

No. 17-1170

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IN THE  
**Supreme Court of the United States**

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DRK PHOTO, A SOLE PROPRIETORSHIP,

*Petitioner,*

*v.*

MCGRAW-HILL GLOBAL EDUCATION HOLDINGS,  
LLC AND MCGRAW-HILL SCHOOL EDUCATION  
HOLDINGS, LLC,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the District Court and Court of Appeals correctly determined that Petitioner, as a non-exclusive stock photo licensing agent and assignee of a bare right to sue, lacked standing to assert copyright infringement claims on photos for which it was neither a legal nor beneficial owner of an exclusive copyright right, as required by 17 U.S.C. § 501(b).

## **CORPORATE DISCLOSURE**

Respondents McGraw-Hill Global Education Holdings, LLC and McGraw-Hill School Education Holdings, LLC make the following disclosure pursuant to S. Ct. Rule 29.6:

1) McGraw-Hill Global Education Holdings, LLC is not a public company and no public corporation owns 10% or more of the interest in McGraw-Hill Global Education Holdings, LLC. Its parent company is McGraw-Hill Global Education Intermediate Holdings, LLC, which is not publicly held; and

2) McGraw-Hill School Education Holdings, LLC is not a public company and no public corporation owns 10% or more of the interest in McGraw-Hill School Education Holdings, LLC. Its parent company is McGraw-Hill School Education Intermediate Holdings, LLC, which is not publicly held.

**TABLE OF CONTENTS**

	<i>Page</i>
QUESTION PRESENTED .....	i
CORPORATE DISCLOSURE .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES .....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE .....	2
DRK’s Aggregation Scheme Unravels .....	3
The District Court Below Finds DRK Lacks Statutory Standing under the Copyright Act .....	5
The Court of Appeals Affirms The Dismissal of DRK’s Claims.....	6
REASONS TO DENY PETITION .....	9
I. There is No Conflict Among Circuits (or Any Lower Courts) with regard to Statutory Standing for Copyright Infringement Claims.....	12

*Table of Contents*

	<i>Page</i>
II. Courts Universally Recognize That a Transfer of a Bare Right to Sue Is Not a Transfer of an Exclusive Copyright Right. . . .	21
III. DRK’s Proffered Definition of a “Beneficial Owner” under the Copyright Act Would Render the Express Language of Section 501(b) Superfluous. . . . .	25
CONCLUSION . . . . .	26

TABLE OF CITED AUTHORITIES

Page

CASES

*ABKCO Music, Inc. v. Harrisongs Music, Ltd.*,  
944 F.2d 971 (2d Cir. 1991) .....13, 18, 20

*Broad. Music, Inc. v. Hirsch*,  
104 F.3d 1163 (9th Cir. 1997).....25

*Contra Piracy v. Does 1-2919*,  
2013 WL 3828771 (N.D. Cal. July 23, 2013) .....14

*Cortner v. Israel*,  
732 F.2d 267 (2d Cir. 1984) .....25

*Eden Toys, Inc. v. Florelee Undergarment Co.*,  
697 F.2d 27 (2d Cir. 1982) .....13, 20, 21

*Fortnightly Corp. v. United Artists*,  
392 U.S. 390 (1968).....16

*Gardner v. Nike, Inc.*,  
279 F.3d 774 (9th Cir. 2002).....14

*Goss v. Zueger*,  
2014 WL 901446 (D. Colo. Mar. 7, 2014) .....14

*Greg Young Publ'g, Inc. v. Zazzle, Inc.*,  
2017 WL 2729584 (C.D. Cal. May 1, 2017).....13

*Cited Authorities*

	<i>Page</i>
<i>Guzman v. Hacienda Records &amp; Recording Studio, Inc.</i> , 808 F.3d 1031 (5th Cir. 2015) . . . . .	18
<i>Hacienda Records, L.P. v. Ramos</i> , 2018 WL 297163 (5th Cir. Jan. 4, 2018) . . . . .	18, 19
<i>HyperQuest, Inc. v. N'Site Sols., Inc.</i> , 632 F.3d 377 (7th Cir. 2011) . . . . .	13
<i>John Wiley &amp; Sons, Inc. v. DRK Photo (Wiley I)</i> , 998 F. Supp. 2d 262 (S.D.N.Y. 2014) . . . . .	<i>passim</i>
<i>John Wiley &amp; Sons, Inc. v. DRK Photo (Wiley II)</i> , No. 15-1134, --- F.3d ---, 2018 WL 913119 (2d Cir. Feb. 16, 2018) . . . . .	<i>passim</i>
<i>Motta v. Samuel Weiser, Inc.</i> , 768 F.2d 481 (1st Cir. 1985) . . . . .	13
<i>Prather v. Neva Paperbacks, Inc.</i> , 410 F.2d 698 (5th Cir. 1969) . . . . .	14, 15, 18
<i>Righthaven LLC v. Computer Servs. One LLC</i> , 2012 WL 694468 (D. Nev. Mar. 1, 2012) . . . . .	13
<i>Righthaven LLC v. Democratic Underground, LLC</i> , 791 F. Supp. 2d 968 (D. Nev. 2011) . . . . .	13

