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11  
12 **UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF NEVADA**

14 RIGHTHAVEN, LLC,

15 Plaintiff,

16 v.

17 GARRY NEWMAN, an individual; and  
18 FACEPUNCH STUDIOS LTD., a limited  
19 company formed under the laws of Great  
Britain,

20 Defendants.  
21

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

**DEFENDANT GARRY NEWMAN'S  
MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT FOR LACK OF  
SUBJECT MATTER JURISDICTION  
AND LACK OF PERSONAL  
JURISDICTION**

22  
23 On June 28, 2011, Defendant Garry Newman ("Newman") filed a Motion to Dismiss the  
24 Original Complaint filed by Plaintiff Righthaven, LLC ("Righthaven"). (Doc. 19). Righthaven's  
25 deadline to respond to the Motion to Dismiss was July 15, 2011. Despite such deadline,  
26 Righthaven did not respond.  
27  
28

1 On July 16, 2011, without seeking leave of Court, Righthaven filed an improperly labeled  
2 “Amended Complaint,” asserting that it was being filed as of right pursuant to Fed. R. Civ. P.  
3 15(a). See Doc. 21. In the Amended Complaint, Righthaven sets forth a new “transaction,  
4 occurrence, or event that happened after the date” of the Original Complaint – namely the  
5 execution of a second amendment to the Strategic Alliance Agreement (“SAA”) between  
6 Righthaven and Stephens Media, which it refers to as the “Restated Amendment.” See Doc. 21 at  
7 ¶ 21. Because the Amended Complaint is based largely on facts that occurred after the filing of  
8 the Original Complaint, Rule 15 requires Righthaven to have sought permission to file a  
9 supplemental pleading and to have provided notice to Newman, pursuant to Fed. R. Civ. P. 15(d).  
10 Righthaven sought no such permission and provided no such notice. Righthaven’s 21-day  
11 window to file an amended complaint as of right, pursuant to Rule 15(a)(1)(B), has expired. This  
12 ground alone is sufficient for dismissal.

13 On July 22, 2011, the Court entered an Order granting the Motion to Dismiss without  
14 prejudice, finding that Righthaven failed to respond to the Motion to Dismiss. (Doc. 22).  
15 Newman now files the present Motion to Dismiss the Amended Complaint, pursuant to Rules  
16 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure.

17 As set forth in the following Memorandum of Points and Authorities, and as supported by  
18 the Declaration of Newman (Doc. 20), the Amended Complaint must be dismissed for lack of  
19 subject matter jurisdiction under Rule 12(b)(1) for two reasons. First, as this Court has already  
20 found in related cases, Righthaven lacks standing to bring this case. Even if the Restated  
21 Agreement provided Righthaven with standing (which Newman cannot ascertain since  
22 Righthaven has not filed a copy of the Restated Agreement with the Amended Complaint or  
23 otherwise provided a copy to Newman), the Amended Complaint did not affect the second basis  
24 for lack of subject matter jurisdiction: the Copyright Act does not apply extraterritorially, and the  
25 alleged infringement in this case occurred in Great Britain.

26 Further, nothing in the Amended Complaint changes the fact that, under Rule 12(b)(2), the  
27 Court also lacks personal jurisdiction over Newman for two reasons: (a) he does not own or  
28 control the allegedly infringing website; rather, a limited company organized under the laws of

1 Great Britain does, and (b) he is a resident of Great Britain, who has not purposefully availed  
2 himself of the rights and privileges of the State of Nevada, and jurisdiction over him would be  
3 manifestly unreasonable.

4 DATED this 1<sup>st</sup> day of August, 2011.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND**

This is a copyright infringement action brought by Plaintiff Righthaven, LLC (“Righthaven”) against Defendant Garry Newman (“Newman”).<sup>1</sup> Newman is a citizen and resident of Great Britain. See Doc. 21 at ¶ 4; Decl. of Garry Newman (Doc. 20) at ¶ 2.<sup>2</sup> He was born in England and has resided there his entire life. Doc. 20 at ¶ 2. He has never been to Nevada, and has never conducted or solicited business there. Id. at ¶¶ 3, 13-14.

Righthaven alleges that it owns the copyright in a newspaper article entitled: “Death ray’ scorched hair,” (the “Article”), attached to the Amended Complaint as Exhibit 1. (Doc. 21 at ¶ 16). The Article describes an architectural curiosity: a “concave reflective surface” on the outside wall of a skyscraper – the Vdara Hotel at CityCenter on the Strip in Las Vegas – that directs the sun’s rays toward guests at the hotel’s swimming pool, melting their plastic cups and shopping bags, and singeing their hair. See Doc. 1 at Ex. 1. The phenomenon is so powerful, apparently, that it has earned the nickname “Vdara death ray.” Id.

The Amended Complaint alleges that Newman is the registrant and administrative contact for the website facepunch.com (the “Website”). Doc. 21 at ¶ 8. It also alleges that Newman allowed the Article to be reproduced on the Website (copy of Article allegedly appearing on Website in Exhibit 2 to the Original Complaint, Doc. 1), in violation of the copyrights owned by Righthaven. Doc. 21 at ¶ 20.

