No. 17-1170

IN THE

Supreme Court of the United States

DRK PHOTO, a Sole Proprietorship,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR THE PETITIONER

I. THE PHOTOGRAPHERS' ASSIGNMENTS WERE NOT "SHAMS," AND DRK HAS NEVER "CONCEDED" THAT THE SOLE PURPOSE OF THE PHOTOGRAPHERS' AGREEMENTS WAS TO CREATE "AN APPEARANCE OF STANDING."

Throughout its brief, Respondents McGraw-Hill Global Education Holdings, LLC and McGraw-Hill School Education Holdings, LLC (collectively herein "McGraw-Hill") characterize the photographers' assignment agreements (the "Agreements") as "shams." Opp. 3, 7, 10, 11, 12, 25. McGraw-Hill contends "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 "give DRK an appearance of standing." Opp. 6, 10. McGraw-Hill's characterization of DRK's position is incorrect.

McGraw-Hill omits the significant fact that the Agreements also gave DRK Photo ("DRK") authority to register the photographs at issue (the "Photographs") as owner of the copyrights therein. Pet. App. 5a-6a. DRK had longstanding relationships with all photographers prior to executing the Agreements, and thus was invested in protecting the rights in the Photographs.[1] Both DRK and the photographers benefited from the lawful exploitation of the Photographs, and likewise suffered direct financial injury as a result of their infringement. The Agreements reflected these

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[1] *See* Declaration of Daniel Krasemann in Support of Motion for Partial Summary Judgment (Doc. 80) at 2-3, *DRK Photo v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 3:12-cv-08093-PGR (D. Ariz. filed Feb. 21, 2014).

mutual priorities – at no point did DRK "concede" they were "intended solely to give DRK an appearance of standing." Opp. 10. It is nonsensical to concede, as McGraw-Hill does, that ownership was transferred for registration purposes but not for bringing suit for copyright infringement. One either has ownership or does not.

Moreover, it is wrong to invalidate a transfer simply because it was motivated to facilitate litigation. As this Court held in *Sprint Communications, Co., L.P. v. APCC Services, Inc.*, it is entirely proper to aggregate small claims by assignment for cost effective prosecution. 554 U.S. 269, 289-90 (2008). And, while DRK maintains that these Agreements serve as more than litigation tools, "the photographers' reasons for assigning ownership [do] not make the transfer of ownership any less effective." *Alaska Stock, LLC v. Pearson Educ., Inc.*, 975 F. Supp. 2d 1027, 1038 (D. Alaska 2013).

The same argument McGraw-Hill makes here failed in *Alaska Stock,* where the infringing publisher also argued that photographers' assignments conveyed only the bare right to sue because they "were made for the purpose of facilitating litigation" and provided for reassignment of ownership "upon completion of the litigation." *Id.* The court rejected the publisher's argument:

> [T]he photographers' reasons for assigning ownership [do] not make the transfer of ownership any less effective. Property rights are transferred every day for any number of reasons and for varying periods of time; copyrights are no different. The Ninth Circuit has never suggested that the reason an assignment is made – even if that reason is simply to facilitate litigation – or an assignment's

> temporary nature will transform an otherwise effective assignment of ownership into an assignment of the bare right to sue.

Id. Where, as here, there is no fraud and the Agreements were executed in good faith, it should not matter why a copyright owner assigns ownership. *See Rawlings v. National Molasses Co.*, 394 F.2d 645, 648 (9th Cir. 1968) (assignment of patent was not a "sham" where it was not "void or voidable" as between contracting parties). Without a way to permit copyright owners to effectively prosecute infringement claims, the decision below undermines the Copyright Act's core purpose.

II. THE DECISION BELOW ALLOWS PUBLISHERS LIKE MCGRAW-HILL TO DIVIDE AND CONQUER AND GET AWAY WITH MASSIVE COPYRIGHT INFRINGEMENT.

