

Associational Standing under the Copyright Act

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INTRODUCTION

Imagine an author. One day, she sees a website that allows users to annotate short stories in an innovative way, providing a variety of short stories with which to experiment. As she peruses the site, she finds that some of the stories are actually hers. She learns that the website is run by a twenty-year-old college student who wanted to show off his new annotation technology and who has no commercial motive. Despite sympathizing with the student, she wants him to take down her stories. The author previously joined the Authors Guild to help her with publishing contracts,¹ and so she contacts the Guild's lawyer to see what help the group can provide. The lawyer tells her that other members have already complained about this website, but the student has not responded to letters demanding that members' works be taken down. He explains that it is unclear whether a class action is available. Many authors actually support the inclusion of their stories and prefer the extra exposure—mainly unpublished authors who are ineligible for full membership in the Guild or published authors who do not want to pay dues for the Guild's services²—which makes it trickier to pursue a class action.³ It will not be a simple case. The best option is to seek legal representation for herself and to obtain an injunction. He cautions her, though, that even pursuing the case in her individual capacity

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¹ See *Legal Services* (Authors Guild), archived at <http://perma.cc/T6GT-KD2Y> (including contract review and dispute intervention as legal services provided to members).

² See *Join the Authors Guild* (Authors Guild), archived at <http://perma.cc/NRR4-FY86> (listing the publication and income requirements for the various levels of membership).

³ FRCP 23 governs the certification of class actions, and it “imposes stringent requirements for certification that in practice exclude most claims.” *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304, 2310 (2013). See also note 243 and accompanying text (noting that there could be problems with certifying a class when members of the proposed class could actually benefit from the alleged infringement).

might not be straightforward, as the case could fall within the complicated regime of fair use and might cost thousands of dollars.⁴ She thinks to herself, why should she be the one to take the risk of suing this student when there are others who know more about this issue and have more resources than she does? Then she wonders, why is it that the Guild cannot bring this suit for its members, when the point of joining the Guild was to help her with legal problems?

The situation described above is one that calls for the application of “associational standing,” a long-standing legal doctrine with a clearly delineated test. Associational standing is a type of representational standing that allows organizations to bring suits on behalf of their members in certain situations.⁵ There is an open question, however, as to whether this doctrine applies in copyright infringement claims. Some federal courts have held that such standing is precluded, pointing to the inability of copyright holders to assign their legal claim or the supposed inability of copyright infringement suits to satisfy associational standing requirements.⁶ Other courts have allowed associational standing in infringement suits when the test for associational standing has been satisfied.⁷

This Comment is the first scholarly work to look into this issue in depth,⁸ and it concludes that associational standing should be allowed under the Copyright Act.⁹ The Comment proceeds in three parts. Part I examines the background law surrounding standing doctrine, including both associational standing and standing under the Copyright Act. Part II describes the cases that have dealt with associational standing under the Copyright Act. Part III argues that associational standing should be allowed, after showing that the courts that rejected associational

⁴ Fair use is a doctrine that allows the unauthorized use of a copyrighted work in certain circumstances. One of the considerations for whether this applies, for example, is whether the alleged infringement was done for commercial purposes. 17 USC § 107.

⁵ See notes 29–31 and accompanying text.

⁶ See Part II.A.

⁷ See Part II.B.

⁸ There are two copyright treatises that have discussed the possibility of associational standing under the Copyright Act, but not to the same extent as this Comment. Compare Melville B. Nimmer and David Nimmer, 3 *Nimmer on Copyright* § 12.02(B)(2) (LexisNexis 2016) (noting that “[i]t is possible . . . that the [performing rights] societies could have associational standing” in certain suits), with William F. Patry, 6 *Patry on Copyright* § 21:28 (Thomson Reuters 2016) (arguing that “contrary to Nimmer’s wholly unsupported statement . . . associational standing is not permitted under the Copyright Act”).

⁹ Pub L No 94-553, 90 Stat 2541 (1976), codified at 17 USC § 101 et seq.

standing erred in their legal analysis¹⁰ and that both traditional statutory interpretation principles and policy reasons weigh in favor of allowing such standing.¹¹

I. BACKGROUND LAW ON STANDING DOCTRINE

This Part first explains the general principles of federal standing jurisprudence. Then, it explains the associational standing doctrine and outlines standing under the Copyright Act. Finally, it provides an example of how associational standing can fit within copyright, specifically in regard to performing rights societies' enforcement suits.

A. Federal Standing Jurisprudence

Every case that comes before a federal court must meet certain requirements in order to ensure there is an actual “case or controversy” that a court has the power to adjudicate.¹² One of these requirements is called “standing.”¹³ Standing focuses on “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”¹⁴ Each case must satisfy two aspects of standing: Article III standing requirements that pertain to whether a justiciable case exists, and prudential standing requirements that courts use to screen out cases that are inappropriate for a court to decide.¹⁵

The Article III requirements focus on whether the plaintiff has a sufficient personal stake in the outcome.¹⁶ The basic requirements are that there is an “injury in fact,” that the injury is fairly traceable to the defendant’s actions, and that the injury is likely to be redressed by a favorable decision in court.¹⁷ Prudential requirements, on the other hand, focus on avoiding cases that involve inappropriate plaintiffs that are not screened out by

¹⁰ See Parts III.A–B.

¹¹ See Parts III.C–D.

¹² US Const Art III, § 2, cl 1.

¹³ The standing requirement comes from Article III, § 2 of the Constitution. See *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 180 (2000) (“The Constitution’s case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins [] our standing . . . jurisprudence.”).

¹⁴ *Warth v Seldin* 422 US 490, 498 (1975).

¹⁵ See *id* (“[The standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”).

¹⁶ See *Camreta v Greene*, 563 US 692, 702 (2011) (“[T]he critical question under Article III is whether the litigant retains the necessary personal stake.”).

¹⁷ See *Lujan v Defenders of Wildlife*, 504 US 555, 560–61 (1992).

Article III standing.¹⁸ Some examples of prudential standing principles include the general prohibition on raising a third party's legal rights and the norm of avoiding issues based on generalized injuries.¹⁹ Courts have flexibility in how they apply the prudential standing requirements, however. They are free to make exceptions and to adjust their level of scrutiny in regard to these rules,²⁰ and courts often do not explicitly address or analyze the various prudential requirements when discussing standing.²¹ As a formal matter, though, a court must be satisfied that a party has prudential standing to proceed with the case.²² These two parts of standing are requirements for a court to have subject matter jurisdiction over a case and are completely separate from the merits of the claim—Article III and prudential standing must be present in every case and must be supported through every stage of litigation.²³

¹⁸ There is no conclusive definition for prudential standing. See *Elk Grove Unified School District v Newdow*, 542 US 1, 12 (2004) (“[W]e have not exhaustively defined the prudential dimensions of the standing doctrine.”).

¹⁹ See *United States v Windsor*, 133 S Ct 2675, 2686 (2013) (describing how prudential standing rules are “designed to protect the courts from decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights”) (alterations in original and quotation marks omitted).

²⁰ See *id.* (“Rules of prudential standing . . . are more flexible [as compared to Article III standing rules.]”); *Mills v United States*, 742 F3d 400, 406–07 (9th Cir 2014) (explaining that, though courts typically decline to hear cases belonging to third parties, there are limited exceptions to that rule).

