:11-cv-00050-PMP-RJJ, at Doc. 28 thereto (D. Nev. June 20, 2011) (copy attached hereto as
16 **Exhibit F**).

19 _____
20 ⁶ In that case, Democratic Underground moved to unseal the SAA. In granting that motion, this
21 Court stated: “As I have . . . considered the multitude of cases filed by Righthaven, on the
22 claimed basis that Righthaven owns the copyrights to certain Stephens Media copy, it appears to
23 the Court that there is certainly an interest and even a right in all the other defendants sued by
24 Plaintiff to have access to this material.” Democratic Underground, No. 2:10-cv-01356-RLH-
25 GWF, at p. 4 of Doc. 93 thereto (Apr. 14, 2011) (Order Unsealing SAA) (copy attached hereto as
26 **Exhibit C**).

27 ⁷ Although not controlling, these decisions are highly persuasive, given the similarity of facts in
28 all Righthaven cases.

⁸ Hoehn, No. 2:11-cv-00050-PMP-RJJ, at Ex. 3 to Doc. 24 thereto (D. Nev. May 9, 2011)
(Gibson Decl., attaching Clarification and Amendment to SAA) (copy attached hereto as **Exhibit**
E).

1 Separately, when Righthaven filed its original Certificate of Interested Parties in October
2 2011, (Doc. 5), it failed to disclose to this Court and to Newman the “direct, pecuniary interest”
3 that Stephens Media has in the outcome of this case. Instead, it listed only three parties, none of
4 which was Stephens Media. Id. In Democratic Underground, the Court stated that it “believes
5 that Righthaven has made multiple inaccurate and likely dishonest statements to the Court.”
6 2011 WL 2378186, at *9. Choosing to focus, however, on what it described as “the most
7 factually brazen,” the Court reprimanded Righthaven for failing to disclose Stephens Media as an
8 interested party in Righthaven’s Certificate of Interested Parties:
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11 Making this failure more egregious, not only did Righthaven fail to
12 identify Stephens Media as an interested party in this suit, the Court believes that
13 Righthaven failed to disclose Stephens Media as an interested party in any of its
14 approximately 200 cases filed in this District. Accordingly, the Court orders
15 Righthaven to show cause, in writing, no later than two (2) weeks from the date of
16 this order, why it should not be sanctioned for this flagrant misrepresentation to
17 the Court.

18
19 Id. Thereafter, on June 20, 2011, Righthaven filed an Amended Certificate of Interested Parties
20 in the instant case, listing Stephens Media as an interested party. (Doc. 17).

21 **II. LEGAL STANDARD**

22 **A. Subject Matter Jurisdiction**

23 The plaintiff has the burden of establishing subject matter jurisdiction. Pesci v. I.R.S., 67
24 F. Supp. 2d 1189, 1194 (D. Nev. 1999). Subject matter jurisdiction is an essential element to
25 every lawsuit and must be demonstrated “at the successive stages of the litigation.” Chapman v.
26 Pure One Imports (U.S.), Inc., 631 F.3d 939, 954 (9th Cir. 2011) (citing Lujan v. Defenders of
27 Wildlife, 504 U.S. 555, 561 (1992)). Where subject matter jurisdiction is lacking, a court has no
28 discretion and must dismiss the case. See Chapman, 631 F.3d at 954.

1 In evaluating a motion to dismiss under Rule 12(b)(1), the Court may consider extrinsic
2 evidence without converting the motion into one for summary judgment. See Safe Air for
3 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). “Rule 12(b)(1) attacks on jurisdiction
4 can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting
5 the court to look beyond the complaint.” Savage v. Glendale Union High Sch., 343 F.3d 1036,
6 1052 n.2 (9th Cir. 2003) (citations omitted). “Once the moving party has converted the motion
7 to dismiss into a factual motion by presenting affidavits or other evidence properly brought
8 before the court, the party opposing the motion must furnish affidavits or other evidence
9 necessary to satisfy its burden of establishing subject matter jurisdiction.” Id. (citations omitted).
10 “The court need not presume the truthfulness of the plaintiff’s allegations.” Meyer, 373 F.3d at
11 1039.

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14 A central component to subject matter jurisdiction is the question of standing, which
15 requires that the party experience actual or imminent harm. Lujan, 504 U.S. at 561. A party’s
16 standing to bring a case is not subject to waiver, and can be used to dismiss the instant action at
17 any time. Fed. R. Civ. P. 12(h)(3); United States v. Hays, 515 U.S. 737, 742 (1995); Chapman,
18 631 F.3d at 954. Within the realm of copyright law, 17 U.S.C. § 501(b) allows only the legal or
19 beneficial owner of an exclusive right in a copyright, specified in 17 U.S.C. § 106, to sue for
20 infringement. Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 884 (9th Cir. 2005).

21 22 23 24 **B. Personal Jurisdiction**

25 “It is the plaintiff’s burden to establish the court’s personal jurisdiction over a defendant.”
26 Doe v. Unocal Corp., 248 F.3d 915, 923 (9th Cir. 2001) (citations omitted). The court may
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1 consider extrinsic evidence on a motion to dismiss for lack of personal jurisdiction without
2 converting the motion into one for summary judgment. See id.