Although Newman concedes he is the individual listed at the domain registrar as the contact for the Website, he does not personally own the Website or control it in his individual

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<sup>1</sup> In its First Amended Complaint, Righthaven has added as a defendant Facepunch Studios Ltd., (“Facepunch”), a limited company formed under the laws of Great Britain. Righthaven has not served process on Facepunch, and this Motion to Dismiss is filed solely on behalf of Newman. Without entering an appearance on behalf of Facepunch, undersigned counsel notes that it appears the Court also lacks personal jurisdiction and subject matter jurisdiction over Facepunch, on many of the same grounds it lacks jurisdiction over Newman and this complaint against him.

<sup>2</sup> 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. Doc. 20 at ¶ 4. Rather, the Website is owned by Facepunch Studios Ltd., which is  
2 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.

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

11 Exhibit 2 to the Original Complaint shows that the user who posted the alleged  
12 unauthorized reproduction uses the name “Wii60.” Doc. 20 at ¶ 9; Doc. 1-1 at Ex. 2. The user  
13 name “Wii60” does not belong to Newman. Id. Further, Newman has never used “Wii60” to  
14 post content on the Website. Id. Newman does not direct or create content that third parties, such  
15 as Wii60, post on the Website. Id. at ¶ 10.

16 On October 12, 2010, Righthaven filed its Original Complaint against Newman. Doc. 1.  
17 Prior to filing the Original Complaint, Righthaven never sent a cease & desist letter requesting  
18 removal of the alleged unauthorized reproduction. Newman Decl. at ¶ 11. Immediately upon  
19 learning of Righthaven’s allegations, Newman, acting in his corporate capacity with the  
20 Company, disabled the thread to the posting that is referenced in Exhibit 2 of the Original  
21 Complaint. Id. at ¶ 12. He did this from the Company’s offices in England on November 4,  
22 2010. Id.

23 Newman has never been to Nevada or conducted business there. Id. at ¶¶ 3, 13. He has  
24 never solicited business in Nevada; designated an agent for service of process in Nevada; held a  
25 license in Nevada; incorporated in Nevada; paid taxes in Nevada; or had a bank account in  
26 Nevada. Id. at ¶¶ 3, 14. Moreover, none of the servers supporting the Website are located in  
27 Nevada. Id. at ¶ 17.

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

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

12 **This Court has found Righthaven Lacks Standing in Related Cases**

13 Righthaven’s claims of copyright ownership in the Article have been rejected by this  
 14 Court in related cases. As background, the Copyright Office records indicate that Stephens  
 15 Media, LLC (“Stephens Media”) is the author of the Article. (Copy of copyright registration  
 16 information obtained from Copyright Office webpage attached hereto as **Exhibit A**.)<sup>3</sup>  
 17 Righthaven is listed therein as the copyright claimant, by virtue of a written assignment.<sup>4</sup> Id.  
 18 Righthaven did not attach to the Original or Amended Complaint a copy of the specific  
 19 assignment giving it putative rights in the Article.

20  
 21 <sup>3</sup> Pursuant to Fed. R. Evi. 201(d), the Court is requested to take judicial notice of facts obtained  
 22 from Righthaven’s putative copyright registration of the Article, as obtained from the Copyright  
 23 Office website. The Court may take judicial notice because this is a matter “of public record” and  
 24 “readily verifiable.” Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir.  
 2006). The Certificate of Registration also appears at Doc. 1-1, Ex. 4.

25 <sup>4</sup> Righthaven would have no contractual right to bring the present suit without such assignment,  
 26 and the records from the Copyright Office (attached hereto as **Exhibit A**) indicate that Stephens  
 27 Media assigned certain putative rights to Righthaven. In response to Newman’s argument that  
 28 Righthaven lacks standing, it is presumed that Righthaven will need to produce a copy of the  
 SAA, any amendments thereto, and any specific assignment purporting to transfer rights in the  
 Article from Stephens Media to Righthaven.

1 In recent months, this Court has dismissed multiple complaints filed by Righthaven for  
2 lack of standing.<sup>5</sup> When pressed about its alleged ownership in these related cases, Righthaven  
3 has pointed to several documents showing an alleged assignment of rights from Stephens Media  
4 to Righthaven. After examining the primary agreement – the “Strategic Alliance Agreement” or  
5 “SAA”<sup>6</sup> – that Righthaven filed in its case against Democratic Underground, this Court held that  
6 Righthaven does not actually own any of the *underlying copyrights* belonging to Stephens Media,  
7 but merely owns the *right to sue* for infringement of Stephens Media’s copyrights.<sup>7</sup> Righthaven  
8 LLC v. Democratic Underground, LLC, \_\_ F. Supp. 2d \_\_, 2011 WL 2378186, at \*3 (D. Nev.  
9 June 14, 2011) (slip copy) (copy attached hereto as **Exhibit D**). Pointing to Section 7.2 of the  
10 SAA, the Court found that the only right that Righthaven is granted under the SAA is “the bare  
11 right to bring and profit from copyright infringement actions.” Id. at \*2. Finding that “the SAA  
12 prevents Righthaven from obtaining any of the exclusive rights necessary to maintain standing in  
13  
14  
15

16 <sup>5</sup> Pursuant to Fed. R. Evi. 201(d), the Court is requested to take judicial notice of this fact and all  
17 facts contained within the declarations Righthaven has previously filed with the District of  
18 Nevada in similar cases, and the exhibits thereto. The Court may take judicial notice because  
19 these facts are a matter “of public record” and “readily verifiable.” Reyn’s, 442 F.3d at 746 n.6.