²¹ See, for example, *Lujan*, 504 US at 560 (explaining that some of standing's elements are “merely prudential considerations” and that the “core component[s] of standing” are the Article III requirements, without addressing the prudential elements elsewhere in the opinion).

²² See, for example, Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 Case W Reserve L Rev 413, 413 (2013) (“The Supreme Court has clearly treated the Constitution's Article III standing requirements as mandatory jurisdictional hurdles that a plaintiff must meet for each form of relief sought before federal courts may consider the merits of a case.”).

²³ See *id.* at 561. There is some doubt, however, as to whether prudential standing applies as part of the jurisdictional standing inquiry. See *United States v JP Morgan Chase Bank Account Number Ending 8215 in Name of Ladislao V. Samaniego, VL*, 835 F3d 1159, 1167 (9th Cir 2016) (“The prudential-standing addendum to the Article III standing inquiry has fallen into disfavor in recent years. To the extent it continues to apply, we conclude that the essential requirements are satisfied here.”), citing *Lexmark International, Inc v Static Control Components, Inc*, 134 S Ct 1377, 1386 (2014); *Superior MRI Services, Inc v Alliance Healthcare Services, Inc*, 778 F3d 502, 506 (5th Cir 2015) (noting that *Lexmark* sees tension between prudential standing doctrine and the obligation to hear cases within a court's jurisdiction, but nevertheless applying the prudential requirement that a party must assert its own rights because it is “bound to follow our precedent until the Supreme Court squarely holds to the contrary”); Mank, 64 Case W Reserve L Rev at 413 (cited in note 22) (“[T]he Supreme Court has never squarely held that prudential

Though there are various subtleties in how to apply these requirements when dealing with individual parties, the associational standing test, discussed in the next Section, provides a separate way to satisfy both Article III and prudential standing. It is specifically tailored to the unique problems that an association faces when bringing a claim on behalf of its members, and it allows associations to demonstrate that they have standing without resorting to the normal standing inquiry. In other words, the requirements for standing change when an association brings a suit on behalf of its members. For example, to satisfy Article III standing, instead of analyzing whether the association suffered an injury in fact that is traceable to the alleged infringer's conduct and that can be redressed in court, an association has to meet only the respective Article III prongs of the associational standing test.

A separate, but related, inquiry is whether a statute allows a party to bring a claim for relief in court. This is called "statutory standing," and it is rooted in the substantive requirements of a claim. This is separate from the typical standing inquiry rooted in the court's subject matter jurisdiction.²⁴ It is based on the definition of a claim, and so it is a substantive limitation that does not involve the court's power to hear a case.²⁵ Congress has wide

standing is a jurisdictional issue that must be decided before the merits in every single case."). See also Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U Pa J Const L 213, 221 (2015):

Prior to its *Lexmark* decision, the Court had been inconsistent in at least two decisions regarding whether the prudential standing doctrine was as important as constitutional Article III standing requirements in protecting core separation of powers principles and, therefore, whether prudential standing was a mandatory jurisdictional issue that required dismissal of a case from the federal courts if a plaintiff's suit was contrary to prudential standing principles, although the language in these two decisions is arguably dicta.

This Comment assumes that prudential standing is jurisdictional in nature and is still a part of standing jurisprudence. The case that has caused the doubt in prudential standing's applicability, *Lexmark*, can be read as removing only the "zone-of-interests" requirement from the standing inquiry. See *Lexmark*, 134 S Ct at 1387. Even if prudential standing no longer applies, that does not change the analysis of whether associational standing applies as a whole, as the doctrine still implicates Article III concerns, though it might complicate how to apply the associational standing test. See Part II.B.

²⁴ Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 Okla L Rev 89, 91 (2009) ("[T]he concept of statutory standing applies only to legislatively-created causes of action. . . . [I]t asks whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action.").

²⁵ See, for example, *Lexmark*, 134 S Ct at 1387 n 4 ("We have on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional. . . . But . . . 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the

discretion in defining the availability of claims, but it is constrained by the fundamental standing inquiry in that it cannot abrogate the Article III requirements.²⁶ Prudential standing is merely a background rule, however, and so prudential requirements can be abrogated by express statutory language.²⁷ In other words, Congress can expand or contract the pool of litigants so long as it defines the claim in such a way that remaining potential litigants can satisfy the constitutional requirements. Unless addressed, the prudential requirements apply as a background rule.

For example, suppose Congress passes a statute that says, in the case of injuries resulting from a fire caused by a factory, only residents of the local area affected by the fire can bring a suit. Even though there might be other parties who would otherwise satisfy the Article III requirements—maybe a visiting family member from another state gets injured in the fire—Congress can exclude those parties as a matter of statutory standing. Those who are given statutory standing (the residents) must still meet the Article III constraints, in that they still must show an injury in fact that was caused by the fire and that can be remedied in court. In addition, because the hypothetical statute did not explicitly say that third parties are authorized to bring suits for another party, the prudential restriction on third parties raising the legal rights of others still applies. On the other hand, had Congress also provided that third parties may bring suits on behalf of those injured when the injured cannot bring suit themselves, this prudential restriction would be abrogated and would not apply to these claims. There is no way, however, for Congress to avoid Article III constraints.

case.”), quoting *Verizon Maryland Inc v Public Service Commission of Maryland*, 535 US 635, 642–43 (2002).

²⁶ See *Raines v Byrd*, 521 US 811, 820 n 3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”); *Gladstone, Realtors v Village of Bellwood*, 441 US 91, 100 (1979) (“In no event, however, may Congress abrogate the Art. III minima.”). The judgment of Congress might provide guidance on whether there is standing, however. See *Spokeo, Inc v Robins*, 136 S Ct 1540, 1549 (2016) (discussing how Congress has an important role in determining whether a harm is an injury in fact).

²⁷ See *Gladstone*, 441 US at 100 (“Congress may . . . expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules.”) (quotation marks omitted). See also *Bennett v Spear*, 520 US 154, 163 (1997) (“Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.”).

B. Associational Standing

Associational standing²⁸ provides a way for an organization to satisfy both Article III and prudential standing requirements when it brings a suit on behalf of its members. The doctrine changes the traditional inquiry described above so that the court can deal with this unique scenario. It is a type of representational standing, which deals with “situations in which [a] party sues as the representative of another” party.²⁹ There is no transfer of legal rights or claims between parties³⁰—rather, the test focuses on whether the relationship between the parties allows an association to be a representative for its members in court. The association raises a separate claim to relief, but uses its members’ legal rights to give it standing to raise that claim. It is commonly invoked in different areas of law; for example, environmental groups often use it to establish standing to challenge actions that affect their members.³¹

Though associational standing resembles the class action mechanism in that it involves group litigation, there are major differences, and “the inquiry with respect to associational standing, while similar, is not identical [to the class certification analysis].”³² A class action is a procedural device that puts together an ad hoc group that did not exist before and that is represented by a class representative, while associational standing is a way for a

²⁸ Associational standing is sometimes also called “organizational standing.” See Nathaniel B. Edmonds, Comment, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U Chi L Rev 351, 359 (2002). Note, however, that “organizational standing” is sometimes instead used to describe cases in which the organization itself is injured. See, for example, Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 Mich L Rev 733, 735 n 9 (1988).

²⁹ See Richard M. Re, *Relative Standing*, 102 Georgetown L J 1191, 1222, 1225 (2014). Third-party standing, which allows a plaintiff to assert the rights of a third party, is another type of representational standing. See *id.* at 1223–24.

³⁰ The transfer of the right to sue, which this Comment calls “assignee standing,” is discussed in more detail in Part III.A.