3 Because this action raises a federal question, the issue of whether this Court may exercise
4 personal jurisdiction over a defendant depends on the specific limitations of Nevada's long-arm
5 statute and the constitutional principles of due process. Myers v. Bennett Law Offices, 238 F.3d
6 1068, 1072 (9th Cir. 2001). In this case, the Complaint comports to allege a cause of action for
7 copyright infringement against a British defendant. Because the Copyright Act does not provide
8 for nationwide service of process, Nevada's law of personal jurisdiction applies. Nevada's long-
9 arm statute is co-extensive with the due process principles of the United States Constitution.
10 Myers, 238 F.3d at 1072 (citing Judas Priest v. Second Judicial Dist. Court, 104 Nev. 424, 760
11 P.2d 137, 138 (1988) (interpreting Nevada's long-arm statute to reach the limits of federal due
12 process)). Thus, a non-resident party is only subject to personal jurisdiction in Nevada if
13 exercising jurisdiction comports with federal Constitutional due process requirements. See
14 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1977).

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18 Whether this Court, sitting in Nevada, has personal jurisdiction over Newman depends on
19 whether Righthaven has alleged sufficient "minimum contacts" between Newman and the State
20 of Nevada for purposes of general or specific jurisdiction, "such that the maintenance of the suit
21 does not offend 'traditional notions of fair play and substantial justice.'" Doe v. Unocal Corp.,
22 248 F.3d 915, 923 (9th Cir. 2001) (quoting International Shoe Co. v. Washington, 326 U.S. 310,
23 316 (1945)).
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1 **III. LEGAL ARGUMENT**

2 **A. The Court Lacks Subject Matter Jurisdiction over this Dispute**

3 **1. *Righthaven Lacks Standing***

4 “[O]nly copyright owners and exclusive licensees of copyright may enforce a copyright.”

5 Sybersound Records v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008). Exclusive rights in a
6 copyright are enumerated in 17 U.S.C. § 106 and include the exclusive rights:
7

- 8 (1) to reproduce the copyrighted work in copies or phonorecords;
9 (2) to prepare derivative works based upon the copyrighted work;
10 [and]
11 (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.

12 Id. at 1145 n.3. “The right to sue for an accrued claim for infringement is not an exclusive right
13 under § 106.” Silvers, 402 F.3d at 884. “Exclusive rights in a copyright may be transferred and
14 owned separately, but . . . [there are] no exclusive rights other than those listed in §106.” Id. at
15 885. These exclusive rights may be transferred and owned separately, but the assignment of a
16 bare right to sue is ineffectual because it is not one of the exclusive rights. Id. at 884. Since the
17 right to sue is not one of the exclusive rights, transfer solely of the right to sue does not confer
18 standing on the assignee. Id. at 890. One can only obtain a right to sue on a copyright if the
19 party also obtains one of the exclusive rights in the copyright. See id.
20

21
22 Under Silvers and Sybersound, Righthaven lacks standing to bring this lawsuit because it
23 has *no* rights in the copyrights it claims, as demonstrated by the plain language of at least three
24 sections of the SAA.⁹

25
26 First, under Section 3.3 of the SAA, Righthaven is obligated to reassign the rights to the
27 Work to Stephens Media if it does not pursue an infringement action within 60 days of the

28 _____
⁹ The SAA is referenced surpa at n.5, and attached hereto as **Exhibit B**.

1 Assignment. Id. at § 3.3. Additionally, this section gives Stephens Media the right to direct
2 Righthaven not to pursue an action against an alleged infringer. Id. In the end, Righthaven is
3 left with no ownership of any exclusive copyright.

4 Second, Section 7.2 of the SAA states in pertinent part:

5
6 *Despite any such Copyright Assignment, Stephens Media shall*
7 *retain (and is hereby granted by Righthaven) an exclusive license*
8 *to Exploit the Stephens Media Assigned Copyrights for any lawful*
9 *purpose whatsoever and Righthaven shall have no right or license*
10 *to Exploit or participate in the receipt of royalties from the*
11 *Exploitation of the Stephens Media Assigned Copyrights other than*
12 *the right to proceeds in association with a Recovery. To the extent*
13 *that Righthaven's maintenance of rights to pursue infringers of the*
14 *Stephens Media Assigned Copyrights in any manner would be*
15 *deemed to diminish Stephens Media's right to Exploit the Stephens*
16 *Media Assigned Copyrights, Righthaven hereby grants an*
17 *exclusive license to Stephens Media to the greatest extent*
18 *permitted by law so that Stephens Media shall have unfettered and*
19 *exclusive ability to Exploit the Stephens Media Assigned*
20 *Copyrights. Righthaven shall have no Obligation to protect or*
21 *enforce any Work of Stephens Media that is not Stephens Media*
22 *Assigned Copyrights.*

23 See SAA at § 7.2, referenced supra in n.5, and attached hereto as **Exhibit B** (emphasis added).

24 Under the plain language of Section 7.2, Righthaven's only right is to sue for infringement.

25 Further, the SAA gives Stephens Media the unilateral right, at any time, to terminate the
26 Copyright Assignment and enjoy a complete right of reversion. Id.

27 Third, under Section 8 of the SAA:

28 *Stephens Media shall have the right at any time to terminate, in*
good faith, any Copyright Assignment (the "Assignment
Termination") and enjoy a right of complete reversion to the
ownership of any copyright that is subject of a Copyright
Assignment In order to effect termination of the [sic] any
Copyright Assignment, Stephens Media shall be required to
provide Righthaven with thirty (30) days prior written notice.
Within thirty (30) days after receipt of termination of the [sic] any
Copyright Assignment, Righthaven shall commence
documentation to effect reassignment of the Stephens Media
Assigned Copyrights to Stephens Media.