20 <sup>6</sup> Righthaven LLC v. Democratic Underground LLC, No. 2:10-cv-01356-RLH-GWF, at Ex. 1 to  
21 Doc. 79 thereto (D. Nev. Mar. 9, 2011) (copy of SAA dated Jan. 18, 2010, attached hereto as  
22 **Exhibit B**). A duplicate copy of the SAA was filed in Righthaven LLC v. Hoehn, and was  
23 authenticated by the Declaration of the CEO of Stephens Media, Steven Gibson. See No. 2:11-  
24 cv-00050-PMP-RJJ, at Ex. 2 to Doc. 24 thereto (D. Nev. May 9, 2011) (attached hereto as  
25 **Exhibit E**). Although cases generally should not be attached to filings, many of these cases have  
26 not yet been published or are very recent decisions, thus Newman attaches them here for the  
27 Court’s convenience.

28 <sup>7</sup> In that case, Democratic Underground moved to unseal the SAA. In granting that motion, this  
Court stated: “As I have . . . considered the multitude of cases filed by Righthaven, on the  
claimed basis that Righthaven owns the copyrights to certain Stephens Media copy, it appears to  
the Court that there is certainly an interest and even a right in all the other defendants sued by  
Plaintiff to have access to this material.” Democratic Underground, No. 2:10-cv-01356-RLH-  
GWF, at p. 4 of Doc. 93 thereto (Apr. 14, 2011) (Order Unsealing SAA) (copy attached hereto as  
**Exhibit C**).

1 a copyright infringement action,” the Court dismissed Righthaven for lack of standing.<sup>8</sup> Id. at \*6.  
2 “As such, Righthaven’s complaint is dismissed in its entirety.” Id. at \*9.

3 On May 9, 2011, Righthaven amended the SAA. While not providing a copy to Newman  
4 or filing a copy of the amendment in this case, Righthaven did file a copy in its lawsuit against  
5 defendant Wayne Hoehn.<sup>9</sup> Despite the amendment, this Court held that Righthaven still lacked  
6 standing since the amendment continued to deprive Righthaven of ownership over Stephens  
7 Media’s copyrights. Righthaven LLC v. Hoehn, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 2441020 (D.  
8 Nev. June 20, 2011) (slip copy) (copy attached hereto as **Exhibit F**).

9 On July 13, 2011, this Court granted a similarly situated defendant’s motion to dismiss on  
10 grounds that Righthaven lacked standing. See Righthaven LLC v. Mostofi, Case Number 2:10-  
11 cv-1066-KJD-GWF, 2011 WL 2746315 (D. Nev. July 13, 2011) (slip copy) (copy attached hereto  
12 as **Exhibit G**). There, Righthaven argued that the amendment it executed with Stephens Media  
13 on May 9, 2011 fixed any possible errors in the original SAA that would have prevented  
14 Righthaven from having standing in that matter. Id. at \* 3. The court disagreed, finding that the  
15 amendment could not create standing because “[t]he existence of federal jurisdiction ordinarily  
16 depends on the facts *as they exist when the complaint was filed*.” Id. (quoting Lujan v. Defenders  
17 of Wildlife, 504 U.S. 555, 571 n.4 (1992) (emphasis in Lujan)).

18 After that, and after Newman moved to dismiss the Original Complaint on June 18, 2011  
19 (Doc. 19), Righthaven amended the SAA for a *second time* on July 8, 2011. (Doc. 21 at ¶ 21).  
20 Righthaven refers to this second amendment as the “Amended and Restated Strategic Alliance  
21 Agreement,” or the “Restated Amendment.” Id. Righthaven again failed to attach a copy of the  
22 Restated Amendment to its Amended Complaint or otherwise provide a copy to Newman.  
23 Because Newman is without a copy of the Restated Agreement, and because it is assumed

24 \_\_\_\_\_  
25 <sup>8</sup> Although not controlling, these decisions are highly persuasive, given the similarity of facts in  
all Righthaven cases.

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



1 Righthaven will rely on its contents and attach a copy of it when it responds to this Motion,  
2 Newman reserves the right to address its merits when he files his reply brief.

3 Separately, when Righthaven filed its original Certificate of Interested Parties in October  
4 2010, (Doc. 5), it failed to disclose to this Court and to Newman the “direct, pecuniary interest”  
5 that Stephens Media has in the outcome of this case. Instead, it listed only three parties, none of  
6 which was Stephens Media. Id. In Democratic Underground, the Court stated that it “believes  
7 that Righthaven has made multiple inaccurate and likely dishonest statements to the Court.” 2011  
8 WL 2378186, at \*9. Choosing to focus, however, on what it described as “the most factually  
9 brazen,” the Court reprimanded Righthaven for failing to disclose Stephens Media as an  
10 interested party in Righthaven’s Certificate of Interested Parties. Id. Only after being ordered to  
11 do so did Righthaven finally file an Amended Certificate of Interested Parties in the instant case,  
12 listing Stephens Media as an interested party, on June 20, 2011. (Doc. 17).