³¹ See, for example, *Center for Sustainable Economy v Jewell*, 779 F3d 588, 596–99 (DC Cir 2015) (holding that the association had standing to seek review of the Department of the Interior’s approval of a leasing program for exploration and extraction of oil and gas); *Humane Society of the United States v Hodel*, 840 F2d 45, 52–61 (DC Cir 1988) (holding that the association had standing to challenge a decision by the Fish and Wildlife Service to expand hunting in wildlife refuges).

³² *Retired Chicago Police Association v City of Chicago*, 76 F3d 856, 864 (7th Cir 1996) (alteration in original and quotation marks omitted). For example, class certification is inappropriate when class members have conflicting claims, but associational standing is inappropriate only when there are “profound conflicts of interest,” which is a much higher threshold. See *id.* (quotation marks omitted).

party to demonstrate sufficient standing. These involve two different aspects of litigation, and they are not mutually exclusive. For example, a class representative in a class action can actually be an association, as long as the association shows it has standing under the associational standing test to bring the suit.³³ Though associational standing allows a group to bring a claim as an association, there is only one party, the association, which brings its own claim for relief, while a class action allows multiple third parties' distinct claims to be resolved through the resolution of a representative claim.

The modern version of associational standing “emerges from a trilogy of cases” that the Supreme Court decided in the 1970s and 1980s.³⁴ The first explicit recognition of associational standing came in *Warth v Seldin*.³⁵ *Warth* dealt, in part, with the question whether a nonprofit organization can bring an action for declaratory and injunctive relief regarding the exclusionary effects of a town's zoning plan.³⁶ The Court acknowledged that “[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members.”³⁷ This “does not eliminate or attenuate the constitutional requirement of a case or controversy,” as the association must still allege that at least one of its members is “suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.”³⁸ In addition, the claim must not require the individual participation of each injured party or require individualized proof.³⁹ If these elements are satisfied, “the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.”⁴⁰

³³ See, for example, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 277 FRD 52, 61–63 (D Mass 2011). This is also what the Authors Guild attempted to do in *Authors Guild, Inc v HathiTrust*, 755 F3d 87 (2d Cir 2014), which is discussed in Part II.A of this Comment.

³⁴ *United Food and Commercial Workers Union Local 751 v Brown Group, Inc*, 517 US 544, 552–53 (1996) (describing the trilogy of cases). The trilogy consists of *Warth*, *Hunt v Washington State Apple Advertising Commission*, 432 US 333 (1977), and *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Brock*, 477 US 274 (1986).

³⁵ 422 US 490 (1975). See also *United Food*, 517 US at 552 (“We first squarely recognized an organization's standing to bring such a suit in *Warth v. Seldin*.”).

³⁶ See *Warth*, 490 US at 493–98.

³⁷ *Id.* at 511.

³⁸ *Id.*

³⁹ *Id.* at 511, 515–16.

⁴⁰ *Warth*, 490 US at 511.

The Court created the modern three-part test for associational standing in *Hunt v Washington State Apple Advertising Commission*,⁴¹ using *Warth* as its foundation. *Hunt* involved a plaintiff association claiming that a North Carolina statute discriminated against interstate commerce when it prohibited apple containers from bearing any grade other than the applicable US grade.⁴² The *Hunt* Court held:

[A]n 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.⁴³

Later cases have elaborated on the third element, clarifying that associational standing is typically allowed only when the association seeks declaratory or injunctive relief.⁴⁴ Monetary relief is almost always rejected on the grounds that it requires individual participation (and so it fails the test's third prong), and the Supreme Court has noted that *Hunt* "suggest[s] that an association's action for damages running solely to its members would be barred for want of the association's standing to sue" because "[individual] participation would be required in an action for damages to an association's members."⁴⁵ There is no per se rule against associations seeking monetary relief for their members, however,⁴⁶ though courts have never allowed associational standing for monetary relief based on how they apply the individual-participation requirement.⁴⁷ In addition, the third element "is best seen as

⁴¹ 432 US 333 (1977).

⁴² See id at 335.

⁴³ Id at 343. Circuit courts have sometimes articulated the first prong as requiring that "at least one of its members would have standing to sue in his or her own right." *Sierra Club v Federal Energy Regulatory Commission*, 827 F3d 59, 65 (DC Cir 2016).

⁴⁴ See *United Food*, 517 US at 553–54 ("[L]ater precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members.").

⁴⁵ Id at 546.

⁴⁶ See *Pennsylvania Psychiatric Society v Green Spring Health Services, Inc.*, 280 F3d 278, 284 (3d Cir 2002) ("Because claims for monetary relief *usually* require individual participation, courts have held associations cannot *generally* raise these claims on behalf of their members.") (emphasis added); *Telecommunications Research & Action Center on Behalf of Checknoff v Allnet Communication Services, Inc.*, 806 F2d 1093, 1095–96 (DC Cir 1986) (Ginsburg) (noting that, though it rejected associational standing for monetary relief, there is no per se rule against it).

⁴⁷ See *United Union of Roofers, Waterproofers, and Allied Trades No 40 v Insurance Corp of America*, 919 F2d 1398, 1400 (9th Cir 1990) (noting that "no federal court has

focusing on [] matters of administrative convenience and efficiency,”⁴⁸ so courts have sometimes held that needing a limited amount of individual participation does not defeat a claim of associational standing.⁴⁹ Conflicts of interest within organizations also raise barriers to associational standing under the *Hunt* test, although the lower courts have not adopted a uniform approach to applying the test in those situations.⁵⁰

Finally, *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Brock*⁵¹ reaffirmed the associational standing test as a separate way to achieve a representational suit distinct from class actions. The Court in *Brock* held that a plaintiff union had associational standing to challenge a Department of Labor policy after applying the test laid out in *Hunt*.⁵² The Court refused to assent to the respondent’s request to reject associational standing in favor of class action suits, finding unpersuasive the argument that associational standing should be rejected because it does not have the same safeguards as class actions to ensure adequate representation in the context of this particular case.⁵³ Instead, it looked to the

allowed an association standing to seek monetary relief on behalf of its members” because they “have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test”); *Sanner v Board of Trade of the City of Chicago*, 62 F3d 918, 923 (7th Cir 1995) (“We are not aware of any cases allowing associations to proceed on behalf of their members when claims for monetary, as opposed to prospective, relief are involved.”). See also *Committee to Protect Our Agricultural Water v Occidental Oil and Gas Corporation*, 2017 WL 272215, *19 (ED Cal) (quoting *United Union* for the same proposition). It is important to keep in mind that the issue is not that associations will get some financial benefit from the suit, but rather that an inquiry into the extent of damages usually requires a particularized inquiry into the specific circumstances of that incident, and that usually requires extensive individualized participation. Whether that is true for situations in which the damages are clear or easy to determine, such as by not getting the appropriate public performance license from a performing rights organization (discussed in Part I.D), is unclear.

⁴⁸ *United Food*, 517 US at 557.

⁴⁹ See, for example, *Alliance for Open Society International, Inc v United States Agency for International Development*, 651 F3d 218, 229–30 (2d Cir 2011).

⁵⁰ See Edmonds, Comment, 69 U Chi L Rev at 358–66 (cited in note 28) (describing how different courts screen for conflicts of interest in either the second prong or the third prong of the *Hunt* test).

⁵¹ 477 US 274 (1986).

⁵² See *id* at 281, 290.