*Cited Authorities*

	<i>Page</i>
<i>Righthaven LLC v. Hoehn</i> , 716 F.3d 1166 (9th Cir. 2013) . . . . .	7
<i>Righthaven LLC v. Hush-Hush Entm't, Inc.</i> , 2012 WL 688429 (D. Nev. Mar. 1, 2012) . . . . .	13
<i>Righthaven LLC v. Mostofi</i> , 2011 WL 2746315 (D. Nev. July 13, 2011) . . . . .	13
<i>Righthaven LLC v. Newman</i> , 838 F. Supp. 2d 1071 (D. Nev. 2011) . . . . .	13
<i>Righthaven LLC v. Newsblaze LLC</i> , 2011 WL 5373785 (D. Nev. Nov. 4, 2011) . . . . .	13
<i>Righthaven LLC v. S. Coast Partners, Inc.</i> , 2012 WL 693711 (D. Nev. Mar. 1, 2012) . . . . .	13
<i>Righthaven LLC v. Wehategringos.com</i> , 2012 WL 693934 (D. Nev. Mar. 1, 2012) . . . . .	13
<i>Righthaven LLC v. Wolf</i> , 813 F. Supp. 2d 1265 (D. Colo. 2011) . . . . .	14
<i>Righthaven LLC v. Hyatt</i> , 2011 WL 3652532 (D. Nev. Aug. 19, 2011) . . . . .	13
<i>Silvers v. Sony Pictures Entm't</i> , 402 F.3d 881 (9th Cir. 2005) . . . . .	<i>passim</i>



*Cited Authorities*

	<i>Page</i>
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984) . . . . .	16
<i>Sprint Communications Co. v. APCC Services, Inc.</i> , 554 U.S. 269 (2008) . . . . .	24
<i>Teleprompter Corp. v. CBS</i> , 415 U.S. 394 (1974) . . . . .	16
<i>Thompson v. Hubbard</i> , 131 U.S. 123 (1889) . . . . .	16
<i>TufAmerica, Inc. v. Diamond</i> , 2015 WL 10846075 (S.D.N.Y. Mar. 24, 2015) . . . . .	13
<i>Viesti Assocs., Inc. v. McGraw-Hill Glob. Educ. Holdings, LLC</i> , 2015 WL 585806 (D. Colo. Feb. 11, 2015) . . . . .	13
<i>Viesti Assocs., Inc. v. Pearson Educ., Inc.</i> , 2014 WL 1053772 (D. Colo. Mar. 19, 2014) . . . . .	13-14
<i>Warren v. Fox Family Worldwide, Inc.</i> , 328 F.3d 1136 (9th Cir. 2003) . . . . .	25
<i>White-Smith Music Publ'g Co. v. Apollo Co.</i> , 209 U.S. 1 (1908) . . . . .	16

*Cited Authorities*

	<i>Page</i>
<b>STATUTES AND OTHER AUTHORITIES</b>	
17 U.S.C. § 101 .....	29
17 U.S.C. § 106 .....	9, 10, 17
17 U.S.C. § 501(b) .....	<i>passim</i>
Copyright Act of 1976, PL 94–553 (Oct. 19, 1976), 90 Stat 254117 .....	18
H.R. Rep. No. 94–1476 .....	17



## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-27a) is reported at 870 F.3d 978. The opinion of the United States District Court for the District of Arizona granting petitioner's motion for partial summary judgment (Pet. App. 30a-46a), is not officially reported but is available at 2014 WL 2584811.

## JURISDICTION

The judgment of the court of appeals was entered on September 12, 2017. A petition for rehearing *en banc* was denied on November 7, 2017 (Pet. App. 28a). A copy of the petition for a writ of *certiorari* was served by email on Respondents on February 2, 2018, and was docketed by this Court on February 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 501(b) of the Copyright Act provides that:

The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served

upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

Section 101 of the Copyright Act provides the following relevant definitions:

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

### **STATEMENT OF THE CASE**

This case arises out of the attempt by Petitioner DRK Photo (“DRK”) to aggregate thousands of claims of copyright infringement of hundreds of photos on behalf of dozens of non-party photographers for whom DRK served merely as a non-exclusive stock photo licensing agent. In addition to its non-exclusive representation agreements with those photographers, and as part of its aggregation scheme, DRK entered into purported copyright “transfer” agreements which nominally mentioned copyrights but substantively only manufactured a mere appearance of an ownership interest in the photos. As each of the lower

courts correctly recognized, the undisputed facts showed that DRK was not the author of any of the photos, never acquired any actual exclusive copyright rights in the photos, and held, at most, only a bare right to sue. Pet. App. 3a, 10a-20a, 40a-45a.

Having executed these sham “transfers” of copyright, DRK proceeded to sue various textbook publishers, including Respondents McGraw-Hill Global Education Holdings, LLC and McGraw-Hill School Education Holdings, LLC (collectively herein “McGraw-Hill”) on over a thousand copyright infringement claims involving scores of photos for which it had been the non-exclusive licensing agent. By aggregating these infringement claims, covering decades of DRK’s non-exclusive invoicing of the photos to McGraw-Hill, DRK hoped to use the *in terrorem* threat of massive statutory damages available under the Copyright Act as a bludgeon to extract a windfall settlement.

### **DRK’s Aggregation Scheme Unravels**

DRK’s scheme to manufacture the appearance of statutory standing under Section 501(b) of the Copyright Act began to unravel when, in a contemporaneously-filed suit against another textbook publisher, a federal district court rejected DRK’s identical standing arguments involving the very same photographers, the very same “transfer” agreements, and the very same non-exclusive representation agreements. *See John Wiley & Sons, Inc. v. DRK Photo (Wiley I)*, 998 F. Supp. 2d 262, 279, 284 (S.D.N.Y. 2014), *aff’d*, No. 15-1134, --- F.3d ---, 2018 WL 913119 (*Wiley II*) (2d Cir. Feb. 16, 2018). That court held the “transfer” agreements were nothing more than

“disguised assignments of the bare right to sue” because the “sole purpose” of the agreements was to “grant DRK the right to bring suit.” *Id.* at 283-84 (citation and internal quotation marks omitted). The *Wiley I* court specifically found that the “transfer” agreements were intended to “circumvent the prohibition against allowing ‘holders of rights under copyrights to choose third parties to bring suits on their behalf.’” *Id.*

As to the non-exclusive representation agreements that DRK relied upon to license the photos to others, the *Wiley I* court found there was “uncontroverted proof that the Representation Agreements are nonexclusive licenses [to DRK],” the express language of which disclaimed any transfer of exclusive rights, and that it was “axiomatic that if the Representation Agreement did not specify that exclusive rights were being transferred, no such rights were in fact transferred.” *Id.* at 278-79; *see also id.* (noting that DRK’s subsequent execution of the “transfer” agreements buttresses the conclusion that the representation agreements did not transfer any exclusive rights).