## 13 **II. LEGAL STANDARD**

### 14 **A. Subject Matter Jurisdiction**

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

21 In evaluating a motion to dismiss under Rule 12(b)(1), the Court may consider extrinsic  
22 evidence without converting the motion into one for summary judgment. See Safe Air for  
23 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). “Rule 12(b)(1) attacks on jurisdiction  
24 can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting  
25 the court to look beyond the complaint.” Savage v. Glendale Union High Sch., 343 F.3d 1036,  
26 1052 n.2 (9th Cir. 2003) (citations omitted). “Once the moving party has converted the motion to  
27 dismiss into a factual motion by presenting affidavits or other evidence properly brought before  
28 the court, the party opposing the motion must furnish affidavits or other evidence necessary to

1 satisfy its burden of establishing subject matter jurisdiction.” Id. (citations omitted). “The court  
2 need not presume the truthfulness of the plaintiff’s allegations.” Meyer, 373 F.3d at 1039.

3 A central component to subject matter jurisdiction is the question of standing, which  
4 requires that the party experience actual or imminent harm. Lujan, 504 U.S. at 561. A party’s  
5 standing to bring a case is not subject to waiver, and can be used to dismiss the instant action at  
6 any time. Fed. R. Civ. P. 12(h)(3); United States v. Hays, 515 U.S. 737, 742 (1995); Chapman,  
7 631 F.3d at 954. Within the realm of copyright law, 17 U.S.C. § 501(b) allows only the legal or  
8 beneficial owner of an exclusive right in a copyright, specified in 17 U.S.C. § 106, to sue for  
9 infringement. Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 884 (9th Cir. 2005).

#### 10 **B. Personal Jurisdiction**

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

15 Because this action raises a federal question, the issue of whether this Court may exercise  
16 personal jurisdiction over a defendant depends on the specific limitations of Nevada’s long-arm  
17 statute and the constitutional principles of due process. Myers v. Bennett Law Offices, 238 F.3d  
18 1068, 1072 (9th Cir. 2001). In this case, the Amended Complaint comports to allege a cause of  
19 action for copyright infringement against a British defendant. Because the Copyright Act does  
20 not provide for nationwide service of process, Nevada’s law of personal jurisdiction applies.  
21 Nevada’s long-arm statute is co-extensive with the due process principles of the United States  
22 Constitution. Myers, 238 F.3d at 1072 (citing Judas Priest v. Second Judicial Dist. Court, 104  
23 Nev. 424, 760 P.2d 137, 138 (1988) (interpreting Nevada’s long-arm statute to reach the limits of  
24 federal due process)). Thus, a non-resident party is only subject to personal jurisdiction in  
25 Nevada if exercising jurisdiction comports with federal Constitutional due process requirements.  
26 See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1977).

27 Whether this Court, sitting in Nevada, has personal jurisdiction over Newman depends on  
28 whether Righthaven has alleged sufficient “minimum contacts” between Newman and the State

1 of Nevada for purposes of general or specific jurisdiction, “such that the maintenance of the suit  
 2 does not offend ‘traditional notions of fair play and substantial justice.’” Doe v. Unocal Corp.,  
 3 248 F.3d 915, 923 (9th Cir. 2001) (quoting International Shoe Co. v. Washington, 326 U.S. 310,  
 4 316 (1945)).

### 5 **III. LEGAL ARGUMENT**

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

##### 7 **1. *Righthaven Lacks Standing***

8 “[O]nly copyright owners and exclusive licensees of copyright may enforce a copyright.”  
 9 Sybersound Records v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008). Exclusive rights in a  
 10 copyright are enumerated in 17 U.S.C. § 106 and include the exclusive rights:

- 11 (1) to reproduce the copyrighted work in copies or phonorecords;
- 12 (2) to prepare derivative works based upon the copyrighted work;
- 13 [and]
- 14 (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.

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

23 Righthaven has not provided Newman with a copy of the Restated Amendment to the  
 24 SAA that it claims to have executed with Stephens Media on July 7, 2011. Accordingly,  
 25 Newman has no way of assessing Righthaven’s standing based on that agreement. Nevertheless,  
 26 under Supreme Court precedent and this Court’s ruling in Mostofi, Righthaven cannot create  
 27 standing by pointing to the July 7, 2011 Restated Amendment because “[t]he existence of federal  
 28 jurisdiction ordinarily depends on the facts *as they exist when the complaint was filed.*” Mostofi,

1 2011 WL 2746315 at \*3. Instead, the Court must examine the original SAA that was in place at  
 2 the time Righthaven filed suit against Newman. “Although a lower case court may allow parties  
 3 to amend defective allegations of jurisdiction, it may not allow the parties to amend the facts  
 4 themselves.” *Id.* (citing *Newman-Green, Inc. v. AlfonzoLarrain*, 498 U.S. 826, 830 (1989)). In  
 5 explaining this principle, the Court stated that a party may amend a complaint to correctly  
 6 misstated domicile, but may not move to a new residence after filing the complaint in order to  
 7 change his domicile. *Id.* That is exactly what Righthaven is attempting to do in the present case.

8 Thus, examining the SAA in its original form, Righthaven lacks standing to bring this  
 9 lawsuit because it has *no* rights in the copyrights it claims, as demonstrated by the plain language  
 10 of at least three sections of the SAA.<sup>10</sup> *E.g.*, *Silvers*, 408 F.3d at 884; *Sybersound*, 517 F.3d at  
 11 1144.