1 SAA at § 8 (emphasis added).

2 As this Court held in Righthaven, LLC v. Hoehn, these “carve outs deprive Righthaven
3 of any of the rights normally associated with ownership of an exclusive right necessary to bring
4 suit for copyright infringement and leave Righthaven no rights except to pursue infringement
5 actions, a right which itself is subject to Stephens Media’s veto.” Case No. 2:11-cv-00050-PMP-
6 RJJ, Doc. 28 at p. 8 (D. Nev. June 20, 2011).

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8 The SAA was entered into on January 18, 2010. See SAA at p. 1 (attached hereto as
9 **Exhibit B**). According to Exhibit 1 to the Complaint, the Work was first published on
10 September 25, 2010. (Doc. No. 1 at ¶ 6, & Exh. 1 thereto). The Complaint alleges that Newman
11 allowed an unauthorized reproduction to be displayed on facepunch.com on approximately
12 September 25, 2010. (Doc. No. 1 at ¶ 9). Based on Section 7.1 of the SAA, Righthaven and
13 Stephens Media agreed to execute “a particularized assignment with respect to each copyright . . .
14 . . . consistent with (and in form and substance the same as) the scope of assignment as set forth in
15 the form of copyright assignment as embodied in Exhibit 1.” See **Ex. B** (SAA at § 7.1) and Ex. 1
16 thereto (Copyright Assignment Form). Righthaven did not attach the specific assignment giving
17 it the rights in the Work that is the subject of the present Complaint, but Righthaven would have
18 no contractual right to bring the present suit without such assignment. On October 12, 2010,
19 Righthaven filed the present lawsuit against Newman. Thus, it is presumed that Righthaven and
20 Stephens Media executed the assignment regarding the Work some time between September 25,
21 2010 (date of publication of the Work) and October 12, 2011 (filing of the Complaint).

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25 Months later, on May 9, 2011, Stephens Media and Righthaven amended the SAA by
26 entering into a “Clarification and Amendment to Strategic Alliance Agreement” (the
27 “Clarification”). See Gibson Decl. filed by Righthaven in Righthaven LLC v. Hoehn, No. 2:11-
28

1 CV-00050-PMP-RJJ, at Ex. 3 to Doc. 24 thereto (D. Nev. May 9, 2011), attached hereto as

2 **Exhibit E.** The Clarification amends section 7.2 of the SAA and replaces it with the following:

3 Automatically upon execution of a Copyright Assignment,
4 Stephens Media is granted a non-exclusive license to Exploit the
5 Stephens Media Assigned Copyright to the greatest extent
6 permitted by law in consideration for payment in the amount of
7 One Dollar and Zero Cents (\$1.00) per year to Righthaven as a
8 license or royalty for each Stephens Media Assigned Copyright as
9 Consideration for the license granted herein (the "License Fee").
10 Any License Fee required under this amended and revised Section
11 7.2 shall be retroactive to the Effective Date. In the event that
12 Righthaven decides to Exploit or participate in receipt of royalties
13 from Exploitation of a Stephens Media Assigned Copyright other
14 than in association with a Recovery, Righthaven shall give
15 Stephens Media 30 days prior written notice. The parties
16 acknowledge that failure to provide such notice would be a
17 material breach of this Agreement and would cause Stephens
18 Media irreparable harm, remediable through injunctive relief,
19 which Righthaven and those asserting rights obtained from it shall
20 have no right to oppose.

21 Id.

22 Additionally, the Clarification amends section 8 of the SAA and replaces it with sections
23 8.1 and 8.2, including the following:

24 At any time, within its sole discretion, Stephens Media shall have
25 the option, within 14 days of providing notice of the exercise of
26 such option, to purchase all right and title to the Stephens Media
27 Assigned Copyright in consideration for payment in the amount of
28 Ten Dollars and Zero Cents (\$10.00) ("Exercised Option").

Id. The Clarification states it is to be retroactively effective to the original date of the SAA. Id.

Despite the above "clarification," Righthaven still lacks standing. As this Court found in

24 Righthaven LLC v. Hoehn:

25 The May 9, 2011 Clarification provides Righthaven with only an
26 illusory right to exploit or profit from the Work, requiring 30 days
27 advance notice to Stephens Media before being able to exploit the
28 Work for any purpose other than bringing an infringement action.
Stephens Media has, in its sole discretion, the option to repurchase
the Copyright Assignment for a nominal amount within 14 days,

1 thereby retaining the ability to prevent Righthaven from ever
 2 exploiting or reproducing the Work. Stephens Media’s power to
 3 prevent Righthaven from exploiting the Work for any purpose
 4 other than pursuing infringement actions is further bolstered by the
 5 Clarification’s provision that every exploitation of the Work by
 6 Righthaven other than pursuing an infringement action without
 7 first giving Stephens Media notice constitutes irreparable harm to
 8 Stephens Media. Stephens Media may obtain injunctive relief
 9 against Righthaven to prevent such “irreparable harm” and,
 pursuant to the Clarification, Righthaven has no right to oppose
 Stephens Media’s request for injunctive relief. Accordingly,
 Righthaven does not have any exclusive rights in the Work and
 thus does not have standing to bring an infringement action. The
 Court therefore will grant Defendant’s Motion to Dismiss for lack
 of standing.