In addition, the *Wiley I* court also rejected DRK’s argument that by virtue of the financial benefit it derived from its non-exclusive licensing of the photos it was a “beneficial owner” under Section 501(b), concluding that such a theory of statutory standing was not available to DRK because it “never owned the copyrights” or legal title to the photos. *Id.* at 279.

### **The District Court Below Finds DRK Lacks Statutory Standing under the Copyright Act**

At the time of the *Wiley I* decision, the instant case was approaching the close of nearly two years of discovery, wherein the record evidence on DRK's purported rights in the photos was entirely identical to that in the *Wiley I* matter. The facts showed DRK had repeatedly reassured the photographers – the actual authors and copyright owners of the photos at issue – that the purported “transfer” agreements were crafted solely to create an appearance of “legal standing to pursue would be infringers,” and that there was “no ‘rights grab’ going on.” Pet. App. 6a, 37a-38a, 41a-42a. McGraw-Hill moved for partial summary judgment in the district court, asserting that DRK's copyright infringement claims were barred by well-worn principles of collateral estoppel, as well as by DRK's failure to satisfy the statutory standing requirements of Section 501(b); that is, the indisputable factual record showed that DRK was neither the legal nor beneficial owner of *any* exclusive copyright rights in any of the photos.

The district court agreed. It held that, “[e]ven without according the [*Wiley I*] decision preclusive effect, the Court is persuaded by the analysis in *Wiley [I]* and in other cases that have found similar [transfer] agreements insufficient to confer standing.” Pet App. 40a (citing cases involving the same plaintiff's counsel and similar “transfer” agreements). Addressing the substance of the “transfer” agreements, rather than the nominal label DRK had applied to them, the district court found that they “conveyed to DRK nothing more than the ‘bare right to sue.’” *Id.* 41a. The district court also



found the “Representation Agreements” were merely “non-exclusive licenses” that failed to “grant DRK any exclusive rights under 17 U.S.C. § 106.” *Id.* 40a. The district court also rejected DRK’s post-hoc attempts to characterize itself as a beneficial owner merely because it stood to gain financially from its own non-exclusive licensing of the photos. *Id.* 42a. For these reasons, the district court granted McGraw-Hill’s motion for partial summary judgment, finding DRK lacked standing to sue for copyright infringement with regard to the nearly 1,000 claims at issue in that motion. *Id.* 40a-45a.

### **The Court of Appeals Affirms The Dismissal of DRK’s Claims**

The court of appeals affirmed the district court’s conclusions in all respects. Pet. App. 3a. First, it agreed with the district court that, “[i]n the absence of . . . [a] promise [of exclusivity], DRK’s Representation Agreements confer nonexclusive licenses and do not render DRK a legal owner for standing purposes.” *Id.* 13a. The court of appeals also rejected DRK’s contention that its *non-exclusive* right to authorize others to use the photos constituted an “exclusive” copyright interest. On this front, the panel held: “Neither the statutory text nor the analysis [in prior cases] suggests that, having been given the right ‘to authorize’ others to exercise the rights of copyright holders, a nonexclusive licensee becomes a legal owner with standing to sue.” *Id.*

Second, the court of appeals affirmed that the record showed DRK had admitted, repeatedly, that the sole purpose of the “transfer” agreements “was to put DRK ‘in a legal position to bring copyright infringement claims

against infringers’ and to have an agreement with the photographers as to how settlement proceeds would be divided, ‘*nothing more.*’” *Id.* 6a, 16a-19a (emphasis added); *id.* 6a (noting DRK assured the photographers that the agreements “would allow DRK to bring infringement suits and that DRK had ‘no intentions of using [the “transfers”] in any other manner”). The court of appeals found that such a record fully supported the district court’s conclusion that all that DRK received under the transfer agreements was a bare right to sue. *Id.* 19a (citing *Silvers v. Sony Pictures Entm’t*, 402 F.3d 881 (9th Cir. 2005) (*en banc*) (“[A]n assignee who holds an accrued claim for copyright infringement, but who has no legal or beneficial interest in the copyright itself, [may not] institute an action for infringement. . . . This conclusion naturally followed from the notable absence of the “right to sue” from the list of exclusive rights set forth in section 106 and was reinforced by the text and legislative history of the Copyright Act as a whole.”)).

The court of appeals further concluded that DRK’s “transfer” agreements were akin to those it had previously rejected in *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013), wherein the plaintiff had engaged in the same sham construct through a purported “transfer” of legal title in copyright, but where “in substance and effect,” none of the parties actually intended to transfer anything more than “a bare right to sue.” Pet. App. 17a, 19a (citing *Righthaven LLC*, 716 F.3d at 1169–70). As in *Righthaven*, the court of appeals concluded:

DRK’s admitted course of dealing with photographers following the execution of the [transfer agreements] demonstrates that each

party retained the rights it had under the nonexclusive Representation Agreements—meaning the photographers retained the exclusive rights to the photographs and DRK retained a nonexclusive license to authorize their use. As the district court recognized, the email exchanges surrounding execution of the Assignment Agreements further underscore this reality. . . . The undisputed evidence shows that for all practical purposes, the nonexclusive Representation Agreements continued to govern who controlled the exclusive rights associated with the photographs following execution of the purported copyright assignments; thus, the substance and effect of the [transfer agreements] was merely a transfer of the right to sue on accrued claims, which cannot confer standing.