12 First, under Section 3.3 of the SAA, Righthaven is obligated to reassign the rights to the  
 13 Work to Stephens Media if it does not pursue an infringement action within 60 days of the  
 14 Assignment. *Id.* at § 3.3. Additionally, this section gives Stephens Media the right to direct  
 15 Righthaven not to pursue an action against an alleged infringer. *Id.* In the end, Righthaven is left  
 16 with no ownership of any exclusive copyright.

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

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

18 \_\_\_\_\_  
 19 <sup>10</sup> The SAA is referenced surpa at n.6, and attached hereto as **Exhibit B**.

1 See SAA at § 7.2, referenced supra in n.5, and attached hereto as **Exhibit B** (emphasis added).  
 2 Under the plain language of Section 7.2, Righthaven’s only right is to sue for infringement.  
 3 Further, the SAA gives Stephens Media the unilateral right, at any time, to terminate the  
 4 Copyright Assignment and enjoy a complete right of reversion. Id.

5 Third, under Section 8 of the SAA:

6 *Stephens Media shall have the right at any time to terminate, in*  
 7 *good faith, any Copyright Assignment (the “Assignment*  
 8 *Termination”) and enjoy a right of complete reversion to the*  
 9 *ownership of any copyright that is subject of a Copyright*  
 10 *Assignment . . . . In order to effect termination of the [sic] any*  
 11 *Copyright Assignment, Stephens Media shall be required to*  
 12 *provide Righthaven with thirty (30) days prior written notice.*  
 13 *Within thirty (30) days after receipt of termination of the [sic] any*  
 14 *Copyright Assignment, Righthaven shall commence*  
 15 *documentation to effect reassignment of the Stephens Media*  
 16 *Assigned Copyrights to Stephens Media.*

17 SAA at § 8 (emphasis added).

18 As this Court held in Righthaven, LLC v. Hoehn, these “carve outs deprive Righthaven of  
 19 any of the rights normally associated with ownership of an exclusive right necessary to bring suit  
 20 for copyright infringement and leave Righthaven no rights except to pursue infringement actions,  
 21 a right which itself is subject to Stephens Media’s veto.” Case No. 2:11-cv-00050-PMP-RJJ,  
 22 Doc. 28 at p. 8 (D. Nev. June 20, 2011). Finding that “the SAA prevents Righthaven from  
 23 obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement  
 24 action,” the Court dismissed Righthaven for lack of standing in Democratic Underground. \_\_ F.  
 25 Supp. 2d \_\_\_, 2011 WL 2378186, at \*6 (copy attached hereto as **Exhibit D**).

26 For all of the above reasons, Newman respectfully requests this Court to adopt the  
 27 analysis and conclusion from both Hoehn and Democratic Underground, to find Righthaven lacks  
 28 standing, and to dismiss the Amended Complaint for lack of subject matter jurisdiction.

29 **2. *The Copyright Act does Not Apply Extraterritorially; Here the Alleged***  
 30 ***Infringement Occurred in England***

31 Even if the Court ultimately finds that Righthaven has sufficient standing, the Court still  
 32 lacks subject matter jurisdiction over this particular dispute because United States copyright laws  
 33 do not apply extraterritorially, and the alleged infringement in this case occurred in Great Britain.

1 See Subafilms, Ltd. v. MGM-Pathe Comm’s Co., 24 F.3d 1088, 1095-99 (9th Cir. 1994).  
 2 “Because the copyright laws do not apply extraterritorially, each of the rights conferred under the  
 3 five section 106 categories must be read as extending ‘no farther than the [United States’]  
 4 borders.’” Subafilms, 24 F.3d at 1094. For the Copyright Act to apply, “at least one alleged  
 5 infringement must be completed entirely within the United States.” Los Angeles News Serv. v.  
 6 Reuters Television Int’l, Ltd., 149 F.3d 987, 990-91 (9th Cir. 1988) (citations omitted). The  
 7 Ninth Circuit has ruled, “[r]ecognizing the importance of avoiding international conflicts of law  
 8 in the area of intellectual property [] we have applied a more robust version of this presumption to  
 9 the Copyright Act, holding that the Act presumptively does not apply to conduct that occurs  
 10 abroad even when that conduct produces harmful effects within the United States.” Omega S.A.  
 11 v. Costco Wholesale Corp., 541 F.3d 982, 988 (9th Cir. 2008).

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

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

25 **B. The Court Lacks Personal Jurisdiction over Garry Newman**

26 The Amended Complaint does not change the conclusion that the Court lacks personal  
 27 jurisdiction over Newman. The Amended Complaint adds a count of vicarious copyright  
 28

1 infringement<sup>11</sup> against Newman, and adds facts in support of that claim. Regardless of the new  
 2 claim and newly asserted facts, the Amended Complaint still fails to assert that Newman’s acts of  
 3 infringement occurred in or were specifically targeted to Nevada. Rather, Newman is shielded  
 4 from claims of direct copyright infringement by virtue of the fact that Facepunch Studios Ltd.  
 5 owns and controls the website where the infringement is alleged to have been published. And he  
 6 has insufficient contacts with Nevada to warrant either general or specific personal jurisdiction  
 7 for either the direct copyright infringement claim or the vicarious copyright infringement claim.