Fundamentally, the Ninth Circuit's decision undermines the very purpose of the Copyright Act: to encourage dissemination of creative works for the public benefit by making copyrights enforceable. DRK is in the best position to enforce the photographers' copyrights, but the decision below sacrifices copyright enforceability in favor of an inflexible reading of standing unsupported by both the history and purpose of the Copyright Act.

The majority's ruling makes it difficult for small copyright owners to remedy infringement against large corporations like McGraw-Hill. As the Ninth Circuit observed in *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, given the "the expenses of litigation" and "the burdens of coordination," photographers may be reluctant "to bring suit individually, either in individual actions or in a single suit under Federal Rule of

Civil Procedure 20." 795 F.3d 997, 1005 (9th Cir. 2015).

McGraw-Hill can only win by making it impractical to sue. It is a three times adjudicated copyright infringer, once by a Philadelphia jury and twice by district courts' summary judgments in almost identical photography cases.[6] Prior to settlement in *Grant Heilman Photography*, McGraw-Hill admitted to the court that it had infringed similarly situated photographers' images more than 1,000 times.[7] This case *alone* impacts the interests of 74 photographers, bringing 978 copyright infringement claims for misuse of 558 unique photographs in McGraw-Hill's publications – it would be inefficient, impractical, and antithetical to the core purpose of the Copyright Act's to require each photographer to bring suit individually. After more than a decade of litigation, McGraw-Hill continues to use procedural tactics to bar photographers from their day in court. And, it aggressively seeks to avoid even

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[6] On September 24, 2014, a jury sitting in the Eastern District of Pennsylvania found MHE liable for copyright infringement of 38 photographs in 11 textbooks. *See Grant Heilman Photography, Inc. v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, 115 F. Supp. 3d 518, 521 (E.D. Pa. 2015). *See also* Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment (Doc 165), *GHPI v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, Case No. 5:12-cv-02061-MMB (E.D. Pa. Aug. 6, 2014) (granting partial summary judgment on the issue of McGraw–Hill's liability for copyright); *Panoramic Stock Images, Ltd v. McGraw-Hill Global Educ. Holdings, LLC, et al.,* No. 12 C 9881, 2014 WL 6685454, at *6 (N.D. Ill. Nov. 25, 2014), opinion clarified, No. 12 C 9881, 2015 WL 393381 (N.D. Ill. Jan. 27, 2015) (same).

[7] *See* Defendants' Memorandum Regarding Liability and Damages for Remaining Claims (Doc. 275), *GHPI. v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 12-cv-02061-MMB (E.D. Pa. Nov. 20, 2015).

paying the license fees it owes hundreds of copyright holders for unlicensed use of their photographs.[8]