Pet. App. 17a-19a.

Finally, the court of appeals also rejected DRK’s attempt to paint itself as a “beneficial” owner of copyright under Section 501(b) on the strength of its status as a non-exclusive licensing agent, because “[t]o hold that DRK is a beneficial owner simply on the very bases that it cannot be deemed the legal owner would effectively negate our holding in *Silvers* and render portions of section 501(b) superfluous.”<sup>1</sup> *Id.* 21a.

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1. On February 16, 2018, the U.S. Court of Appeals for the Second Circuit likewise affirmed the *Wiley I* court’s dismissal of DRK’s copyright infringement claims against another publisher arising from the same representation agreements and “transfer” agreements. *See Wiley II*, --- F.3d ---, 2018 WL 913119.

## REASONS TO DENY PETITION

The Copyright Act of 1976 expressly defines the *limited* subset of parties who are permitted to pursue copyright infringement claims. Though any non-exclusive licensing agent, including DRK here, could bring breach of contract claims for purported violations of its non-exclusive invoicing of others' photos, an option DRK elected not to pursue in this case, Section 501(b) of the Copyright Act reserves copyright infringement claims for only the "legal or beneficial *owner* of an *exclusive* right under a copyright." (emphasis added). The indisputable factual record in this case demonstrates that DRK holds, at most, non-exclusive licensing rights, not ownership of any exclusive rights. Such non-exclusive licenses have *never* been held to be sufficient for copyright standing under the plain language of Section 501(b).

The Copyright Act's specification of the exclusive copyright rights in a work, at 17 U.S.C. § 106, encompasses rights of reproduction, adaptation, distribution, public display, and public performance. Section 101 of the Act highlights the significance of this limited list of copyright rights by defining a "[c]opyright owner" as the owner of "any one of the exclusive rights." Notably absent from the list of exclusive rights is any mention of a "right to sue." Thus, because a bare right to sue is not among the statutorily defined rights under Section 106, one does not become a "copyright owner," as defined by Section 101, by having acquired such a right to sue.

This plain reading of the Copyright Act is unwavering in the case law. Contrary to DRK's arguments in its Petition, there is simply no conflict among the courts

below concerning the interpretation of Section 501(b) as limiting statutory standing for copyright infringement claims to legal owners of *exclusive* copyright rights under Section 106. *Cf.* Pet. 19-24; Pet. App. 9a-19a (court of appeals rejecting DRK’s identically argued theories of a “conflict” in the case law). The Petition, in reality, asks this Court to reevaluate the evidence below, which revealed DRK’s attempt to create a sham appearance of standing by nominal reference to copyright rights in “transfer” agreements with no actual assignment of exclusive ownership of the photographers’ Section 106 rights. Those agreements, as conceded by DRK, were intended *solely* to give DRK an appearance of standing and *not* to transfer any actual exclusive copyright interests in the photographers’ copyrights for their photos. DRK’s disclaimers of any actual exclusive interest in any of the copyrights is fatal to DRK’s standing here. Courts have universally rejected such assignments of a bare “right to sue” as grounds for statutory standing, finding they are inconsistent with the plain language of Section 501(b). *See infra* at 12-14.

DRK’s Petition thus asks this Court to ignore the plain language of Section 501(b) because, DRK argues, the “rigid standing rules” of that provision purportedly “bar enforcement efforts by parties best situated to pursue them and allow infringers to escape accountability.” Pet. 2. Setting aside the point that this argument is one for Congress, not this Court, there is simply no evidence that the photographers who were nonexclusively represented by DRK were in any way prevented, legally or factually, from filing their own copyright claims.<sup>2</sup> Nor

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2. After over two years of discovery, and only after its lack of standing was definitively determined on summary judgment,

is there any express provision of the Copyright Act that manifests Congress' intent to permit what DRK sought to create here: the aggregation of thousands of copyright infringement claims in a single plaintiff who did not own any exclusive copyright rights so as to use the threat of significant statutory damages to extract a windfall settlement.

Finally, the Petition asks this Court to read into the “beneficial owner” term in Section 501(b) the permission for a non-exclusive agent with a financial interest in the licensing of a copyrighted work to seek copyright redress, in addition to its already existing right to pursue breach of contract or other claims. It is a reading that would, as the court of appeals correctly noted, render the limitations enshrined in Section 501(b) a nullity. *Cf.* Pet. 30-35; Pet. App. 21a.

In fact, the Petition dances around its true aim. At bottom, DRK seeks to have this Court judicially rewrite the Copyright Act so as to extend the availability of copyright infringement claims to *any* licensing agent with a financial interest in a copyrighted work, irrespective

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DRK attempted to “join” certain of the photographers – the actual owners of copyright in the photos – as plaintiffs in the litigation. Pet. App. 21a-22a & n.8. This gambit underscores that DRK’s structure of the case, aggregating claims from dozens of photographers using sham “transfer” agreements, was a litigation device, and was not the result, as DRK continues to profess here, of some purported hindrance to those photographers’ rights or abilities to bringing their own claims as the sole owners of the exclusive copyright rights in the photos. The Ninth Circuit correctly affirmed the district court’s procedural rejection of that post-summary-judgment tactic. *Id.*

of whether that agent holds an *exclusive* copyright right in the work. That is not a compelling reason, nor even a proper one, to grant a writ of *certiorari* here.