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

10 “Under English law, a corporation is a separate legal entity from its directors, officers,  
 11 members, shareholders, or other controlling parties. This principle was definitively established in  
 12 the case of Salomon v. A. Salomon & Co., Ltd., [1897] A.C. 22 (H.L.)” In re: Tyson, 433 B.R.  
 13 68 (S.D.N.Y. 2010). Salomon<sup>12</sup> is a “landmark” opinion “that continues to be widely cited.” Id.  
 14 at 79. Under English law, the company is not an alias for its owners; rather, it is a distinct legal  
 15 entity. See id. at 80, n. 18 (citing Lord Herschell).

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

25 <sup>11</sup> Vicarious copyright infringement requires a showing of three elements: (1) direct infringement  
 26 by a third party; (2) the right and ability to supervise the infringing activity; and (3) direct  
 27 financial benefit. appropriate. See 6 William F. Patry, Patry on Copyright § 21:66 (2011) (copy  
 attached hereto as **Exhibit I**).

28 <sup>12</sup> A copy of the Salomon decision attached hereto as **Exhibit J**.

1 First, given Salomon, the fact that a person engages in the  
2 “carrying on of a business” using a duly incorporated, yet  
3 seemingly artificial, entity is not sufficient to justify piercing that  
4 entity’s veil. . . . Second, courts may “pierce the corporate veil  
5 only where special circumstances exist indicating that [it] is a mere  
6 façade concealing the true facts.” . . . Third, . . . the plaintiff’s  
7 ability to recover from the defendant on a veil-piercing theory  
8 turns on whether the defendant had already incurred some liability  
9 to the plaintiff at the time he interposed the corporate structure. . . .  
10 Fourth, where the plaintiff may recover in fraud or “deceit” against  
11 a defendant directly, that path is preferably to indirect liability via  
12 veil-piercing. . . . Finally, . . . English courts have observed that  
13 parties may avoid the harsh effects of the Salomon principle by the  
14 exercise of due diligence, for instance, by contracting around a  
15 potential problem [on the front end].

16 Id. at 86-90.

17 In the present case, Newman is shielded against personal liability, and the Court lacks  
18 personal jurisdiction over him. He does not own the website facepunch.com; rather, the website  
19 is owned by Facepunch Studios Ltd., a British Limited Company. See Newman Decl. ¶ 4. The  
20 Amended Complaint alleges no facts justifying piercing of the corporate veil, and Righthaven has  
21 not even made such a request. Accordingly, the Amended Complaint should be dismissed against  
22 Newman.

## 23 **2. No Personal Jurisdiction Exists over Newman**

24 In addition to the above argument that English corporate law shields Newman from  
25 individual liability for the infringement alleged in the Amended Complaint, American legal  
26 principles demonstrate that this Court has neither general nor specific personal jurisdiction over  
27 Newman. Telegraphing Righthaven’s awareness that personal jurisdiction is lacking over  
28 Newman, the Amended Complaint neglects to include explicit allegations of personal jurisdiction  
(either general or specific), even though it notes that Newman is a resident of Great Britain. See  
Doc. 21 at ¶ 4.

### **a. General Personal Jurisdiction**

General jurisdiction exists when a Defendant’s contacts with the forum state are  
“substantial” and “continuous and systematic.” Bancroft & Masters, Inc. v. Augusta Nat. Inc.,  
223 F.3d 1082, 1086 (9th Cir. 2000). The burden on Plaintiff in establishing general jurisdiction



1 is “fairly high,” and requires that the defendant’s contacts be of the sort that approximate physical  
2 presence. Id. Factors considered in determining general jurisdiction include whether the  
3 defendant is incorporated in the forum, whether he solicits business there, holds a license, or  
4 designates an agent for service of process. See id.

5 Here, on the Amended Complaint that Righthaven has filed, general jurisdiction is not a  
6 credible basis for establishing personal jurisdiction over Newman. The Amended Complaint  
7 doesn’t contain a single allegation of “substantial,” or “continuous and systematic” contacts  
8 between Newman and Nevada. Newman’s Declaration bolsters the conclusion that general  
9 personal jurisdiction is lacking, in that he testifies he has never conducted or solicited business in  
10 Nevada, and that he never even traveled to Nevada.

11 ***b. Specific Personal Jurisdiction***

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

- 16 (1) The non-resident defendant must do some act or consummate  
17 some transaction with the forum or perform some act by which he  
18 purposefully avails himself of the privilege of conducting activities  
19 in the forum, thereby invoking the benefits and protections of its  
20 laws.  
(2) The claim must be one which arises out of or results from the  
defendant’s forum-related activities.  
(3) Exercise of jurisdiction must be reasonable.

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

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

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

7 If the Court disagrees and wishes to further analyze personal jurisdiction, it will have to  
8 pierce the corporate veil to find Newman liable for activities of the Company, which owns and  
9 operates the Website. In conducting such analysis, the Court should examine the seminal case of  
10 whether the operation of a website from outside the forum can constitute “purposeful availment”  
11 is Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (discussed in  
12 Cybersell, 130 F.3d at 418). There, the court concluded that purposeful availment should be  
13 evaluated based on a “sliding scale” of interactivity: the more interactive the website and the  
14 more the defendant directs the activities of the website toward the forum state, the more likely it  
15 is that the defendant has purposefully availed itself of doing business in the relevant forum. Id. at  
16 1124.