10 Hoehn, Case No. 2:11-cv-00050-PMP-RJJ, at p. 10 of Doc. 28 thereto (D. Nev. June 20, 2011),
 11 attached hereto as **Exhibit F**. Similarly, this Court dismissed Righthaven for lack of standing in
 12 Democratic Underground, finding that “the SAA prevents Righthaven from obtaining any of the
 13 exclusive rights necessary to maintain standing in a copyright infringement action” __ F.
 14 Supp. 2d ___, 2011 WL 2378186, at *6 (copy attached hereto as **Exhibit D**).

15 For all of the above reasons, Newman respectfully requests this Court to adopt the
 16 analysis and conclusion from both Hoehn and Democratic Underground, to find Righthaven
 17 lacks standing, and to dismiss the Complaint for lack of subject matter jurisdiction.
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21 **2. *The Copyright Act does Not Apply Extraterritorially; Here the Alleged***
 22 ***Infringement Occurred in England***

23 United States copyright laws do not apply extraterritorially. Subafilms, Ltd. v. MGM-
 24 Pathe Comm’s Co., 24 F.3d 1088, 1095-99 (9th Cir. 1994). “Because the copyright laws do not
 25 apply extraterritorially, each of the rights conferred under the five section 106 categories must be
 26 read as extending ‘no farther than the [United States’] borders.’” Subafilms, 24 F.3d at 1094.
 27 For the Copyright Act to apply, “at least one alleged infringement must be completed entirely
 28

1 within the United States.” Los Angeles News Serv. v. Reuters Television Int’l, Ltd., 149 F.3d
2 987, 990-91 (9th Cir. 1988) (citations omitted). The Ninth Circuit has ruled, “[r]ecognizing the
3 importance of avoiding international conflicts of law in the area of intellectual property [] we
4 have applied a more robust version of this presumption to the Copyright Act, holding that the
5 Act presumptively does not apply to conduct that occurs abroad even when that conduct
6 produces harmful effects within the United States.” Omega S.A. v. Costco Wholesale Corp., 541
7 F.3d 982, 988 (9th Cir. 2008).

9 “In cases involving the posting of infringing material on an internet website [] courts
10 have held that the tort occurs where the website is created and/or maintained, usually where the
11 server supporting the website is located, not where the internet website can be seen, because that
12 would be literally anywhere the internet can be accessed.” Cable News Network, L.P. v. Go
13 Sms.com, Inc., No. 00-Civ-4812 (LMN), 2000 WL 1678039, at * 3 (S.D.N.Y. Nov. 6, 2000)
14 (unpublished) (copy attached as **Exhibit G**).

16 In the present case, the alleged infringement took place in England, where the website
17 facepunch.com is controlled. See Newman Decl. at ¶ 7. As soon as Newman learned of the
18 alleged infringement, he disabled the thread to the post – and he did so from the Company’s
19 offices in England. Id. at ¶ 12. None of the servers supporting the website are located in
20 Nevada. Id. at ¶ 17. Given the robust presumption against the extraterritorial effect of the
21 Copyright Act, this Court has no jurisdiction over the subject matter of this dispute. E.g.,
22 Omega, 541 F.3d at 988.
23
24
25
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1 **B. The Court Lacks Personal Jurisdiction over Garry Newman**¹⁰

2 **1. *A British Limited Company Owns the Website, Shielding Newman from***
 3 ***Liability under British Law***

4 “Under English law, a corporation is a separate legal entity from its directors, officers,
 5 members, shareholders, or other controlling parties. This principle was definitively established
 6 in the case of Salomon v. A. Salomon & Co., Ltd., [1897] A.C. 22 (H.L.).” In re: Tyson, 433
 7 B.R. 68 (S.D.N.Y. 2010). Salomon¹¹ is a “landmark” opinion “that continues to be widely
 8 cited.” Id. at 79. Under English law, the company is not an alias for its owners; rather, it is a
 9 distinct legal entity. See id. at 80, n. 18 (citing Lord Herschell).

10 English law permits the corporate veil to be pierced “only in extremely limited
 11 circumstances.” Id. at 80. Indeed, “veil piercing is quite rare under English law.” Id. at 86. In
 12 Tyson, the federal district court reversed the bankruptcy court on the finding that English law
 13 permitted corporate veil piercing to hold British defendants liable for the corporation’s
 14 obligations. The Tyson Court explained that U.S. courts have previously noted that “[u]nlike
 15 American law, English case law does not provide an enumerated set of factors that a court can
 16 evaluate in deciding whether to lift the corporate veil.” Id. at 81 (citations and quotations
 17 omitted). The Tyson Court thereafter surveyed English law and reached the following
 18 conclusions, all describing the difficulty of piercing the corporate veil in Britain:
 19
 20
 21

22 First, given Salomon, the fact that a person engages in the
 23 “carrying on of a business” using a duly incorporated, yet
 24 seemingly artificial, entity is not sufficient to justify piercing that
 25 entity’s veil. . . . Second, courts may “pierce the corporate veil
 only where special circumstances exist indicating that [it] is a mere

26 ¹⁰ Although Facepunch Studios Ltd. was not named as a defendant and is not presently before
 27 this Court, if Righthaven sought leave to amend the Complaint to add the Company as a
 28 defendant, the Court would lack personal jurisdiction over it for the same reasons that it lacks
 personal jurisdiction over Newman.

