

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., GRAPHIC ARTISTS GUILD, PICTURE ARCHIVE COUNCIL OF AMERICA, INC., NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, LEIF SKOOGFORS, AL SATTERWHITE, MORTON BEEBE, ED KASHI, JOHN SCHMELZER, SIMMS TABACK, LELAND BOBBE, JOHN FRANCIS FICARA, and DAVID W. MOSER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 10 Civ. 2977 (DC)

ECF Case

**DEFENDANT GOOGLE INC.'S REPLY MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS**

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I. INTRODUCTION

The American Society of Media Photographers, Inc. (“ASMP”) asks the Court to ignore the factual realities of this litigation. The ASMP and the other associational plaintiffs are not owners of the copyrights asserted in this case, and the associations do not possess the facts about copyright ownership, individual economic impact, or the other individualized questions required of a plaintiff in a copyright litigation matter where ownership and fair use are at issue. The associations’ brief focuses on Google in an attempt to mask this truth.

There will be a time for individual plaintiffs to challenge the merits of Google’s project to make books searchable online and to display brief snippets, allowing users to discover the existence of books responsive to their queries. That question, however, is not yet before the Court. Instead, the issue presented is a narrow one: whether the associations can litigate this case on behalf of their members without the involvement of those individual members. They cannot.

II. ARGUMENT

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Supreme Court held that “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” The third prong is not satisfied here, because both the associations’ claims and their requested relief require the participation of individual association members.

A. The third prong of the *Hunt* test is an important limit on federal jurisdiction.

Plaintiffs make much of the fact that the Supreme Court has characterized the third prong of the *Hunt* test as “prudential,” and from that argue that this Court may essentially disregard it at will. ASMP Memorandum of Law in Opposition to Motion to Dismiss (“ASMP Opp.”), ECF No. 36 at 7-8. But Plaintiffs misunderstand the Court’s opinion in *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556-57 (1996) (“*UFCW*”), which held the third prong of the *Hunt* test was not a “constitutional necessity.” In so holding, the

Court did not regard the third prong as the sort of optional, standardless inquiry that Plaintiffs make it out to be, but instead upheld it as an important limit on federal jurisdiction—albeit one which is malleable by Congress. In *UFCW*, the issue before the Court was the constitutionality of the provision of the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. § 2101 *et seq.*, which allowed labor unions to sue on behalf of their members for violations of that Act. *Id.* at 545-46. The defendant argued that Congress had violated Article III of the Constitution by conferring standing on an association where the claim asserted or the relief requested required the participation of individual members in the lawsuit. *Id.* at 551. Thus, the question before the court was whether “this third prong of the test is constitutional and absolute, or prudential and malleable by Congress.” *Id.* at 544. The Court held that the third prong of the *Hunt* test was a requirement that “Congress may abrogate.” *Id.* In other words, like other prudential standing doctrines, the third prong of the *Hunt* test is a “rule[] of judicial self-governance that Congress may remove by statute.” *Id.* at 558 (quoting *Warth v. Seldin*, 422 U.S. 490, 509 (1975)) (internal quotations and modifications omitted).

Far from abrogating *Hunt*’s third prong as it applies to claims for copyright infringement, Congress has narrowly defined the class of aggrieved parties with standing to sue. Only “[t]he legal or beneficial owner of an exclusive right under a copyright” has such standing, and may sue only for “infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b).

Hunt’s third prong is a “rule[] of judicial self-governance,” *UFCW* at 558, but that does not mean that it is not *a rule*. See *UFCW* at 556 (“To see *Hunt*’s third prong as resting on less than constitutional necessity is not, of course, to rob it of its value.”). A court may not, for example, adjudicate a claim which raises a generalized grievance, or which falls outside the zone of interests protected by the legal provision invoked, even though those limitations on standing are likewise “prudential” in nature. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974) (generalized grievance); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) (“zone of interests”). Likewise here, although it is “prudential,” the rule against

associational standing where the claim asserted or the relief requested requires the participation of individual members is a requirement imposed by the Supreme Court and may not be overlooked or sidelined.

B. It is appropriate to take the copyright ownership issue into account in determining whether the *Hunt* test is met.

The ASMP's assertion that the court must ignore individualized inquiries which relate to a particular association member's standing in analyzing *Hunt*'s third prong is plainly wrong. Injury-in-fact is a requirement in order for a plaintiff to have Article III standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical") (internal quotations and citations omitted). But where the presence and degree of that injury varies among association members in ways that matter to the claim asserted or the relief requested, those same facts may defeat associational standing. *See, e.g., Warth*, 422 U.S. at 515-16 (denying associational standing because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof"). It is appropriate to take into account the complexities of the copyright ownership inquiry in adjudicating *Hunt*'s third prong.