**I. There is No Conflict Among Circuits (or Any Lower Courts) with regard to Statutory Standing for Copyright Infringement Claims**

DRK strains to paint a purported circuit split arising out of the Ninth Circuit’s 2005 *en banc* decision in *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881 (9th Cir. 2005), *cert. denied* No. 04-1738 (Oct. 3, 2005), all the while ignoring that its lack of statutory standing was *not* the consequence of some purported “conflict” in the circuits over the interpretation of Section 501(b). The dismissal of DRK’s claims was entirely a product of the universal rule barring reliance on the kind of sham construct DRK had crafted in its “transfer” agreements, which purported to assign “copyright” but in fact gave *nothing* more than a bare right to sue. *See supra* at 3-8.

DRK keeps harping on the false premise that the court of appeals’ decision here, and its *en banc* decision more than a decade earlier in *Silvers*, somehow eliminated the divisibility of copyright rights that were ushered in by the Copyright Act of 1976 (“1976 Act”). Pet. 4, 22, 28-30. But, in their rejection of DRK’s standing in this case, neither the district court nor the court of appeals ruled that copyright rights are indivisible. Moreover, there is nothing inconsistent in *any* of the case law interpreting the standing requirements of Section 501(b).<sup>3</sup> *See, e.g.*, Pet.

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3. The *Wiley II* court, like DRK here, identified the only “split” of authority as the *dissent* in *Silvers*. Not a single case since

App. 8a-9a, 35a; *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*9; *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013);<sup>4</sup> *HyperQuest, Inc. v. N'Site Sols., Inc.*, 632 F.3d 377, 381–82 (7th Cir. 2011); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991); *Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 484 (1st Cir. 1985); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 & n.3 (2d Cir. 1982); *Greg Young Publ'g, Inc. v. Zazzle, Inc.*, 2017 WL 2729584, at \*3 (C.D. Cal. May 1, 2017); *TufAmerica, Inc. v. Diamond*, 2015 WL 10846075, at \*4 (S.D.N.Y. Mar. 24, 2015); *Wiley I*, 998 F. Supp. 2d at 280-81; *Viesti Assocs., Inc. v. McGraw-Hill Glob. Educ. Holdings, LLC*, 2015 WL 585806 (D. Colo. Feb. 11, 2015); *Viesti Assocs., Inc. v. Pearson Educ., Inc.*, 2014 WL

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1978 has adopted an interpretation of the Copyright Act under which a holder of a bare right to sue, apart from any exclusive copyright rights, had standing under Section 501(b). *Cf.* --- F.3d ---, 2018 WL 913119, at \*5-6.

4. The *Righthaven* line of cases universally rejected the attempt by various publishers to appoint a single plaintiff by virtue of similar nominal “transfer” agreements, as here, to enforce their copyright rights without actually granting any exclusive copyright interest in their works to that plaintiff. *See, e.g., Righthaven LLC v. Computer Servs. One LLC*, 2012 WL 694468, at \*2 (D. Nev. Mar. 1, 2012); *Righthaven LLC v. Wehategringos.com*, 2012 WL 693934, at \*2 (D. Nev. Mar. 1, 2012); *Righthaven LLC v. S. Coast Partners, Inc.*, 2012 WL 693711, at \*2 (D. Nev. Mar. 1, 2012); *Righthaven LLC v. Hush-Hush Entm't, Inc.*, 2012 WL 688429, at \*2 (D. Nev. Mar. 1, 2012); *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 973 (D. Nev. 2011); *Righthaven LLC v. Newman*, 838 F. Supp. 2d 1071, 1074 (D. Nev. 2011); *Righthaven LLC v. Newsblaze LLC*, 2011 WL 5373785, at \*2 (D. Nev. Nov. 4, 2011); *Righthaven LLC v. Hyatt*, 2011 WL 3652532, at \*1 (D. Nev. Aug. 19, 2011); *Righthaven LLC v. Mostofi*, 2011 WL 2746315, at \*2 (D. Nev. July 13, 2011).



1055975, at \*11 (D. Colo. Mar. 19, 2014); *Viesti Assocs., Inc. v. Pearson Educ., Inc.*, 2014 WL 1053772, at \*6 (D. Colo. Mar. 19, 2014); *Goss v. Zueger*, 2014 WL 901446, at \*3 (D. Colo. Mar. 7, 2014); *Contra Piracy v. Does 1-2919*, 2013 WL 3828771, at \*2 (N.D. Cal. July 23, 2013); *Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265, 1271-73 (D. Colo. 2011).

*First*, DRK attempts to paint an illusory conflict between *Silvers* and *Prather v. Neva Paperbacks, Inc.*, 410 F.2d 698 (5th Cir. 1969). Apart from the fact that *Silvers* addressed standing under the 1976 Act, in which Congress included the Section 501(b) requirements for the first time, while *Prather* was decided under the 1909 Act, the two cases are not even at odds.

As the *Silvers en banc* majority noted, *Prather* was decided under the 1909 Act, which “simply afforded the ‘proprietor’ of a copyright the right to sue for infringement.” 402 F.3d at 889 (citing 17 U.S.C. § 101(b) (1952)). Not only were copyright rights indivisible under the 1909 Act, the Act “did not define ‘proprietor’ or ‘exclusive rights,’ nor did it provide that ‘legal or beneficial owners’ of exclusive rights were entitled to sue for infringement,” as are now in the express text of the 1976 Act. *Id.*; *cf. Prather*, 410 F.2d at 699 (noting indivisibility of rights in copyright under 1909 Act); *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002). *Silvers* correctly rejected *Prather* as “unhelpful” with respect to the 1976 Act and its statutory standing requirements. 402 F.3d at 889.