¹¹ A copy of the Salomon decision attached hereto as **Exhibit H**.

1 façade concealing the true facts.” . . . Third, . . . the plaintiff’s
 2 ability to recover from the defendant on a veil-piercing theory
 3 turns on whether the defendant had already incurred some liability
 4 to the plaintiff at the time he interposed the corporate structure. . . .
 5 Fourth, where the plaintiff may recover in fraud or “deceit” against
 6 a defendant directly, that path is preferably to indirect liability via
 7 veil-piercing. . . . Finally, . . . English courts have observed that
 8 parties may avoid the harsh effects of the Salomon principle by the
 9 exercise of due diligence, for instance, by contracting around a
 10 potential problem [on the front end].

11 Id. at 86-90.

12 In the present case, Newman is protected from personal liability and the Court lacks
 13 personal jurisdiction over him. He does not own the website facepunch.com; rather, the website
 14 is owned by Facepunch Studios Ltd., a British Limited Company. See Newman Decl. ¶ 4. The
 15 Complaint alleges no facts justifying piercing of the corporate veil, and Righthaven has not even
 16 made such a request. Accordingly, the Complaint should be dismissed against Newman.¹²

17 **2. No Personal Jurisdiction Exists over Newman**

18 In addition to the above argument that English corporate law shields Newman from
 19 individual liability for the infringement alleged in the Complaint, American legal principles
 20 demonstrate that this Court has neither general nor specific personal jurisdiction over Newman.

21 In its Complaint, Righthaven alleges that the Court has subject matter jurisdiction, (Doc.
 22 1 at ¶ 5), but Righthaven is silent regarding explicit allegations of personal jurisdiction, either
 23 general or specific. See Doc. 1. It is intriguing that Righthaven omitted reference to the fact that
 24 Newman is a resident of Great Britain in the Complaint when it clearly was aware of his
 25

26
 27 ¹² Even if Righthaven claims to be traveling under theories of vicarious liability or contributory
 28 infringement, these are separate claims from a claim of copyright infringement, see A&M
Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019, 1022-23 (9th Cir. 2001), and Righthaven has
 not articulated either one in its Complaint.

1 residency, as evidenced by the summons it issued to Newman’s residence in the United
2 Kingdom. (See Doc. # 3.)

3
4 **a. General Personal Jurisdiction**

5 General jurisdiction exists when a Defendant’s contacts with the forum state are
6 “substantial” and “continuous and systematic.” Bancroft & Masters, Inc. v. Augusta Nat. Inc.,
7 223 F.3d 1082, 1086 (9th Cir. 2000). The burden on Plaintiff in establishing general jurisdiction
8 is “fairly high,” and requires that the defendant’s contacts be of the sort that approximate
9 physical presence. Id. Factors considered in determining general jurisdiction include whether
10 the defendant is incorporated in the forum, whether he solicits business there, holds a license, or
11 designates an agent for service of process. See id.

12
13
14 Here, on the Complaint that Righthaven has filed, general jurisdiction is not a credible
15 basis for establishing personal jurisdiction over Newman. The Complaint doesn’t contain a
16 single allegation of “substantial,” or “continuous and systematic” contacts between Newman and
17 Nevada. Newman’s Declaration bolsters the conclusion that general personal jurisdiction is
18 lacking, in that he testifies he has never conducted or solicited business in Nevada, and that he
19 never even traveled to Nevada.
20

21
22 **b. Specific Personal Jurisdiction**

23
24 Where there is no general jurisdiction, a Court may exercise specific jurisdiction over a
25 foreign defendant if his or her substantial contacts with the forum give rise to the cause of action
26 before the Court. See id. at 1086. The Ninth Circuit applies a three-part test for determining
27 whether the exercise of specific jurisdiction is consistent with the principles of due process:
28

1 (1) The non-resident defendant must do some act or consummate
2 some transaction with the forum or perform some act by which he
3 purposefully avails himself of the privilege of conducting activities
4 in the forum, thereby invoking the benefits and protections of its
5 laws.

6 (2) The claim must be one which arises out of or results from the
7 defendant's forum-related activities.

8 (3) Exercise of jurisdiction must be reasonable.

9 Doe 248 F.3d at 923 (citations omitted). Of these three elements, the first prong, purposeful
10 availment, "is the most critical." Cybersell, 130 F.3d at 416.

11 Before a defendant may be sued in a forum, the defendant must "purposefully avail"
12 itself of the "privilege of conducting activities within the forum state, thus invoking the benefits
13 and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)
14 (citations and quotations omitted). This "ensures that a defendant will not be haled into a
15 jurisdiction solely as a result of random, fortuitous or attenuated contacts, or of the unilateral
16 activity of another party or a third person." Id.

17 Purposeful availment requires "affirmative conduct," that is, a deliberate effort by the
18 defendant to direct its activities toward and to make contact with, the forum. See Unocal, 248
19 F.3d at 924. In the present case, Righthaven cannot demonstrate that Newman has purposely
20 availed himself of the benefits of the laws of Nevada. He has taken no affirmative conduct to
21 direct his activities into the forum. He does not even own or operate the website. Newman Decl.
22 at ¶ 4. Given this fact, no further analysis is needed on the issue of personal jurisdiction.