C. Fair use issues preclude associational standing.

1. It is appropriate to take the fair use issue into account in determining whether the *Hunt* test is met.

This case is, at its heart, a case about fair use. To ignore that fact would be to elevate form over substance. In determining whether the claim asserted or the relief requested required the participation of individual members in the lawsuit, the court should take into account all of the issues that, as a practical matter, will need to be inquired into in order to resolve the plaintiff's claims and, if appropriate, to provide the requested relief. *See, e.g., Rent Stabilization Assoc. of New York v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993). In this case, one such issue is fair use. That fair use is an affirmative defense does not mean that litigating the associations' claims

will somehow not involve the individualized fair use inquiry. *See, e.g., Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577 (5th Cir. 2002) (denying associational standing on the ground that individual association members would need to participate in the litigation because “principles of due process would require that [the defendant] be able to obtain sufficient knowledge of the affected contracts to defend against the representatives’ claims and, perhaps, to assert the affirmative defense of justification”). Although Google bears the burden at trial of proving the facts underlying its fair use defense, the associations bear the burden at this stage of showing that they have standing, and that analysis must take into consideration the individualized nature of the factual inquiries which will be necessary to determine whether Google’s uses are fair. *See Lujan*, 504 U.S. at 560-61 (the party invoking federal jurisdiction bears the burden of establishing standing); *cf. Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010) (“While [defendant] will ultimately bear the burden of proving the merits of” its affirmative defense, the burden remained on plaintiffs to support their motion for class certification by showing “that more ‘substantial’ aspects of this litigation will be susceptible to generalized proof for all class members than any individual issues”).

The cases cited by the ASMP are not to the contrary. This Court’s opinion in *National Association of Letter Carriers, AFL-CIO v. U.S. Postal Service*, 604 F. Supp. 2d 665, 672 (S.D.N.Y. 2009) does not hold that a case-dispositive affirmative defense such as fair use should not be considered when adjudicating the third prong of the *Hunt* test. Instead, the Court held that associational standing was appropriate in the circumstances of that case, in which an “individualized inquiry [was] not required to resolve the broader legal question of whether OIG has the legal authority to ask for the information in the first place.” *Id.* Where a case can be reduced to a question of law, as in *National Association of Letter Carriers*, the third prong of the *Hunt* test is met. But where, as here, the central issues in the case depend on individualized circumstances and factual inquiries, the third prong of the *Hunt* test is not met, and associational standing should be denied.

The ASMP's other cases are even less relevant. *In re Senior Cottages of America, LLC*, 482 F.3d 997, 1004 (8th Cir. 2007), does not deal with the third prong of the *Hunt* test, but instead with the question whether the ordinary Article III standing requirements are met where the defendant has an *in pari delicto* defense. The other case cited by the ASMP on this issue, *Oregon ex rel. Department of Transportation v. Heavy Vehicle Electronic License Plate, Inc.*, 157 F. Supp. 2d 1158, 1170 (D. Or. 2001), likewise deals only with ordinary Article III standing, not with the third prong of the *Hunt* test. The ordinary Article III standing analysis does not ask, as the *Hunt* test does, whether litigating the claim asserted or providing the relief requested will require the participation of individual members, because in the ordinary Article III standing analysis, the injured party is before the court and so there is no question of participation. Thus, cases outside the associational standing context are of little relevance here.

2. Individual issues as to fair use preclude associational standing.

Litigating the fair use question will require individualized evidence. The first factor focuses on the conduct of the accused infringer. Google agrees that because Google used the books at issue similarly, the first factor is not an individualized inquiry. But the first factor is only one part of the analysis, and the other three factors vary from book to book, as described in detail in Google's opposition to the motion for class certification in the *Author's Guild, et al. v. Google Inc.* ("AG") case. See Google Inc.'s Opposition to Motion for Class Certification ("Google Cl. Cert. Opp."), AG ECF No. 1000 at 17-22.

UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000), is not to the contrary. In *MP3.com*, the defendant chose to present its fair use arguments as to all factors in an across-the-board manner as to all of the works at issue, which were popular CDs owned by the nine defendants. See MP3.com's Consolidated Opposition to Plaintiffs' Motions for Partial Summary Judgment, available at 2000 WL 34474983. MP3.com made that choice; Google has not. As a result, the Court would be required to evaluate these issues to arrive at a judgment in this case.