⁵³ See *id* at 288–90. The Court did note, however, that there is a real problem if an association advances under the *Hunt* test but does not serve as an adequate representative for its members, and that the Court will need to address that issue when it arises. See *id* at 290. Given that there was no issue over adequate representation in *Brock*, the Court did not address how to resolve such issues. See *id*.

unique benefits of suits by associations that are not offered by class actions.⁵⁴ Specifically, the Court recognized that “an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital” and that, given that “the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others,”⁵⁵ “[t]he only practical judicial policy when people pool their capital, their interests, or their activities . . . often is to permit the association or corporation in a single case to vindicate the interests of all.”⁵⁶

There are other important aspects of associational standing that need to be considered outside of these three foundational cases. For one, these cases left open the question whether the associational standing test is a constitutional requirement that Congress cannot do away with when legislating associational standing issues, or whether it is “prudential and malleable by Congress.”⁵⁷ The Court tackled this question in *United Food and Commercial Workers Union Local 751 v Brown Group, Inc.*⁵⁸ which dealt with whether the plaintiff union had standing to bring an action under the Worker Adjustment and Retraining Notification Act.⁵⁹ The opinion clarifies that the first two prongs of the *Hunt* test address Article III requirements, but “the associational standing test’s third prong is a prudential one.”⁶⁰ This is significant, because the issues discussed above in regard to the *Hunt* test, such as the availability of monetary relief and the need for individual participation, relate to this third, prudential requirement. Thus, courts have some flexibility in how they determine whether in specific cases the third prong precludes monetary relief or associational standing altogether.⁶¹ The Court also goes on to say that associational standing, as a strand of representational standing, “rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background

⁵⁴ See id at 289.

⁵⁵ *Brock*, 477 US at 289–90.

⁵⁶ Id at 290 (quotation marks omitted).

⁵⁷ *United Food*, 517 US at 551.

⁵⁸ 517 US 544 (1996).

⁵⁹ See id at 546.

⁶⁰ Id at 555.

⁶¹ The Court actually emphasized the prudential nature of this requirement even in regard to damages claims, noting that “[r]epresentative damages litigation is common.” Id at 557.

presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties."⁶² This means that the typical prudential bar in raising a third party's claim does not apply to associational standing.

In addition, despite the fact that only one claim is resolved when an association brings a claim, there is the possibility that an association's claim will preclude its members' subsequent claims. The principles of *res judicata*, specifically claim preclusion, should normally apply to restrict an association's members from bringing separate claims after the resolution of the association's claim. Under claim preclusion, a final judgment on the merits of a claim precludes relitigating that same claim brought by the same parties. Sometimes, though, nonparties can be precluded, and one such exception is when a nonparty is "adequately represented by someone with the same interests who [wa]s a party to the suit."⁶³ Given that the basis of associational standing is that the association serves as a representative of its members' interests when certain requirements are met, claim preclusion should arguably apply to any subsequent suits brought by the association's members. The test for associational standing, however, does not *guarantee* adequate representation for the purposes of claim preclusion.⁶⁴ For example, courts have said that a member's claim for damages is not precluded after an association brought a claim for injunctive or declaratory relief, because the association's interests and the member's interest were not aligned given that the association could not seek monetary relief.⁶⁵

⁶² *United Food*, 517 US at 557 (citations omitted).

⁶³ *Taylor v Sturgell*, 553 US 880, 893–94 (2008) (alteration in original and quotation marks omitted). Representation is adequate for preclusion only if "(1) [t]he interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900 (citations omitted).

⁶⁴ See *United Food*, 517 US at 556 n 6 ("The germaneness of a suit to an association's purpose may, of course, satisfy a standing requirement without necessarily rendering the association's representation adequate to justify giving the association's suit preclusive effect as against an individual ostensibly represented."); *Brock*, 477 US at 290 ("Should an association be deficient [in regard to whether it is an adequate representative for its injured members], a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles.").

⁶⁵ See, for example, *Harris v County of Orange*, 682 F3d 1126, 1133–34 (9th Cir 2012) ("[W]e conclude that claim preclusion does not bar a second action for damages, where a damages remedy was unavailable in the first action. . . . We find that the interests of [the association and the members] are not aligned because associational standing rules prevent [the association] from pursuing damages."). It should be noted, though, that this assumes that an association is barred altogether from seeking monetary relief. This is true in a

To summarize, the associational standing test described in *Hunt* is a mix of constitutional and prudential standing requirements that provides a separate and distinct way to establish standing for organizations bringing a claim on behalf of their members. When the requirements for associational standing are met, this overcomes the presumption that a party cannot assert the legal rights of a third party. This is the default rule.⁶⁶ For example, though the Employee Retirement Income Security Act of 1974⁶⁷ (ERISA) allows only plan participants and beneficiaries to bring a claim, courts have allowed associational standing for ERISA claims.⁶⁸ Congress can, however, define claims in a way that prevents associational standing from being applied so as to reverse this default rule—this would be a statutory standing issue, not a constitutional or prudential standing issue. The Tenth Circuit, for example, concluded that the Fair Labor Standards Act of 1938⁶⁹ barred unions from bringing liability suits, regardless of whether they could meet associational standing requirements.⁷⁰ The relevant question for associational standing, therefore, is whether the Copyright Act precludes associational standing altogether in copyright infringement suits as a matter of statutory standing. It comes down to whether Congress in the statute has defined copyright infringement claims in a way that prevents the associational standing test from being applied altogether.

functional sense given how *Hunt* is applied, but as a formal matter, a court could theoretically find that an association can seek monetary relief, though this has never happened.

⁶⁶ See, for example, *Doe v Stincer*, 175 F3d 879, 882 (11th Cir 1999) (“It has long been settled that an organization has standing . . . without a statute explicitly permitting associational standing.”).

⁶⁷ Pub L No 93-406, 88 Stat 829, codified at 29 USC § 1001 et seq.

⁶⁸ See, for example, *Southern Illinois Carpenters Welfare Fund v Carpenters Welfare Fund of Illinois*, 326 F3d 919, 922 (7th Cir 2003) (“[W]e do not think that by confining the right to sue . . . to plan participants and beneficiaries Congress intended to prevent unions from suing on behalf of participants.”). See also *Borrero v United Healthcare of New York, Inc*, 610 F3d 1296, 1305 (11th Cir 2010) (listing the courts that have allowed associational standing under ERISA). The statute stated only that “[a] civil action may be brought by a participant or beneficiary.” 29 USC § 1132(a)(1).

⁶⁹ 52 Stat 1060, codified at 29 USC § 201 et seq.

⁷⁰ See *United Food & Commercial Workers Union, Local 1564 of New Mexico v Albertson's, Inc*, 207 F3d 1193, 1201–02 (10th Cir 2000) (“The question [] of organizational standing generally is irrelevant in light of the specific statutory bar on representative actions under the FLSA.”). The statute stated that “[a]n action to recover the liability prescribed [for violations] . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 USC § 216(b).