Moreover, unlike in *Silvers* and here, in *Prather*, the plaintiff actually obtained ownership of a copyright interest along with an assignment of accrued causes of action. *Id.* at 698-99. Though DRK reads *Prather* to permit

a bare assignment of the right to sue, the *Prather* court was not faced with the situation here where the plaintiff holds *only* a naked cause of action and the actual owners of the copyright rights are not parties. *See Silvers*, 402 F.3d at 889 (“[T]he *Prather* court was not faced, as we are, with a situation in which the owner of all the exclusive rights and the owner of the accrued causes of action are two different people.”). Unsurprisingly, *Silvers* rejected the same false comparison that DRK attempts to construct here. *Id.*

Critically, there was no analogue to Section 501(b) in the 1909 Act, and *Prather* could not and did not speak to the interpretation of that later provision. Rather, *Silvers* and its progeny have applied standard principles of statutory interpretation to the unambiguous terms of Section 501(b). In *Silvers*, the plaintiff’s sole basis for standing was her “Assignment of Claims and Causes of Action,” which transferred only a cause of action but did *not* transfer any copyright rights in the work at issue. *See* 402 F.3d at 883. The *Silvers* court correctly recognized that under “traditional principles of statutory interpretation Congress’ explicit listing of who may sue for copyright infringement should be understood as an exclusion of others from suing for infringement.” *Id.* at 885 (emphasis added); *id.* (“doctrine of *expressio unius est exclusio alterius* as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions” (quotation omitted)); *see also Wiley II*, --- F.3d ---, 2018 WL 913119, at \*7 (same). This doctrine is particularly apropos given that Congress went further than just limiting standing to the legal or beneficial owner of an exclusive right; it also restricted

statutory standing to only a litigant whose “particular right” was infringed “while he or she is the owner of [the right].” This “durational limitation,” as *Silvers* indicates, further underscores that “Congress’ grant of the right to sue was carefully circumscribed.” 402 F.3d at 885; *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*8 (same).

*Second*, there is no merit to DRK’s suggestion that *Silvers* erred in applying a “rigid” approach to standing under Section 501(b). As this Court has recognized, “the protection given to copyrights is wholly statutory,” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984), and thus there is no express or implied invitation in the Act for courts to fill some alleged interstitial failures by Congress. The remedies for infringement, and those who qualify to pursue them, “are only those prescribed by Congress.” *Id.* (citing *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)); *see also id.* (“The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. . . . In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.” (citing *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968); *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908)). There was no basis for *Silvers* to read into the Act additional categories of litigants whom Congress had not included.<sup>5</sup> Unsurprisingly, in the 13 years since *Silvers* was

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5. *Silvers* also found that the legislative history of the 1976 Act supported its interpretation of Section 501(b). For example, *Silvers* remarked that legislators were concerned with notice

decided, no court has done so. *See supra* at 12-14 (string citation of cases); *see also Wiley II*, --- F.3d ---, 2018 WL 913119, at \*7 (“The special features of copyright make the application of the *expressio unius* canon especially appropriate. In enacting and amending the Copyright Act, Congress legislates regarding a property interest that carries special and deep-rooted public policy concerns. . . .

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to multiple owners of exclusive rights, and that in response, “Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action in that owner’s name alone, while at the same time insuring to the extent possible that the other owners whose rights may be affected are notified and given a chance to join the action.” 402 F.3d at 886 (quoting H.R.Rep. No. 94–1476, at 159, reprinted in 1976 U.S.C.C.A.N. at 5775)). Thus, those “claiming a bare right to sue, such as *Silvers*, are not entitled to notice or joinder, which suggests that Congress did not envision their existence” nor did Congress envision “the right to sue” as “a right severable from ownership of one of the authorized exclusive rights.” *Id.*; *see also Wiley II*, --- F.3d ---, 2018 WL 913119, at \*7-9, 15 (recognizing same legislative history as supportive of the interpretation of Section 501(b) that has developed since the 1976 Act was enacted).

Likewise, *Silvers* found that the legislative history confirmed that the list of exclusive rights enumerated in Section 106 was exhaustive because the “House Report states: [t]he exclusive rights accorded to a copyright owner under section 106 are ‘to do and to authorize’ any of the activities specified in the five numbered clauses” and “each of the five enumerated rights may be subdivided indefinitely and, . . . in connection with section 201 [governing transfer of rights], each subdivision of an exclusive right may be owned and enforced separately.” 402 F.3d at 887 (quoting H.R.Rep. No. 94–1476, at 61, reprinted in 1976 U.S.C.C.A.N. at 5674). Thus, “[i]f a right is not ‘specified,’” such as a bare right to sue apart from any *exclusive* right under Section 106, “it is not one of the exclusive rights granted by Congress.” *Id.* A bare right to sue is all that DRK ever acquired from the photographers here.

We are reluctant to risk disturbing the balance that Congress settled on by reading into the Act features that Congress has not expressly adopted.”).

Ignoring the unbroken string of cases that have uniformly interpreted Section 501(b), DRK contends that *Prather* remains good law because a recent Fifth Circuit case allegedly cited it as “binding authority.” Pet. 21-22 (citing *Hacienda Records, L.P. v. Ramos*, 2018 WL 297163 (5th Cir. Jan. 4, 2018)). The Fifth Circuit did no such thing. Rather, the *Hacienda Records* court relied on *Prather* to discuss a contractual *disclaimer* of the right to sue by one co-owner of a copyright to the benefit of another co-owner. *Hacienda Records*, 2018 WL 297163, at \*1. Setting aside that at least some of the works at issue in that dispute *pre-date* the 1976 Act,<sup>6</sup> *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031 (5th Cir. 2015) (“Guzman wrote Triste in the early 1970s, . . . [and] filed the music and lyrics to Triste with the United States Copyright Office in 1974”), it is unremarkable that *Prather* would govern standing questions under the applicable *1909 Act*, and indeed, none of the parties apparently cited cases interpreting the 1976 Act, *see generally Hacienda Records*, 2018 WL 297163. In any event, the Fifth Circuit merely held that a “plain meaning of the clause granting Showalter [the other co-owner] the ‘*exclusive* right to enforce any legal rights in respect to the Works’ means Showalter . . . was the only person capable of enforcing all the artists’ rights in this action.” *Id.* at \*8. The *Hacienda* court was, in other words, enforcing the parties’

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6. *Cf.* Copyright Act of 1976, PL 94–553 (Oct. 19, 1976), 90 Stat 254117 (U.S.C. note prec. 101) (“This Act becomes effective on January 1, 1978”).

contractual expectations that only one of the co-owners of the copyright would have standing to sue:

Therefore, the broad and inclusive language in the assignments and special powers of attorney, created before this action, was sufficient under *Prather* to deprive the standing appellants of their ability to pursue this action. Accordingly, the district court did not err in dismissing, for lack of standing, Guanajuato's copyright-infringement claim.