D. Individual issues as to Partner Program works preclude associational standing for the ASMP.

The ASMP has brought one set of claims that mirror those of the AG: that Google’s scanning, indexing, and snippet display of books from libraries is copyright infringement, not fair use. First Amended Class Action Complaint, ECF No. 29 at ¶¶ 68-73. But the ASMP also makes allegations as to books scanned at the behest of publishers as part of the Partner Program—a completely different set of claims with a completely different set of underlying facts and defenses. *Id.* at ¶ 58. As to those works, the Court will need to look to the terms of each contract between photographer and each publisher, as those contracts may govern whether the publisher had the rights necessary to place its book in the Partner Program. *See, e.g., Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 40 (2d Cir. 2005) (looking to particular contractual terms in determining the scope of a publisher’s rights to digitally republish photographs in magazines). Fundamentally, the ASMP’s beef with respect to Partner Program books is with the publishers, and the relationship between the photographers and the publishers is governed by the same kind of contracts at issue in the *NAFP* and *Faulkner* cases. *National Association of Freelance Photographers v. Associated Press*, No. 97 Civ. 2267 (DLC), 1997 WL 759456 (S.D.N.Y. Dec. 10, 1997) (“*NAFP*”).

E. Plaintiffs’ attempts to distinguish *AIME* and *NAFP* are unavailing.

1. *AIME*

The ASMP simply disagrees with Judge Marshall’s analysis in *Association for Information Media & Equipment v. Regents of the University of California*, No. CV 10-9378 CBM (MANx) (C.D. Cal. Oct. 3, 2011) (“*AIME*”), calling it a “flawed analysis” which “misinterprets and misapplies the *Hunt* test.” ASMP Opp. at 13. The ASMP thinks that Judge Marshall should have ignored copyright ownership in considering whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. According to the ASMP, it doesn’t matter whether one photographer has standing to sue Google or whether all of them do. *Id.* That is not the law. *See* part II-B, *supra*. Associational standing is a narrow exception to the ordinary rule that a party must assert its own rights, not the rights of others. The

third prong of the *Hunt* test imposes an important limit on associational standing, appropriately preventing the association-wide litigation of issues which, like copyright ownership, depend on case-by-case inquiries.

2. *NAFP*

The ASMP attempts to distinguish *NAFP* by asserting that “the sort of subjective, individualized defense asserted by the AP in *NAFP* is not present here.” ASMP Opp. at 16. The ASMP’s claims turn on individual transactions between the creators of the works at issue and the publishers of those works, which will determine who is a copyright owner of the works at issue with standing to sue. As set forth in part II-D, each member’s claim turns on the interpretation of the license between the photographer and the publisher. These transactions and negotiations must be examined in order to determine whether each member has a claim.

F. **The copyright associational standing cases are distinguishable.**

Plaintiffs rest their arguments on three cases which, they claim, stand for the proposition that associational standing is permissible in a case like this one. As discussed below, the cases Plaintiffs cite tell us nothing about how the associational standing inquiry should come out in this case.

1. *Itar-Tass*

As discussed in Google’s motion and in section II-A and II-B above, the associations’ claims here flunk the third prong of the *Hunt* test for two principal reasons: individualized evidence will be required of each association member as to economic harm as part of the fair use analysis, and individualized evidence will be required of each association member as to copyright ownership. Neither of those issues arose in *Itar-Tass Russian News Agency v. Russian Kurier*, No. 95 Civ. 2144 (JGK), 1997 WL 109481 (S.D.N.Y. Mar. 10, 1997), *rev’d in part*, 153 F.3d 82 (2d Cir. 1998).

In *Itar-Tass*, fair use was not at issue. For this reason, UJR’s decision to limit its claims to those for injunctive and declaratory relief meant that issues of individualized harm did not arise. By contrast, here, the same issues of individualized harm that would be necessary to the

adjudication of a damages claim are necessary to the adjudication of the fourth factor with respect to Google's fair use claim.

Nor did individualized issues of copyright ownership arise in *Itar-Tass*, because the *Itar-Tass* court applied the Russian law of copyright ownership, rather than United States law. Applying Russian law obviated the need for the sort of individualized analysis of copyright ownership that the Court would need to undertake in this case. One of the individualized questions which precludes associational standing here is the question whether each work was a "work made for hire." Google Inc.'s Memorandum of Law in Support of Motions to Dismiss ("Google Br."), ECF No. 33 at 15-16; Google Cl. Cert. Opp., AG ECF No. 1000 at 15-17. If a work was "made for hire," its creator lacks standing to sue. *Id.* In *Hunt*'s terms, the "claim asserted" requires this individualized determination. But this issue did not preclude a finding of associational standing in *Itar-Tass*, because Russian law "explicitly excludes newspapers from a work-for-hire doctrine." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 84 (2d Cir. 1998). Because all of the works at issue were Russian newspaper articles, no individualized inquiry was required to determine that none of the works was "made for hire." *Id.* And because there was no allegation that publication contracts or other licenses vested copyright ownership in the newspaper rather than in the journalists under Russian law, this simplification of the work-for-hire question meant that there were no questions of copyright ownership for which individualized evidence was required.