C. Standing under the Copyright Act

Section 501(b) of the Copyright Act states that “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”⁷¹ In turn, § 101 defines a “copyright owner” of an exclusive right as “the owner of that particular right.”⁷² The list of “exclusive rights” in § 106 of the Act is considered exhaustive by some courts.⁷³ This definition of “owner” extends only to copyright owners and exclusive licensees,⁷⁴ so “strangers and nonexclusive licensees cannot bring suit to enforce a copyright.”⁷⁵ A “beneficial owner” is defined as the original copyright owner who no longer has legal title over the exclusive right after transferring it to another party.⁷⁶

The fact that “[t]he statute does not say expressly that *only* a legal or beneficial owner of an exclusive right is entitled to sue” has led to questions as to who can bring a copyright infringement suit.⁷⁷ This is important, because whether the Copyright Act allows for associational standing depends on whether Congress defined the claim in such a way as to preclude associations. In other words, it is a matter of statutory standing.

Cases involving the assignability of the right to sue for copyright infringement provide some guidance on the Act’s statutory standing as defined in § 501(b), though arguably not much.⁷⁸ They deal with the most relevant question for the associational standing issue: Who is allowed to bring a suit under the Act? If, as the following case holds, § 501(b) limits statutory standing to only legal or beneficial owners to the exclusion of everyone else, that

⁷¹ 17 USC § 501(b). The Act also requires the copyright to be preregistered or registered before an infringement claim can be instituted. 17 USC § 411(a).

⁷² 17 USC § 101.

⁷³ See, for example, *Minden Pictures, Inc v John Wiley & Sons, Inc*, 795 F3d 997, 1002 (9th Cir 2015), citing *Silvers v Sony Pictures Entertainment, Inc*, 402 F3d 881, 883–84 (9th Cir 2005).

⁷⁴ An owner can transfer an exclusive right to someone else only according to specific requirements. See 17 USC § 201(d). Both “an *assignment* (which transfers legal title to the transferee) or an *exclusive license* (which transfers an exclusive permission to use to the transferee) qualifies as a ‘transfer’ of a right in a copyright,” and so “any party to whom such a right has been transferred . . . has standing to bring an infringement action based on that right.” *Minden Pictures*, 795 F3d at 1003.

⁷⁵ *Sybersound Records, Inc v UAV Corp*, 517 F3d 1137, 1144 (9th Cir 2008).

⁷⁶ See *Moran v London Records, Ltd*, 827 F2d 180, 183 (7th Cir 1987) (describing how the 1909 Copyright Act used common-law trust principles to determine who was a beneficial owner and how Congress merely codified this case law in the 1976 Act).

⁷⁷ *Silvers*, 402 F3d at 885 (emphasis in original).

⁷⁸ See Part III.A.

arguably precludes associational standing, given that associations are not the owners of the copyrights involved in these claims. It is important to keep in mind, however, that there are issues with analogizing from assignability cases to the associational standing cases.⁷⁹ Courts consider them relevant because they interpret the Act's statutory standing limitations, but the assignability cases present distinct issues from the associational standing cases.

The most recent analysis on the assignability of the right to sue is in *Silvers v Sony Pictures Entertainment, Inc.*⁸⁰ In *Silvers*, an author wrote a script under a work-for-hire agreement that gave the studio the copyright to the script. She later received the right to sue for copyright infringement regarding that script, but did not receive the underlying copyright.⁸¹ The initial Ninth Circuit panel allowed the author to pursue the claim, stating that “[n]othing in the statute prohibits the legal or beneficial owner of the exclusive right under copyright from assigning an accrued cause of action for infringement of that right.”⁸² The court reviewed the case en banc, however, and reversed the earlier opinion, holding that “[t]he bare assignment of an accrued cause of action is impermissible under 17 U.S.C. § 501(b).”⁸³ It reached this conclusion because “[t]he right to sue for an accrued claim for infringement is not an exclusive right under § 106” and interpreted § 501(b) as allowing *only* a legal or beneficial owner of exclusive rights under § 106 to bring a suit, despite the fact that the text does not explicitly say this.⁸⁴ The *Silvers* en banc majority faced heavy criticism for its interpretation.⁸⁵

⁷⁹ See *id.*

⁸⁰ 402 F3d 881 (9th Cir 2005). See also Shyamkrishna Balganes, *The Uneasy Case against Copyright Trolls*, 86 S Cal L Rev 723, 736 (2013) (“*Silvers v. Sony Pictures Entertainment, Inc.* is the leading case on [whether the right to sue is assignable].”). The question is arguably still open in other circuits, though, despite the prominence of this case. See *Viesti Associates, Inc v Pearson Education, Inc*, 2014 WL 1053772, *6 (D Colo) (“Although the Tenth Circuit has not decided this specific issue, the weight of authority interprets § 501(b) as authorizing suit *only* by legal or beneficial owners.”).

⁸¹ *Silvers*, 402 F3d at 883.

⁸² *Silvers v Sony Pictures Entertainment, Inc*, 330 F3d 1204, 1208 (9th Cir 2003).

⁸³ *Silvers*, 402 F3d at 890.

⁸⁴ *Id* at 884–85.

⁸⁵ See Ian Polonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 Colum J L & Arts 71, 84 (2012) (“The decision in *Silvers* has been met with harsh criticism, both on the bench and in academic circles.”); *Silvers*, 402 F3d at 891 (Berzon dissenting) (“The majority opinion [] is internally inconsistent, provides inadequate support for its conclusion, and ignores our analogous precedents.”).

The court made two interpretative choices that are relevant to associational standing under the Copyright Act. First, the opinion concluded from a Supreme Court patent infringement case that there was a presumption against applying common-law standing doctrine in intellectual property cases.⁸⁶ Whether there is such a presumption is a question discussed in Part III.C.

Second, the en banc court distinguished an earlier Fifth Circuit opinion that allowed for the assignability of copyright infringement claims and instead followed two Second Circuit opinions that reached a different conclusion. The Fifth Circuit in *Prather v Neva Paperbacks, Inc*⁸⁷ said that to assign accrued causes of action for copyright infringement, “[a]ll that is required is that the contract cover in no uncertain terms choses in action for past, prior, accrued damages.”⁸⁸ The Second Circuit, however, stated in *Eden Toys, Inc v Florelee Undergarment Co, Inc*⁸⁹ that “[w]e do not believe that the Copyright Act permits holders of rights under copyrights to choose third parties to bring suits on their behalf.”⁹⁰ Later, in *ABKCO Music, Inc v Harrisongs Music, Ltd*,⁹¹ the Second Circuit allowed the assignment of accrued claims when both the copyright and the causes of action were transferred.⁹² The Ninth Circuit interpreted these two Second Circuit cases as establishing that a party without an ownership interest has no standing to sue.⁹³ It found them more persuasive than *Prather* because its “independent analysis [led the court] to the same conclusion” and because it wanted to avoid creating a circuit split in copyright.⁹⁴ The Ninth Circuit also distinguished *Prather* by acknowledging that the case was decided before the 1976 Copyright Act, which enacted the language in § 501(b),⁹⁵ and in its view *Prather* involved a transfer of what would be considered exclusive rights under § 106.⁹⁶

⁸⁶ See *Silvers*, 402 F3d at 887–88, citing *Crown Die & Tool Co v Nye Tool & Machine Works*, 261 US 24, 26, 33–35 (1923).

⁸⁷ 410 F2d 698 (5th Cir 1969).

⁸⁸ *Id.* at 700.

⁸⁹ 697 F2d 27 (2d Cir 1982).

⁹⁰ *Id.* at 32 n 3.

⁹¹ 944 F2d 971 (2d Cir 1991).

⁹² See *id.* at 980–81.

⁹³ See *Silvers*, 402 F3d at 890.

⁹⁴ *Id.*

⁹⁵ See Copyright Act of 1976 § 501(b), 90 Stat at 2584, 17 USC § 501(b).