*Id.* at \*9. The *Hacienda Records* court is *not* citing *Prather* as good law for who *has standing* under the 1909 Act (or the 1976 Act), it is merely confirming that a party who *gives away* his right to sue as an owner of copyright by contract loses whatever standing he may have otherwise had. Whatever its propriety, nothing in *Hacienda Records* conflicts with the settled law on the statutory requirements for standing under Section 501(b) of the 1976 Act.

*Third*, there is no conflict between the court of appeals decision here (or in *Silvers*) with *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991). *Cf. Pet.* 23-24. In fact, the *Silvers* court specifically noted it was *following* the reasoning in *ABKCO*,<sup>7</sup> to avoid creating

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7. DRK ignores that the *ABKCO* decision is *consistent* with the court of appeals here, all the other case law, and the express ownership and temporal limitations in Section 501(b). *ABKCO* acknowledged that [“t]he legal or beneficial owner of an exclusive right under a copyright is entitled to bring actions for infringements of that right occurring during the period of its ownership.” 944 F.2d at 980 (citation omitted). The question in *ABKCO* was not whether

a circuit split, as well as the Second Circuit’s earlier decision in *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982),<sup>8</sup> both of which expressly held that “[w]e do not believe that the [1976] Copyright Act permits holders of rights under copyrights to choose third parties to bring suits on their behalf.” *Eden Toys, Inc.*, 697 F.2d at 32 & n.3; *ABKCO Music*, 944 F.2d at 980 (“[T]he Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf.”); *Silvers*, 402 F.3d at 889-90. Contrary to DRK’s argument here, *ABKCO* “made clear that its decision was limited to the situation in which the same entity purchased both the copyright and accrued claims” and that “the only issue was one of timing.” *Silvers*, 402 F.3d at 890.<sup>9</sup> No such “timing”

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a bare right to sue is sufficient for standing – the court found it was not – but rather what happens if exclusive rights are transferred separately from accrued causes of action. The court noted that “a copyright owner can assign its copyright *but, if the accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them.*” *Id.* (emphasis added). Under Section 501(b), such an “assignee is only entitled to bring actions for infringements that were committed while it was the copyright owner and the assignor retains the right to bring actions accruing during its ownership of the right, even if the actions are brought subsequent to the assignment.” *Id.* The *ABKCO* court ultimately found that “by purchasing from Bright Tunes not only the song’s copyright and the U.S. infringement claim, but also ‘any and all rights assertable under copyright against the Infringing Composition in any part of the world which may have heretofore arisen or which may hereafter arise,’” *ABKCO* had standing to sue for infringement under Section 501(b). *Id.*

8. Superseded by rule and statute on other grounds.

9. The *Wiley II* court also rejected the assertion of tension between *ABKCO* and *Silvers* (and its progeny), noting that “[b]ecause *ABKCO* possessed both the exclusive right allegedly



issue is present here. As found by the district court and court of appeals, DRK *never* owned any exclusive copyright rights in the photos at issue. *See supra* at 5-8; Pet. App. 13a-19a, 40a-42a; *see also Wiley II*, --- F.3d ---, 2018 WL 913119, at \*6.

Thus, contrary to DRK's efforts to paint a split of authority, the principles first affirmed in *Silvers* and *Eden Toys* have become the universally accepted interpretation of Section 501(b): "The Copyright Act authorizes only two types of claimants to sue for copyright infringement: (1) owners of copyrights, and (2) persons who have been granted exclusive licenses by owners of copyrights." *Eden Toys*, 697 F.2d at 32; *Righthaven*, 716 F.3d at 1169. "Only the legal or beneficial owner of an exclusive right under a copyright has standing to sue for infringement," and Section 106 "lists the 'exclusive rights' that can be held." *Righthaven*, 716 F.3d at 1169 (emphases added) (quoting 17 U.S.C. § 501(b)); *see also supra* at 12-14 (string citation of cases); *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*6, 14-15 (same).

## **II. Courts Universally Recognize That a Transfer of a Bare Right to Sue Is Not a Transfer of an Exclusive Copyright Right**

DRK next argues that the court of appeals decision here improperly perpetuates a purported misreading of

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infringed and the accrued claim for infringement (as to which liability had already been adjudicated), that decision did not necessarily resolve the question whether one assigned merely the right to sue for infringement and who has never held any of the exclusive rights listed in section 106 has statutory standing to sue." *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*6.



Section 501(b) by every court to address the issue since the provision took effect in 1978. Pet. 24-30. DRK contends that Congress did not intend to limit standing to *only* the legal or beneficial owners of an exclusive right, but rather – by its alleged silence – Congress intended to incorporate the “common law” assignability of claims in addition to the two classes of claimants expressly specified under Section 501(b). *Id.*

This argument not only contradicts forty years of established case law, *see supra* at 12-14 (citing cases), the express language of the provision, *supra* at 19, and the limited legislative history of Section 501(b), *supra* at 16-18 & n.5, it is at odds with basic principles of statutory construction. Congress specifically identified a limited category of claimants entitled to pursue infringement claims. In the context of U.S. copyright law, a purely statutory creature, such an express identification by Congress must be viewed as exclusive. *Supra* at 16-18. In fact, there is no evidence that in enacting Section 501(b) Congress incorporated *any* concepts from the common law. *Id.*; *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*7 (recognizing that Copyright did “not exist at common law” and that “the most natural reading of this provision . . . is that by identifying who may bring suit under the Act, Congress signaled that others may not”).