The *Itar-Tass* court's determination that the claim asserted did not require the participation of individual UJR members was based on the fact that questions of economic harm and copyright ownership did not require individualized inquiry, under the particular set of claims and foreign legal rules that were at issue in that case. Here, by contrast, the fair use issue raises individualized questions of economic harm, and the application of United States law rather than Russian law as to works created in the United States means that copyright ownership questions cannot be resolved without looking to the particular circumstances of the creation of each work at issue.

2. *EchoStar*

Plaintiffs characterize *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505, 518 (11th Cir. 2006) as a copyright associational standing case, but that case applies a different standing analysis than the claims at issue here. Plaintiffs' claims in this case are made pursuant to section 501(b), which confers standing only on "[t]he legal or beneficial owner of an exclusive right under a copyright." 17 U.S.C. § 501(b). The claims in the *EchoStar* case were made pursuant to section 501(e), which does not require copyright ownership in order to bring a claim. *EchoStar* at 518. Section 501(e) does not apply here because the claims at issue do not have to do with the satellite retransmission of broadcast television programming. See 17 U.S.C. § 501(e). For this reason, *EchoStar* does not tell us anything about whether associational standing is appropriate in cases where standing is governed by the much more restrictive section 501(b).

3. *Olan Mills*

Plaintiffs place substantial reliance on *Olan Mills, Inc. v. Linn Photo Co.*, 795 F. Supp. 1423 (N.D. Iowa 1991), *rev'd*, 23 F.3d 1345 (8th Cir. 1994). That district court case is, of course, an authority only to the extent its reasoning is persuasive. As to the application of the third prong of the *Hunt* test, it is not persuasive. The opinion states the conclusion that "PPA does not assert a claim or request relief which requires the participation in this lawsuit of PPA's individual members," *Olan Mills* at 1427, but does not say why. The court engages in no analysis whatsoever on the application of the third *Hunt* prong. The ASMP's assertion that "the [c]ourt devoted two pages of its decision to analyzing the issue of associational standing," ASMP Opp. at 19, misses the point. The amount of analysis of the first and second *Hunt* prongs is irrelevant. What matters is the persuasiveness of the court's analysis with respect to the point of law for which Plaintiffs cite the opinion—the application of the third *Hunt* prong. That analysis is not merely unpersuasive; it is absent. *Olan Mills* does not provide a basis to confer standing on the associations here.

G. Remedies in a copyright infringement lawsuit must be tied to the works at issue.

The ASMP argues that declaratory and injunctive relief in a case brought by a copyright owner for infringement of his copyrights may go beyond the copyrights which the plaintiff owns and has proved to have been infringed. The ASMP does not attempt to distinguish the Seventh Circuit opinion cited in Google's moving papers. *See Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 632 (7th Cir. 2003) (Posner, J.) (an injunction must be limited to works in which the particular plaintiff "has valid and subsisting copyright"). Instead, the ASMP cites a number of cases having to do with businesses that performed musical works without the necessary licenses from ASCAP, which is a collective organization to which a large percentage of composers and music publishers have delegated the licensing of public performance rights. None of those cases analyzes the propriety of enjoining infringement of works not at issue in the lawsuit, and most were either default judgments or were litigated against *pro se* defendants. *See, e.g., EMI April Music Inc. v. Jet Rumeurs, Inc.*, 632 F. Supp. 2d 619, 621 (N.D. Tex. 2008) (default judgment); *Major Bob Music v. Heiman*, No. 09-CV-341-BBC, 2010 WL 1904341 (W.D. Wis. May 11, 2010) (*pro se* defendant). To the extent these cases can be read to stand for the proposition that copyright remedies may be granted without a showing of ownership, validity, and infringement as to each work that is the subject of the remedy, they are wrong, as discussed in the *Chicago Board of Education* case.

III. CONCLUSION

For the foregoing reasons, the claims of the associations, who own no copyrights alleged to have been infringed, should be dismissed with prejudice.

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Respectfully submitted,

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