

Can a Stock Photography Agency Bring a Copyright Lawsuit? The Ninth Circuit Says “Maybe,” and the Supremes Say Nothing

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by Shannon Bjorklund

Can a stock photography agency bring a copyright infringement lawsuit on behalf of individual photographers? According to the Ninth Circuit, the answer is “maybe.” A recent decision provides another example of what the Ninth Circuit referred to as “the now often litigated issue of whether a stock photography agency . . .



has standing under the Copyright Act of 1976 to pursue infringement claims involving photographs from its collection.” *DRK Photo v. McGraw Hill Global Education Fund*, 870 F.3d 978 (9th Cir. 2017). Section 501(b) of the Copyright Act allows the “legal or beneficial owner of an exclusive right under a copyright” to sue for infringement. In a set of three cases decided in the last dozen or so years, the Ninth Circuit has addressed standing when a copyright infringement claim has been assigned:

- In *Silvers v. Sony Pictures Entertainment*, 402 F.3d 881 (9th Cir. 2005), the Ninth Circuit rejected the “bare right to sue” rule, holding that assignment of an accrued cause of action – without other rights to the copyright – did not create standing. The plaintiff was no stranger to the copyrighted work; Silvers was the creator of the work pursuant to a work-for-hire contract, but the copyright was held by the employer. Still, the Ninth Circuit held that Silvers lacked sufficient “legal or beneficial” ownership to support standing.
- The court came to the opposite conclusion three years ago in *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1002 (9th Cir. 2015), ruling that a stock photography agency had standing to sue for copyright infringement, because it was the “exclusive licensee” of the copyright holders, even though the copyright holders retained some rights to use or license the works themselves.

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- In the most recent of the three rulings, *DRK Photo*, the Ninth Circuit held last fall that another stock photography agency did not have standing to sue, because it was a non-exclusive licensee. The court compared the agreements at issue in *Minden Pictures* and *DRK*, noting that Minden was the “sole and exclusive agent,” giving it standing, while the DRK agreement did not prevent the photographers from entering an agreement with another stock photography company or agent.

On April 13, 2018, the United States Supreme Court denied a petition for review of the *DRK* case, leaving this trio of cases untouched for now. Given the “now often litigated issue” of standing for assignment of a copyright claim, we can expect to see the contours of this rule continue to develop in the coming years.