Indeed, by limiting infringement claims to owners of an exclusive right in copyright, Congress expressly intended to omit *non-exclusive* licensees of a work from having standing to pursue infringement claims. By limiting infringement claims to owners of an exclusive right at the time of infringement, Congress expressly intended to limit even owners of an exclusive right from

filing infringement claims *unless* they also held those rights exclusively at the time of infringement. This is the plain language of the statute. As the courts below correctly found, DRK has never factually satisfied either of these predicates. Pet. App. 13a-20a, 40a-42a; *see also Wiley II*, --- F.3d ---, 2018 WL 913119, at \*7, 14-16.

DRK's proposed reading of Section 501(b), permitting mere assignees of a bare right to sue to file infringement claims, would render the rest of that provision a nullity. It is no wonder that *every* court to consider standing under Section 501(b) has rejected the notion that a bare right to sue, acquired apart from an actual transfer of an exclusive copyright interest, is sufficient to confer statutory standing for infringement claims. *Supra* at 12-14.

Moreover, nothing in the court of appeals decision here, nor in the myriad prior cases, has limited or eliminated the divisibility or assignability of copyright rights. *Cf.* Pet. 24-25. Contrary to DRK's assertion that "*Silvers* and *Righthaven* together undermine the principles of free transferability and divisibility of copyright ownership," *see* Pet. 4, those decisions do no such thing. Rather, they stand for the unremarkable proposition that *feigning* a transfer of copyright in order to effectuate the appearance of having satisfied the Act's statutory requirement for standing is improper. Put simply, the lower courts have rejected (repeatedly) the gimmick that DRK attempted here by its "transfer" agreements: to, in substance, obtain no actual exclusive rights in copyright and instead create merely the nominal appearance of those rights along with a right to sue.

In support of its effort to eliminate decades of case law rejecting the sufficiency of a bare right to sue, DRK foists a false comparison between this Court's decision in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), finding Article III standing in an aggregator of "dial-around" claims against long-distance carriers, and the purely statutory standing that is at issue under the Copyright Act. *Cf.* Pet. 26-27. It is telling that not a single court has viewed this Court's decision in *Sprint* as abrogating the limitations on standing under Section 501(b) in the eight years since. The reason is simple: *Sprint* did not involve claims for copyright infringement, but rather addressed standing for claims accruing under the Communications Act of 1934. 554 U.S. at 271. Unlike in the Copyright Act, Congress did not expressly, that is by statute, limit the parties entitled to such a cause of action under the Communications Act. *Id.*; *see* Pet. App. 19a (court of appeals here recognizing that "*Sprint* did not involve the Copyright Act, and its *standing analysis was not predicated on any statutory provision analogous to section 501(b)*" (emphasis added)). As the court of appeals here succinctly concluded, "*Sprint* does not undercut the reasoning of *Silvers* [and *Righthaven* before it], which was grounded on the specific statutory language and history of the Copyright Act's standing provision for infringement claims, and *Sprint* and *Silvers* are not 'clearly irreconcilable.'" Pet. App. 19a; *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*9-10 (same).

The unbroken string of cases rejecting standing under the Copyright Act for a holder of a bare right to sue did not err in their interpretation of Section 501(b). Rather, DRK is asking this Court to grant the writ of *certiorari* in order to amend the Act. *See Wiley II*, --- F.3d ---, 2018

WL 913119, at \*15 (“Congress might reasonably have chosen to permit such aggregation by assignment. But, as drafted, the Copyright Act does not . . . permit DRK to assert those claims when it has received nothing more than the bare right to sue for infringement and has never held an exclusive right under copyright in the photographs. It is for Congress, not our Court, to say otherwise.”).

### **III. DRK’s Proffered Definition of a “Beneficial Owner” under the Copyright Act Would Render the Express Language of Section 501(b) Superfluous**

Finally, this case is *not* the vehicle to determine the scope of what constitutes a “beneficial owner” of an exclusive right, as referenced by Section 501(b). DRK, as the holder of nothing more than sham “transfer” agreements and the non-exclusive right to license photos, is clearly excluded from that provision.

In construing this provision, several courts have pointed to the classic example of “an author who ha[s] parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1144 (9th Cir. 2003) (quoting H.R. Rep. No. 1476, at 159); *accord Wiley II*, --- F.3d ---, 2018 WL 913119, at \*15; *Broad. Music, Inc. v. Hirsch*, 104 F.3d 1163, 1166 (9th Cir. 1997) (“Beneficial ownership arises by virtue of section 501(b) for the purpose of enabling an author or composer to protect his economic interest in a copyright that has been transferred.”); *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984). But DRK is not the author of any of the photos here, nor did it ever part with legal title to the copyrights to those photos. It never had legal title in the first instance.

As the court of appeals correctly noted, “under [its] agreements [with the photographers], DRK is a nonexclusive licensing agent and an assignee of accrued causes of action. To hold that DRK is a beneficial owner simply on the very bases that it cannot be deemed the legal owner would . . . render portions of section 501(b) superfluous.” Pet. App. 21a; *Wiley II*, --- F.3d ---, 2018 WL 913119, at \*15 (“Even an expansive definition of beneficial ownership must have limits.”). For that reason, “on the specific facts of this case, DRK has failed to demonstrate that it is a beneficial owner.” Pet. App. 21a.

### CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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