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

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

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

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

2 “Express aiming” requires “something more.” See Bancroft & Masters, 223 F.3d at 1087.  
3 It requires the defendant to “individually target [] a known forum resident.” Id. The presence of  
4 “individualized targeting” is what is required to satisfy the effects test. See id. at 1088. As the  
5 Ninth Circuit noted in Bancroft & Masters, the Plaintiff could not satisfy that factor in Cybersell  
6 where “there was no showing that the defendants even knew of the existence of the plaintiffs, let  
7 alone targeted them individually.” Id. at 1088 (citing Cybersell, 130 F.3d at 420).

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

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

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

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 availment.  
 3 See Cybersell 130 F.3d at 418 (discussing Bensusan Restaurant Corp. v. King, 937 F. Supp. 295,  
 4 301(S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997)). Newman had never heard of Righthaven  
 5 or *The Las Vegas Review-Journal* prior to receiving notice of the instant Amended Complaint.  
 6 Newman Decl. at ¶ 15.

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

16 Like the defendants in Remick, Newman did not "expressly aim" any tortious activities  
 17 into Nevada. Setting aside the fact that he does not own or operate the website in his individual  
 18 capacity, it is accessible worldwide and its readership is not focused on or limited to any  
 19 particular geographic region. Newman Decl. at ¶ 16. Newman disagrees with Righthaven's  
 20 conclusory allegation that reproduction of the Work on facepunch.com was of specific interest to  
 21 Nevada residents. Id. To the contrary, his experience has been that interest in facepunch.com is  
 22 based on visitors' identity as a gamer, regardless of their residency. Id.

23 Righthaven has alleged nothing to indicate that Newman has taken any specific, deliberate  
 24 steps to establish a substantial connection with Nevada. There is no indication in the Amended  
 25 Complaint that Newman has conducted business in Nevada, had any employees or agents in

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

1 Nevada, or had legitimate Nevada customers. Indeed, the record establishes that Newman’s only  
 2 contacts with Nevada are “random” or “attenuated,” both of which are insufficient to establish  
 3 purposeful availment and personal jurisdiction. See Burger King, 471 U.S. at 475. Thus,  
 4 Righthaven cannot establish that Newman purposefully availed himself of the privilege of  
 5 conducting activities in Nevada, thus invoking the benefits and protections of its laws. See eg.,  
 6 id.

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

- 13 (1) the extent of the defendant’s purposeful interjection into the
- 14 forum state, (2) the burden on the defendant in defending in the
- 15 forum, (3) the extent of the conflict with the sovereignty of the
- 16 defendant’s state, (4) the forum state’s interest in adjudicating the
- 17 dispute, (5) the most efficient judicial resolution of the
- 18 controversy; (6) the importance of the forum to the plaintiff’s
- 19 interest and convenient and effective relief; and (7) the existence of
- 20 an alternative forum.

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

22 Analyzing the above factors, the extent of Newman’s purposeful interjection into the  
 23 forum state’s affairs was minimal. The Amended Complaint alleges only a single incidence.  
 24 “The smaller the element of purposeful interjection, the less the jurisdiction to be anticipated and  
 25 the less reasonable is its exercise.” Core-Vent Corp. v. Nobel Invest. AB, 11 F.3d 1482, 1488  
 26 (9th Cir. 1993) (citations omitted). Accordingly, this factor weighs against personal jurisdiction.

27 The second factor of reasonableness, the burden on defendants, weighs strongly against  
 28 jurisdiction. “The unique burdens placed upon one who must defend oneself in a foreign legal  
 system should have significant weight in assessing the reasonableness of stretching the long arm  
 of personal jurisdiction over national borders.” Asahi Metal Industry Co. v. Superior Court, 480  
 U.S. 102, 114 (1987). The use of an agent in the United States might alleviate a foreign

1 defendant's burden, see Core-Vent, 11 F.3d at 1488, but Newman does not have such an agent.  
2 Newman Decl. at ¶ 14. Further, he has testified under oath that he has never travelled to Nevada.  
3 Id. at ¶ 3. Newman has also testified that defending this action in Nevada would be unduly  
4 burdensome and expensive for him. Id. at ¶ 18. Thus, this factor weighs strongly against  
5 personal jurisdiction over Newman.

6 Regarding the third factor, "litigation against an alien defendant creates a higher  
7 jurisdictional barrier than litigation against a citizen from a sister state because important  
8 sovereignty concerns exist." Sinatra v. National Enquirer, 854 F.2d 1191, 1199 (9th Cir. 1988).  
9 The Court should presume that Great Britain has a sovereign interest in adjudicating the claim  
10 against a British individual resident. Doe v. Geller, 533 F. Supp. 2d 996, 1008 (N.D. Cal. 2008)  
11 (citing Harris Rutsky and Co. Ins. Serv., Inc. v. Bell and Clements Ltd., 328 F.3d 1122, 1133 (9th  
12 Cir. 2003)). Further, the website forum that is at the heart of this dispute is controlled from  
13 England. Newman Decl. at ¶ 7. Accordingly, this factor weighs strongly against the  
14 reasonableness of exercising jurisdiction over Newman.