23 If the Court disagrees and wishes to further analyze personal jurisdiction, it will have to
24 pierce the corporate veil to find Newman liable for activities of the Company, which owns and
25 operates the Website. In conducting such analysis, the Court should examine the seminal case of
26 whether the operation of a website from outside the forum can constitute "purposeful availment"
27
28

1 is Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (discussed in
2 Cybersell, 130 F.3d at 418). There, the court concluded that purposeful availment should be
3 evaluated based on a “sliding scale” of interactivity: the more interactive the website and the
4 more the defendant directs the activities of the website toward the forum state, the more likely it
5 is that the defendant has purposefully availed itself of doing business in the relevant forum. Id.
6 at 1124.

8 In the present case, the Website appears to be on the low end of interactivity. The
9 Complaint indicates that third parties may post content to the site, but not that items are for sale
10 on the site. The website merely provides a forum for independent third parties to post topics and
11 issues of interest to them, but neither Newman nor the Company exercises control or direction
12 over these third parties. Newman Decl. at ¶ 10.

14 In the Ninth Circuit, purposeful availment in tort cases often is analyzed under the effects
15 test from Calder v. Jones, 465 U.S. 783 (1984):

16 As we have previously recognized, Calder stands for the
17 proposition that purposeful availment is satisfied even by a
18 defendant “whose only ‘contact’ with the forum state is the
19 ‘purposeful direction’ of a foreign act having effect in the forum
20 state.” Based on these interpretations of Calder, the “effects” test
21 requires that the defendant allegedly have (1) committed an
22 intentional act, (2) expressly aimed at the forum state, (3) causing
23 harm that the defendant knows is likely to be suffered in the forum
24 state.

25 Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002) (citations omitted).

26 “Express aiming” requires “something more.” See Bancroft & Masters, 223 F.3d at
27 1087. It requires the defendant to “individually target [] a known forum resident.” Id. The
28 presence of “individualized targeting” is what is required to satisfy the effects test. See id. at
1088. As the Ninth Circuit noted in Bancroft & Masters, the Plaintiff could not satisfy that
factor in Cybersell where “there was no showing that the defendants even knew of the existence

1 of the plaintiffs, let alone targeted them individually.” Id. at 1088 (citing Cybersell, 130 F.3d at
2 420).

3 The Calder “effects test” does not apply with the same force to corporate plaintiffs as it
4 does to individual plaintiffs, since a corporation “does not suffer harm in a particular geographic
5 location in the same sense that an individual does.” Cybersell, 130 F.3d at 420 (concluding that
6 defendant’s web page was not aimed intentionally at the forum state knowing that harm was
7 likely to be caused in the forum to the plaintiff).
8

9 Here the three elements under Calder weigh against the exercise of personal jurisdiction.
10 First, the law does not presume that copyright infringement is intentional; to the contrary, the
11 Copyright Act allows for both enhanced damages for willful infringement, and reductions of
12 statutory damages for innocent infringement. See 17 U.S.C. § 504(c)(2). Here third parties post
13 material without direction or control from Newman, the Company or its other officers or
14 directors. Newman Decl. at ¶ 10. Rebutting the argument that the infringement was intentional,
15 Newman disabled the post as soon as he was alerted to allegations of infringement. Id. at ¶ 12.
16 Righthaven never sent a cease & desist letter, id. at ¶ 11; had it done so, Newman would have
17 removed the thread to the post even sooner. Id. These facts show the opposite of intentional
18 infringement.
19
20

21 Second, it is unreasonable to conclude that Newman’s actions were expressly aimed at
22 Righthaven, let alone any other residents of Nevada. As a corporation, Righthaven is not entitled
23 to the same entitlements under Calder because it is presumed that a corporation “does not suffer
24 harm in a particular geographic location in the same sense that an individual does.” See
25 Cybersell, 130 F.3d at 420. Righthaven’s primary argument, impliedly, is that Newman, through
26 his connections with facepunch.com, has specifically intended interaction with residents of every
27
28

1 state in that facepunch.com can receive customers from anywhere in the country. However,
2 simply maintaining a website available to residents in the forum state is not purposeful
3 availment. See Cybersell 130 F.3d at 418 (discussing Bensusan Restaurant Corp. v. King, 937 F.
4 Supp. 295, 301(S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997)). Newman had never heard of
5 Righthaven or the *Las Vegas Review-Journal* prior to receiving notice of the instant Complaint.
6 Newman Decl. at ¶ 15.

8 Third, and contrary to Righthaven's conclusory allegations in paragraphs 13 and 14 of the
9 Complaint,¹³ Newman did not cause harm knowing it is likely to be suffered in Nevada. In a
10 factually similar case, the Third Circuit found personal jurisdiction over the defendants was
11 lacking where no evidence existed that they had "expressly aimed their allegedly tortious activity
12 at Pennsylvania knowing that harm was likely to be caused there." See Remick v. Manfredy,
13 238 F.3d 248, 259 (3rd Cir. 2001). "Given that the website was . . . accessible worldwide, there
14 is no basis to conclude that the defendants expressly aimed their tortious activity at Pennsylvania
15 knowing that harm was likely to be caused there." Id. at 259. Any resulting harm to the plaintiff
16 was found to be "merely incidental." Id.