⁹⁶ See *Silvers*, 402 F3d at 889.

Thus, the result reached in *Silvers* weighs in favor of requiring an ownership interest in a copyright to allow a claim of infringement based on that copyright. This has impacted later cases dealing with associational standing, because such an interpretation might preclude associational standing as a matter of statutory standing.⁹⁷ Whether the assignability cases do in fact provide guidance on the associational standing issue is discussed in Part III.A.

D. An Example: The Standing of Performing Rights Societies

Though there are a wide variety of organizations that could desire associational standing under the Copyright Act in order to more effectively serve their membership bases,⁹⁸ copyright infringement suits brought by performing rights societies, or performing rights organizations (PROs), best illustrate how associational standing can fit under the Copyright Act's standing regime. Though PROs frequently bring actions in courts to protect their members' copyrights, whether they even have standing to do this is actually an unresolved problem, as courts have never discussed applying associational standing in these situations.

A "performing rights society" is defined as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc."⁹⁹ These organizations play an integral role in the licensing scheme of the modern music industry, as they make blanket licensing for songs possible. The Supreme Court in particular has emphasized the importance of PROs in the modern music industry, describing how such organizations reduce the costs of monitoring and enforcing individuals' copyrights.¹⁰⁰ To this day, PROs are active in bringing lawsuits enforcing the public

⁹⁷ There are issues with the Ninth Circuit's interpretation, however. See *id.* at 907–11 (Bea dissenting) (describing how the majority misinterpreted *Prather*, *Eden Toys*, and *ABKCO*).

⁹⁸ For example, the Authors Guild described in the opening hypothetical exists to help authors with a variety of issues, including legal problems. Associational standing could allow them to more effectively provide legal services to their members. See note 1.

⁹⁹ 17 USC § 101.

¹⁰⁰ See *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1, 20–21 (1979).

performance rights of the copyright holders who have included their works in the PRO catalogues.¹⁰¹

Despite the prevalence of these lawsuits, these organizations do not actually have standing based on any theory of copyright ownership, as they are merely nonexclusive licensees of the copyright holders and, as stated in Part I.C, they are therefore not entitled to the right to sue.¹⁰² This creates an awkward situation, because

[t]he cumulative effect of these various laws and rights is that while ASCAP [just like the other PROs] bears the primary responsibility for enforcing its members' copyrights and has authority to bring enforcing lawsuits on behalf of its members, it must remain a non-exclusive licensee and, therefore, cannot bring the suit in its own name.¹⁰³

Courts often do not even confront whether PROs have standing, however,¹⁰⁴ and some courts simply allow the PROs to proceed based on conclusory assertions.¹⁰⁵ This is a major problem: How can PROs depend on the courts to give them standing to bring these claims when courts have been so inconsistent on this question?

This is exactly the type of problem associational standing is meant to fix, and PROs seem to meet the requirements of the test. Their members (the individual copyright holders) will certainly have standing in cases of infringement of their copyrights, so the first prong of the *Hunt* test is met. These enforcement suits would also be germane to a PRO's purposes, as a PRO's whole function is to maintain a public performance licensing scheme, which presumably includes enforcement of the licenses too. The second

¹⁰¹ See Sergio Bichao, *BMI Song Lawsuits Make Rounds in Jersey Bars* (USA Today, June 10, 2015), archived at <http://perma.cc/G3W4-QNCD>.

¹⁰² See *Granite Music Corp v Center Street Smoke House, Inc*, 786 F Supp 2d 716, 724 (WDNY 2011) ("Further, because ASCAP's right to license public performances of the musical compositions within its repertoire is nonexclusive, ASCAP is without standing to bring this action."); *Broadcast Music, Inc v CBS Inc*, 1983 WL 1136, *6-7 (SDNY) ("I conclude that BMI lacks the standing to sue CBS for copyright infringement. . . . The fact that remedying a procedural requirement may be awkward does not change the fact that BMI is in fact confronted with a procedural requirement.");

¹⁰³ *Ocasek v Heggland*, 116 FRD 154, 157 (D Wyo 1987).

¹⁰⁴ See, for example, *Broadcast Music, Inc v CBS Inc*, 1983 WL 1136 at *6 ("There are reported cases in which BMI has apparently sued for copyright infringement in respect of music in its repertoire. However, the question of BMI's standing to do so was apparently not raised by the alleged infringer.");

¹⁰⁵ See, for example, *Broadcast Music, Inc v McDade & Sons, Inc*, 928 F Supp 2d 1120, 1130 (D Ariz 2013) ("The non-exclusive nature of BMI's licensing agreements, however, does not deprive BMI of the right to enforce the copyrights at issue.");

Hunt prong is therefore satisfied. The individual-participation prong provides the toughest issue, but even there the PROs have a strong argument that individual participation is not required. The individual copyright holder does not need to participate to show that the alleged infringer publicly performed her copyrighted song without a license; all that needs to be shown is that there was a public performance and that the PRO never gave the license to do this. The fact that PROs already engage in these suits without individual copyright holder participation supports this view.¹⁰⁶ Even if this was a close issue, courts would have flexibility in how to apply this third prong, as discussed above. Given the benefits that PROs provide to the music industry, there are strong policy reasons to hold that the prudential third prong is satisfied and to allow for associational standing in this context. The question remains, however, whether the Copyright Act even allows such organizations to rely on the doctrine.¹⁰⁷

II. THE ASSOCIATIONAL STANDING CASES

This Part summarizes the cases that have rejected associational standing and the main cases that have allowed for associational standing in copyright infringement suits. Courts that rejected associational standing held either that § 501(b) precludes associational standing altogether based on the reasoning provided in the assignability cases discussed above or that a copyright infringement claim can never satisfy the associational standing test laid out in *Hunt*. The courts that allowed for associational standing, on the other hand, simply apply the doctrine and defend how they apply it, without explaining whether it is appropriate to allow associational standing in the first place.

A. Courts That Have Rejected Associational Standing

*Authors Guild, Inc v HathiTrust*¹⁰⁸ rejected associational standing for copyright infringement suits. In *HathiTrust*, Google created digital copies of works found in university libraries, retaining copies for itself for its Google Books project while also

¹⁰⁶ This would also arguably be true for suits for damages, though no court has held that a damages suit is justified under the *Hunt* test. See text accompanying notes 44–47.

¹⁰⁷ Previous scholarship has also suggested that PROs could potentially have associational standing. See Nimmer and Nimmer, 3 *Nimmer on Copyright* at § 12.02(B)(2) (cited in note 8).

¹⁰⁸ 755 F3d 87 (2d Cir 2014).

providing the universities with their own digital copies.¹⁰⁹ The universities then contributed their digital copies to the HathiTrust Digital Library (HDL), a digital library that the universities collectively founded in which all participating institutions' digital copies are accessible.¹¹⁰ Plaintiffs, including various domestic and foreign associations like the Authors Guild and the Australian Society of Authors Limited, brought a claim of copyright infringement against the universities and HDL for these reproductions.¹¹¹

The Southern District of New York found that the associational plaintiffs satisfied the *Hunt* test, but rejected associational standing under its interpretation of the Copyright Act.¹¹² Specifically, it concluded the associations lacked statutory standing as only legal or beneficial owners can bring a claim for copyright infringement.¹¹³ Though the opinion acknowledged that associational standing under the Copyright Act was a novel issue,¹¹⁴ it found guidance in *Silvers*, *ABKCO*, and *Eden Toys*, cases that dealt with the assignability of the right to sue and deal in relevant part with the question of who is allowed to sue.¹¹⁵ The court also argued that, because copyright is meant to provide only a limited monopoly to encourage creativity, Congress did not intend for third-party enforcement of those rights as a matter of statutory standing, even though associational standing would have applied otherwise.¹¹⁶

The Second Circuit affirmed the district court's ruling without reconsidering the issue.¹¹⁷ It quickly dismissed the notion that associations could have standing to bring copyright infringement claims on their members' behalf,¹¹⁸ merely quoting *ABKCO* for the proposition that "the Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf."¹¹⁹

The Central District of California also held that associations do not have standing under the Copyright Act in *Association for Information Media and Equipment v Regents of the University of*

¹⁰⁹ See *Authors Guild, Inc v HathiTrust*, 902 F Supp 2d 445, 448 (SDNY 2012).