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[8] *See e.g. Gibson, et al. v. The McGraw-Hill Cos., Inc.*, No. 11-cv-02765-JPO (S.D.N.Y. filed Apr. 22, 2011); *Viesti Assocs., Inc. v. The McGraw-Hill Cos., Inc.*, No. 11-cv-01237 (D. Colo. filed May 5, 2011); *Muench Photography, Inc. v. The McGraw-Hill Cos., Inc.*, No. 12-cv-06595 (S.D.N.Y filed May 15, 2012); *Frerck v. The McGraw-Hill Cos., Inc*., No. 12-cv-07516 (N.D. Ill. filed Sept. 19, 2012); *Panoramic Stock Images, Ltd v. McGraw-Hill Global Educ. Holdings*, *LLC et al*., 12-cv-09881 (N.D. Ill. filed Dec. 11, 2012); *Lefkowitz v. The McGraw-Hill Cos., Inc*., No. 13-cv-05023 (S.D.N.Y. filed Apr. 1, 2013); *McGraw-Hill School Educ. Holdings, LLC, et al. v. Lewine*, No. 13-cv-4338 (S.D.N.Y. filed June 21, 2013); *Young-Wolff v. The McGraw Hill Cos., Inc*., No. 13-cv-04372, 2014 WL 349711 (S.D.N.Y. Jan. 31, 2014); *Englebert, et al. v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 14-cv-02062 (E.D. Pa. filed Apr. 8, 2014); *Gordon v. McGraw-Hill Global Educ. Holdings, LLC, et al*., No. 14-cv-3988 (E.D. Pa. filed June 27, 2014); *McGraw-Hill Global Educ. Holdings LLC, et al. v. Jon Feingersh Photography, Inc.,* No. 14-cv-5050 (S.D.N.Y. filed July 7, 2014); *Viesti Assocs., Inc. v. The McGraw-Hill Cos., Inc.*, No. 12-cv-00668, 2014 WL 3766185 (D. Colo. July 30, 2014); *McGraw-Hill Global Educ. Holdings, LLC, et al. v. Minden Pictures, Inc.*, No. 15-cv-00243 (S.D.N.Y. filed Jan. 14, 2015); *Clifton v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 5:15-cv-01672 (N.D. Cal. filed Apr. 13, 2015); *Frans Lanting, Inc. v. McGraw-Hill Global Educ. Holdings, LLC et al.*, No. 4:15-cv-05281 (N.D. Cal. filed Nov. 24, 2015); *Bob Daemmrich Photography, Inc. v. McGraw-Hill Global Educ. Holdings, LLC, et al.,* No. 1:15-cv-01098-LY (W.D. Tex. Dec. 4, 2015); *Steinmetz v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 2:15-cv-06600-ER (E.D. Pa. filed Dec. 14, 2015); *Eastcott v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 2:16-cv 0094 (E.D. Pa. filed Feb. 25, 2016); *Sohm v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 1:16-cv 04255 (S.D.N.Y. filed Feb. 25, 2016); *Keller v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 16-cv-08435-PKC (S.D.N.Y. filed Apr. 13, 2016); *Menzel v. McGraw-Hill Global Educ. Holdings, LLC, et al.,* No. 3:16-cv 03062 (N.D. Cal. filed June 6, 2016); *Michael Yamashita Inc., et al. v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 2:16-

Other courts have recognized the practical significance of aggregating claims like these. Very recently, in *John Wiley & Sons, Inc. v. DRK Photo*, the majority acknowledged:

> In sum, we see equitable merit in allowing stock photography companies like DRK to aggregate copyright infringement claims otherwise accrued to their clients. Aggregation could provide a practical means of forestalling and compensating for repeated small infringements and Congress might reasonably have chosen to permit such aggregation by assignment.

882 F. 3d 394, 415 (2d Cir. 2018). The dissent agreed, noting that "[a]ggregation provides . . . a practical means of affording redress to the photographers and compensating them for repeated small infringements of their copyrights." *Id.* at 416 (Parker, J., dissenting). Additionally, in *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*, the Ninth Circuit held:

> Stock agencies relieve the photographers of some of the burden of managing the commercial end of their business, so that they can focus more on making images, and they relieve publishers of the burden of locating

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cv-03934-CCC-JBC (D.N.J. filed July 1, 2016); *Jose Luis Pelaez Inc. v. McGraw-Hill Global Educ. Holdings LLC et al.*, No. 16-cv-05393 (S.D.N.Y. filed July 6, 2016); *Krist v. McGraw-Hill School Educ. Holdings, LLC, et al.*, No. 1:17-cv-08200-LAP (S.D.N.Y. filed Nov. 30, 2016); *Kashi v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 2:17-cv-01818-WB, 2017 WL 4547961 (E.D. Pa. Oct. 12, 2017); *Harrington v. McGraw-Hill Global Educ. Holdings, LLC, et al.*, No. 17-cv-02960-RM-KMT (D. Colo. filed Dec. 11, 2017).

> photographers and purchasing rights to use the images they want. A particularly important task the stock agencies may perform is at issue here: registering copyright, to deter pirating.

747 F.3d 673, 676–77 (9th Cir. 2014).

Rather than permit copyright owners to enforce their rights in the most efficient manner, the Ninth Circuit's decision in this case allows publishers to escape liability where it is too costly or difficult for small photographers to bring suit individually. This rewards serial infringers like McGraw-Hill, a large corporation that will almost always win against the single photographer unversed in copyright law and without substantial individual resources.

Respectfully submitted,

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