19 Like the defendants in Remick, Newman did not "expressly aim" any tortious activities
20 into Nevada. Setting aside the fact that he does not own or operate the website in his individual
21 capacity, it is accessible worldwide and its readership is not focused on or limited to any
22 particular geographic region. Newman Decl. at ¶ 16. Newman disagrees with Righthaven's
23 conclusory allegation that reproduction of the Work on facepunch.com was of specific interest to
24

26
27 ¹³ Paragraph 13 of the Complaint alleges: "At all times relevant to this lawsuit, Mr. Newman
28 knew that the Infringement was and is of specific interest to Nevada residents." Paragraph 14 of
the Complaint alleges: "Mr. Newman's display of the Infringement was and is purposefully
directed at Nevada residents." (Doc. 1).

1 Nevada residents. Id. To the contrary, his experience has been that interest in facepunch.com is
2 based on visitors' identity as a gamer, regardless of their residency. Id.

3 Righthaven has alleged nothing to indicate that Newman has taken any specific,
4 deliberate steps to establish a substantial connection with Nevada. There is no indication in the
5 Complaint that Newman has conducted business in Nevada, had any employees or agents in
6 Nevada, or had legitimate Nevada customers. Indeed, the record establishes that Newman's only
7 contacts with Nevada are "random" or "attenuated," both of which are insufficient to establish
8 purposeful availment and personal jurisdiction. See Burger King, 471 U.S. at 475. Thus,
9 Righthaven cannot establish that Newman purposefully availed himself of the privilege of
10 conducting activities in Nevada, thus invoking the benefits and protections of its laws. See eg.,
11 id.

12
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14 If the Court disagrees and finds purposeful availment by Newman, then the exercise of
15 jurisdiction over Newman would be unreasonable. For jurisdiction to be reasonable, it must
16 comport with fair play and substantial justice. See id. at 476. The burden of demonstrating
17 unreasonableness rests with the defendant, and the defendant must show a "compelling case."
18 Id. at 476 – 77. Seven factors should be weighed in evaluating the reasonableness of exercising
19 personal jurisdiction in a given case:
20

- 21 (1) the extent of the defendant's purposeful interjection into the forum state, (2)
22 the burden on the defendant in defending in the forum, (3) the extent of the
23 conflict with the sovereignty of the defendant's state, (4) the forum state's interest
24 in adjudicating the dispute, (5) the most efficient judicial resolution of the
25 controversy; (6) the importance of the forum to the plaintiff's interest and
26 convenient and effective relief; and (7) the existence of an alternative forum.

27 Bancroft & Masters, 223 F.3d at 1088 (citing Burger King, 471 U.S. at 476-77).

28 Analyzing the above factors, the extent of Newman's purposeful interjection into the
forum state's affairs was minimal. The Complaint alleges only a single incidence. "The smaller

1 the element of purposeful interjection, the less the jurisdiction to be anticipated and the less
2 reasonable is its exercise.” Core-Vent Corp. v. Nobel Invest. AB, 11 F.3d 1482, 1488 (9th Cir.
3 1993) (citations omitted). Accordingly, this factor weighs against personal jurisdiction.

4 The second factor of reasonableness, the burden on defendants, weighs strongly against
5 jurisdiction. “The unique burdens placed upon one who must defend oneself in a foreign legal
6 system should have significant weight in assessing the reasonableness of stretching the long arm
7 of personal jurisdiction over national borders.” Asahi Metal Industry Co. v. Superior Court, 480
8 U.S. 102, 114 (1987). The use of an agent in the United States might alleviate a foreign
9 defendant’s burden, see Core-Vent 11 F.3d at 1488, but Newman does not have such an agent.
10 Newman Decl. at ¶ 14. Further, he has testified under oath that he has never travelled to Nevada.
11 Id. at ¶ 3. Newman has also testified that defending this action in Nevada would be unduly
12 burdensome and expensive for him. Id. at ¶ 18. Thus, this factor weighs strongly against
13 personal jurisdiction over Newman.
14
15

16 Regarding the third factor, “litigation against an alien defendant creates a higher
17 jurisdictional barrier than litigation against a citizen from a sister state because important
18 sovereignty concerns exist.” Sinatra v. National Enquirer, 854 F.2d 1191, 1199 (9th Cir. 1988).
19 The Court should presume that Great Britain has a sovereign interest in adjudicating the claim
20 against a British individual resident. Doe v. Geller, F. 33 F. Supp. 2d 996, 1008 (N.D. Cal.
21 2008) (citing Harris Rutsky and Co. Ins. Serv., Inc. v. Bell and Clements Ltd., 328 F.3d 1122,
22 1133 (9th Cir. 2003)). Further, the website forum that is at the heart of this dispute is controlled
23 from England. Newman Decl. at ¶ 7. Accordingly, this factor weighs strongly against the
24 reasonableness of exercising jurisdiction over Newman.
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1 The fourth factor, the forum state's interest in adjudicating the dispute, weighs against the
2 reasonableness of exercising jurisdiction over Newman. Although Righthaven is the party
3 plaintiff, the Agreement that it has with Stephen's Media, LLC indicates that Stephen's Media is
4 the true owner of the underlying copyrights. Thus, Righthaven does not have standing. Further,
5 Nevada "is not the worldwide regulator of free speech in the digital age." Geller, 533 F. Supp.
6 2d at 1008. As discussed above, the Copyright Act was not intended by Congress to be applied
7 extraterritorially. Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 987 (9th Cir. 2008).
8 The District of Nevada "is not an international court of internet law." Geller, 533 F. Supp. 2d at
9 1009. Accordingly, this factor weighs against jurisdiction.