15 The fourth factor, the forum state's interest in adjudicating the dispute, weighs against the  
16 reasonableness of exercising jurisdiction over Newman. Although Righthaven is the party  
17 plaintiff, the Agreement that it has with Stephen's Media, LLC indicates that Stephen's Media is  
18 the true owner of the underlying copyrights. Thus, Righthaven does not have standing. Further,  
19 Nevada "is not the worldwide regulator of free speech in the digital age." Geller, 533 F. Supp. 2d  
20 at 1008. As discussed above, the Copyright Act was not intended by Congress to be applied  
21 extraterritorially. Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 987 (9th Cir. 2008).  
22 The District of Nevada "is not an international court of internet law." Geller, 533 F. Supp. 2d at  
23 1009. Accordingly, this factor weighs against jurisdiction.

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

1 The sixth factor, the importance of the forum to the plaintiff's interest in convenient and  
2 effective relief, weighs against jurisdiction in Nevada. Righthaven has not shown that the claim  
3 cannot be effectively remedied in England. See Geller, 533 F. Supp. 2d at 1010 (quoting Sinatra,  
4 854 F. 2d at 1200). Further, Righthaven fails to articulate any concerns that paint Nevada as  
5 "important" to its claim. Id.

6 Finally, the seventh factor, the existence of an alternative forum, also weighs against  
7 jurisdiction over Newman. "The plaintiff bears the burden of proving the unavailability of an  
8 alternative forum." Core-Vent, 11 F.3d at 1490. Righthaven has made no such showing that it  
9 would be precluded from suing in England. Righthaven's *preference* of venues "is not the test."  
10 Geller, 533 F. Supp. 2d at 1010 (quoting Roth v. Garcia Marquez, 942 F. 2d 617, 625 (9th Cir.  
11 1991)).

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

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

#### 20 **IV. CONCLUSION**

21 For all of the above reasons, the Amended Complaint against Newman should be  
22 dismissed for lack of both subject matter jurisdiction and personal jurisdiction. Subject matter  
23 jurisdiction is lacking because Righthaven has no standing, as Stephens Media transferred to  
24 Righthaven only the right to sue for infringement, but none of the underlying copyrights  
25 enumerated in Section 106 of the Copyright Act. Further, the Copyright Act may not be applied  
26 to infringement that occurs outside the borders of the United States, and here the infringement  
27 occurred in England. Similarly, personal jurisdiction is lacking over Newman because he does  
28 not own the Website; a British Limited Company does, providing Newman with a shield against

1 personal liability. Further, it would violate “traditional notions of fair play and substantial  
2 justice” to force Newman to defend a lawsuit in Nevada. Newman is a resident of England who  
3 has never been in Nevada, nor conducted or solicited business there. Righthaven cannot  
4 demonstrate that Newman purposely availed himself of the benefits of the laws of Nevada, or that  
5 the effects of the alleged infringement were targeted into or felt specifically in Nevada.  
6 Accordingly, this Amended Complaint should be dismissed with prejudice.

7 Righthaven’s motivation in filing suit against Newman is suspect. Even if Righthaven  
8 were deemed the prevailing party, it would not be entitled to recover either statutory damages or  
9 attorneys’ fees against Newman, since copyright registration for the Article was not obtained until  
10 after the alleged infringement. Statutory damages and attorneys’ fees are available only where  
11 registration is obtained prior to infringement commencing. See Derek Andrew, Inc. v. Poof  
12 Apparel Corp., 528 F.3d 696, 700-01 (9th Cir. 2008). The Amended Complaint alleges that the  
13 infringement commenced on September 25, 2010, but registration for the copyright was not  
14 secured until October 6, 2010. Compare Doc. 21 at ¶ 20 with id. at ¶ 31. Even if Righthaven  
15 could surmount the challenges of subject matter and personal jurisdiction, which it cannot, it  
16 would be entitled to very little other possible relief. Thus, these facts indicate that Righthaven’s  
17 true motivation is to target and extract settlements from specific defendants, like Newman, who  
18 will have difficulty defending against litigation (because of cost or distance or, in this case, both).

19 Further, Righthaven cannot claim with a straight face that it has been harmed. Righthaven  
20 acknowledges that the Website attributed *The Las Vegas Review-Journal* as the original source of  
21 the Article for the entire time in which the Article appeared on the Website. See Doc. 21 at ¶ 17.  
22 As soon as he learned of the Amended Complaint, Newman disabled the thread to the post on the  
23 Website, (Newman Decl. at ¶ 12), thus satisfying that portion of Righthaven’s prayer for relief  
24 seeking that the reproduction be removed. See Am. Compl., at Prayer for Relief.

25 Finally, as Judge Hunt found in dismissing Righthaven’s Amended Complaint against  
26 Democratic Underground, Righthaven’s only right under the SAA is to “bring and profit from  
27 copyright infringement actions.” Democratic Underground, 2011 WL 2378186, at \*2. It  
28 possesses none of the rights provided in Section 106 of the Copyright Act.



1 For all the reasons stated above, Righthaven's Amended Complaint against Newman must  
2 be dismissed.

3 DATED this 1<sup>st</sup> day of August, 2011.

4 BROWNSTEIN HYATT FARBER SCHRECK LLP

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**CERTIFICATE OF SERVICE**

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on the 1<sup>st</sup> day of August, 2011, the foregoing **DEFENDANT GARRY NEWMAN’S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND LACK OF PERSONAL JURISDICTION**

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