¹¹⁰ See *id.*

¹¹¹ See *id.* at 447.

¹¹² See *id.* at 450–54.

¹¹³ See *HathiTrust*, 902 F Supp 2d at 452–54.

¹¹⁴ *Id.* at 453 ("Courts in the Second Circuit have not explicitly addressed the issue of whether associational standing is permissible under the Copyright Act.")

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ *HathiTrust*, 755 F3d at 94.

¹¹⁸ See *id.*

¹¹⁹ *Id.*

*California*¹²⁰ (“AIME”). The case involved two plaintiffs, Ambrose Video Publishing (AVP), an educational video producer, and the Association for Information Media and Equipment (AIME), a national trade association that seeks to ensure copyright compliance.¹²¹ The plaintiffs alleged that UCLA copied DVDs licensed by AVP and other AIME members and put the content on the Internet, allowing people with access to the UCLA network to access this content.¹²² In regard to the issue of associational standing, the court held that the participation of the individual copyright owners was necessary (and thus the organization fails the third, prudential, prong of the *Hunt* test), as the individual owners have to prove ownership of the copyright to establish copyright infringement.¹²³ The court rejected the argument that declaratory relief does not require individualized participation of the members, because “the scope of that declaratory relief would be limited by the rights that members have over the copyrights.”¹²⁴ This means that each member would have to show the rights they had over their individual copyrights, which would necessitate individual participation. Thus, according to the court, the third prong of the *Hunt* test cannot be satisfied in a copyright infringement suit.

Therefore, two cases rejected associational standing under the Copyright Act: the *HathiTrust* case reasoned that Congress did not intend for associational standing to be included in the copyright regime, and the *AIME* case held that no copyright infringement action could satisfy the associational standing test because such an action would always require individual participation.

B. Courts That Have Allowed Associational Standing

In contrast, other federal courts allowed for associational standing under the Copyright Act. Though there are a handful of cases in which associational standing was allowed in a copyright infringement suit, this Section will only focus on three court opinions: the lone circuit-court opinion that allows for associational standing and two district-court opinions that provide analyses relevant to the concerns raised by the courts in Part II.A.¹²⁵

¹²⁰ 2011 WL 7447148 (CD Cal).

¹²¹ *Id.* at *1.

¹²² *Id.*

¹²³ *Id.* at *4.

¹²⁴ See *AIME*, 2011 WL 7447148 at *4.

¹²⁵ There are at least three other cases that have either allowed for associational standing or that have applied the *Hunt* test in a copyright infringement claim. See *Itar-Tass*

The Eleventh Circuit in *CBS Broadcasting, Inc v EchoStar Communications Corp*¹²⁶ held that plaintiff associations had standing in a copyright infringement claim based on the Satellite Home Viewer Act of 1988¹²⁷ (SHVA), which gave satellite carriers a compulsory license to retransmit copyrighted network programming to “unserved households.”¹²⁸ It also created a claim actionable as copyright infringement under § 501(b) for retransmitting works to ineligible subscribers.¹²⁹ Network stations and affiliate associations (that is, associations of affiliate network stations) brought such a claim against EchoStar.¹³⁰ The district court found EchoStar liable, but both sides were unsatisfied with the result and appealed the decision.¹³¹

The circuit court addressed the standing issue in a footnote.¹³² In a brief paragraph, the court stated that “[i]ndividual affiliate stations have standing pursuant to 17 U.S.C. § 501(e).”¹³³ Section 501(e) states that a network station will be treated like a legal or beneficial owner under § 501(b) when its rights under the SHVA are violated.¹³⁴ This puts a network station (such as the affiliate network stations in this case) on the same footing as individual copyright holders who can bring a claim under § 501(b), so it merely means that network stations can bring a suit under § 501(b). This does not change the associational standing question: whether § 501(b) allows associations of individuals (in this case, individual network stations) to bring copyright infringement claims through associational standing. The district court

Russian News Agency v Russian Kurier, Inc, 1997 WL 109481, *10–11 (SDNY) (allowing for associational standing for a copyright infringement action filed by a Russian professional writers union); *National Association of Freelance Photographers v Associated Press*, 1997 WL 759456, *4–5 (SDNY) (applying the *Hunt* test in a copyright infringement suit, but ultimately rejecting standing because of the need for individual participation over how the defendant’s practice of endorsing checks and transferring copyrights affected each plaintiff); *Authors League of America, Inc v Association of American Publishers*, 619 F Supp 798, 804–06 (SDNY 1985) (allowing associational standing in a challenge to the manufacturing clause of the Copyright Act, though eventually dismissing the claim on the merits).

¹²⁶ 450 F3d 505 (11th Cir 2006).

¹²⁷ Pub L No 100-667, 102 Stat 3949, codified at 17 USC § 119 et seq.

¹²⁸ See *CBS Broadcasting*, 450 F3d at 510.

¹²⁹ See 17 USC § 119(a)(7)(A).

¹³⁰ See *CBS Broadcasting*, 450 F3d at 508–09.

¹³¹ See *id* at 517.

¹³² See *id* at 517 n 25.

¹³³ *Id*.

¹³⁴ See 17 USC § 501(e).

reasoned that the affiliate network associations had standing because the members of these associations, the affiliate network stations, had standing under § 501(e) and § 501(b),¹³⁵ and the Eleventh Circuit agreed with this analysis.¹³⁶

In the second case, the Northern District of Iowa in *Olan Mills, Inc v Linn Photo Co*¹³⁷ allowed a society of professional photographers to bring a copyright infringement action. Olan Mills, an operator of over a thousand portrait studios around the country, informed Linn Photo—a company that, among other things, reproduced photographs—of its belief that Linn Photo was infringing its copyrights.¹³⁸ In 1987, Olan Mills took photos of its employees and registered its copyright in four of the photographs.¹³⁹ Then the company hired a private investigator to conduct an investigation to see whether Linn Photo would reproduce these photographs.¹⁴⁰ Per the investigator's request, Linn Photo reproduced and enlarged each of these photos in different stores that were visited.¹⁴¹ Based on these facts, Olan Mills and the Professional Photographers of America, Inc (PPA) brought a copyright claim and sought declaratory relief to prevent Linn Photo from reproducing their photographs.¹⁴²

In an earlier order, the district court found that PPA had associational standing, and in this opinion the court discussed that finding. In that earlier order, the court reasoned:

Cases cited by the parties to the effect that only copyright owners or exclusive licensees have standing to sue for copyright infringement, *see Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 (2d Cir. 1982), do not resolve the standing issue presented by this motion since PPA's members are

¹³⁵ See *CBS Broadcasting, Inc v EchoStar Communications Corp*, No 98-2651, slip op at 12 (SD Fla Mar 31, 2003).