10
11 The fifth factor, the most efficient judicial resolution of the controversy, weighs against
12 jurisdiction. This factor requires the Court to evaluate where the witnesses and evidence are
13 likely to be located. See Core-Vent, 11 F.3d at 1489. Given that the website is owned by a
14 British company, whose sole offices are located in England, the witnesses and evidence are
15 likely to be located in England.
16

17
18 The sixth factor, the importance of the forum to the plaintiff's interest in convenient and
19 effective relief, weighs against jurisdiction in Nevada. Righthaven has not shown that the claim
20 cannot be effectively remedied in England. See Geller, 533 F. Supp. 2d at 1010 (quoting Sinatra,
21 854 F. 2d at 1200). Further, Righthaven fails to articulate any concerns that paint Nevada as
22 "important" to its claim. Id.

23
24 Finally, the seventh factor, the existence of an alternative forum, also weighs against
25 jurisdiction over Newman. "The plaintiff bears the burden of proving the unavailability of an
26 alternative forum." Core-Vent, 11 F.3d at 1490. Righthaven has made no such showing that it
27
28

1 would be precluded from suing in England. Righthaven's *preference* of venues "is not the test."
2 Geller (quoting Roth v. Garcia Marquez, 942 F. 2d 617, 625 (9th Cir. 1991)).

3 Just as in Geller, the balance of the above factors weighs against jurisdiction over
4 Newman. There, the court found that it would be "unreasonable and unfair" to assert jurisdiction
5 over British residents in a suit over an allegedly tortious facts sent to a third party in California.
6 "Considering the international context, the heavy burden on the alien defendant, and the slight
7 interests of the plaintiff in the forum State, the exercise and personal jurisdiction . . . in this
8 instance would be unreasonable and unfair." Asahi, 480 U.S. at 116.

9
10 For all of the above reasons, the Court should find it unreasonable to exercise personal
11 jurisdiction over Newman, even if it finds purposeful availment, which the facts dictate against.
12

13
14 **IV. CONCLUSION**

15 For all of the above reasons, the Complaint against Newman should be dismissed for lack
16 of both subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction is
17 lacking because Righthaven has no standing, as Stephens Media transferred to Righthaven only
18 the right to sue for infringement, but none of the underlying copyrights enumerated in Section
19 106 of the Copyright Act. Further, the Copyright Act may not be applied to infringement that
20 occurs outside the borders of the United States, and here the infringement occurred in England.
21

22 Similarly, personal jurisdiction is lacking over Newman because he does not own the
23 Website; a British Limited Company does, providing Newman with a shield against personal
24 liability. Further, it would violate "traditional notions of fair play and substantial justice" to
25 force Newman to defend a lawsuit in Nevada. Newman is a resident of England who has never
26 been in Nevada, nor conducted or solicited business there. Righthaven cannot demonstrate that
27
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1 Newman purposely availed himself of the benefits of the laws of Nevada, or that the effects of
2 the alleged infringement were targeted into or felt specifically in Nevada. Accordingly, this
3 Complaint should be dismissed with prejudice.

4 Righthaven's motivation in filing suit against Newman is suspect. As Judge Hunt found
5 in dismissing Righthaven's Complaint against Democratic Underground, Righthaven's only right
6 under the SAA is to "bring and profit from copyright infringement actions." Democratic
7 Underground, 2011 WL 2378186, at *2. It possesses none of the rights provided in Section 106
8 of the Copyright Act.
9

10 Righthaven cannot claim with a straight face that it has been harmed. Righthaven
11 acknowledges that the Website attributed *Las Vegas Review-Journal* as the original source of the
12 Article for the entire time in which the Article appeared on the Website. See Doc. 1 at ¶ 10.
13 Further, Newman immediately disabled the thread to the post on the Website as soon as he
14 learned of the Complaint, (Newman Decl. at ¶ 12), thus satisfying that portion of Righthaven's
15 prayer for relief seeking that the reproduction be removed. See Compl., at Prayer for Relief.
16
17

18 For all the reasons stated above, Righthaven's Complaint against Newman must be
19 dismissed. But even if Righthaven were deemed the prevailing party, it would not be entitled to
20 recover either statutory damages or attorneys' fees against Newman, since copyright registration
21 for the Article was not obtained until after the alleged infringement. See Derek Andrew, Inc. v.
22 Poof Apparel Corp., 528 F.3d 696, 700-01 (9th Cir. 2008) (noting that statutory damages and
23 attorneys' fees are available only where registration is obtained prior to infringement
24 commencing). The Complaint alleges that the infringement commenced on September 25, 2010,
25 (Doc. 1 at ¶ 9), but registration for the copyright was not secured until October 6, 2010. See Ex.
26 A hereto (copy of records obtained from Copyright Office webpage). Even if Righthaven could
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1 surmount the challenges of subject matter and personal jurisdiction, which it cannot, it would be
2 entitled to very little other possible relief. Thus, these facts indicate that Righthaven's true
3 motivation is to target and extract settlements from specific defendants, like Newman, who will
4 have difficulty defending against litigation (because of cost or distance or, in this case, both).

5 DATED this 28th day of June, 2011.

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21 **CERTIFICATE OF SERVICE**

22 I certify that I served a copy of the foregoing document on the following counsel of
23 record via the Court's CM/ECF system this 28th day of June, 2011:

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