¹³⁶ *CBS Broadcasting*, 450 F3d at 517 n 25 (noting briefly that “Affiliate Associations meet the requirements for representational standing under *Hunt*”). It should be noted that a later district-court opinion in the Eleventh Circuit did not acknowledge that the Eleventh Circuit had addressed this question. See *Broadcast Music, Inc v PRB Productions, Inc*, 2014 WL 3887509, *2 n 1 (MD Fla).

¹³⁷ 795 F Supp 1423 (ND Iowa 1991).

¹³⁸ See *id* at 1426.

¹³⁹ See *id*.

¹⁴⁰ See *id* at 1426–27.

¹⁴¹ See *Olan Mills*, 795 F Supp at 1427.

¹⁴² See *id* at 1428–29.

the copyright owners, and since the requirements of associational standing are otherwise met.¹⁴³

Thus, the court did not find associational standing precluded under the Copyright Act, and it rejected the application of *Eden Toys* in the context of associational standing.¹⁴⁴

Finally, in *Authors Guild v Google, Inc.*,¹⁴⁵ the Southern District of New York allowed for associational standing based on its application of the *Hunt* test. This case is based on the same general set of facts as *HathiTrust*, in which the Second Circuit rejected associational standing: Google created an online database of books scanned from major research libraries, and in response authors brought a class action copyright infringement suit against Google.¹⁴⁶ In a motion to dismiss, Google argued that the associational plaintiffs lacked standing to act as representatives in the class action.¹⁴⁷ In its opinion, the district court stated that there was no dispute that the associations satisfied the first two prongs of the *Hunt* test, so it focused on how to apply the third prudential prong involving the individual participation of the associations' members.¹⁴⁸

¹⁴³ Id at 1427–28.

¹⁴⁴ The opinion goes on to say that the court made no statement as to whether there would be associational standing in the context of a summary judgment motion and limited its prior holding to one based on a motion for judgment on the pleadings. Id at 1428. The opinion was in response to a summary judgment motion, and there was no evidence that the other members of the association registered their copyrights, making declaratory relief inappropriate. See id at 1429. This does not undermine the earlier order's conclusion, however, because on the pleadings' face the court decided that, if the copyrights of all the relevant plaintiffs were registered and part of the case at issue, then associational standing would have been proper. See id at 1428–29 (stating that it was reasonable to infer that the members of the PPA registered their copyrights from the pleadings, but that at summary judgment that was a different issue). The Eighth Circuit later reversed this grant of summary judgment to Linn Photo but never discussed the issue of standing nor even the existence of the PPA as a plaintiff. See generally *Olan Mills, Inc v Linn Photo Co*, 23 F3d 1345 (8th Cir 1994).

¹⁴⁵ 282 FRD 384 (SDNY 2012).

¹⁴⁶ See id at 386. Interestingly enough, both of these cases were decided in the same year, with the *Google* district court releasing this opinion in May 2012, while the *HathiTrust* district court released its opinion in November. Compare *HathiTrust*, 902 F Supp 2d at 445, with *Google*, 282 FRD at 384. The *HathiTrust* district court recognized that the *Google* district court concluded that the associations satisfied the *Hunt* test and agreed with its reasoning, but went on to argue that associational standing was precluded as a matter of statutory standing, which was not addressed by the *Google* district court.

¹⁴⁷ See *Google*, 282 FRD at 388.

¹⁴⁸ See id at 389–91.

The court reasoned that only limited individual participation would be needed to establish the elements of the copyright infringement claim.¹⁴⁹ First, the court noted that, because the copying was undisputed, individual participation for that element was not required.¹⁵⁰ Then the court noted that “[f]or those association members who still own all or part of the copyright to their work,” individual participation is not required because that information can be found in the US Copyright Office’s Registry, especially because “copyright registrations [are] prima facie evidence of copyright ownership.”¹⁵¹ Those members who retained a beneficial interest in their work would require some individual participation, but the degree required “does not defeat associational standing.”¹⁵² The court also rejected the argument that the fair use defense would require individual participation, because “[t]he [c]ourt could effectively assess the merits of the fair-use defense with respect to [subgroups of association members’ works] without conducting an evaluation of each individual work,”¹⁵³ and rejected the notion that individual participation would be required at the relief stage, as the plaintiffs were only seeking injunctive relief.¹⁵⁴ Finally, the court reasoned that because the third prong is prudential, it “has a certain degree of discretion in granting associational standing where, as is undisputedly the case here, the first two prongs are met.”¹⁵⁵ The court considered the advantages in associational standing, the fact that the Authors Guild had been involved in the litigation for almost seven years, and how “it would be unjust to require that each affected association member litigate his claim individually” in holding that the associations had standing.¹⁵⁶

It is important to keep in mind, however, that the Second Circuit, as a result of *HathiTrust*, discussed in Part II.A, has effectively held that associational standing is precluded as a matter

¹⁴⁹ The two elements are “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” See *id.* at 389–90 (quotation marks omitted). The opinion does not actually discuss the limiting language in § 501(b) in its analysis. See generally *id.*

¹⁵⁰ See *id.* at 390.

¹⁵¹ *Google*, 282 FRD at 390.

¹⁵² *Id.* The court explained that “[r]equiring some individual members to present documentary evidence of their beneficial copyright interest would not make this case administratively inconvenient or unmanageable.” *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *id.* at 391.

¹⁵⁵ *Google*, 282 FRD at 391.

¹⁵⁶ *Id.*

of statutory standing.¹⁵⁷ It did so, however, without acknowledging the *Google* district court's reasoning here. Indeed, the *HathiTrust* district court that rejected associational standing as a matter of statutory standing actually agreed with the *Google* district court's analysis that the *Hunt* test is otherwise satisfied.¹⁵⁸ Thus, this analysis is still relevant in the sense that it provides guidance on how to apply the *Hunt* test, regardless of whether statutory standing precludes associational standing.

III. THE CASE FOR ASSOCIATIONAL STANDING

This Comment concludes that associational standing should be allowed under the Copyright Act. First, it explains why assignee standing should not provide guidance on associational standing. Then it examines the errors of the courts that have rejected associational standing. Finally, this Comment argues that statutory interpretation principles and policy issues indicate that associational standing should be available.

A. Assignee Standing Does Not Provide Guidance on Associational Standing

The statutory standing restriction against assigning the right to sue does not necessarily extend to whether there is a similar restriction against associational standing. First, as a formal matter, these are two distinct legal issues. Assignments of legal claims to a third party involve one party assigning the right to sue for a legal claim to another party, as discussed in Part I.C. Associational standing, on the other hand, is a type of representative suit that “does not stem from any actual assignment of rights, but hinges on the relationship between the association and the interests of its members.”¹⁵⁹ Representative suits do not depend on whether the third party was assigned any interest (ownership interest or otherwise), but rather deal with overcoming the prudential restriction against having a third party raise another's

¹⁵⁷ In the later appeal of the *Google* district-court case, the Second Circuit rejected the finding of associational standing in a quick footnote that reaffirmed its stance on statutory standing under the Copyright Act. See *Authors Guild v Google, Inc.*, 804 F3d 202, 208 n 1 (2d Cir 2015) (“[I]n a separate case, this court found that, under the Copyright Act, the Authors Guild lacks standing to sue for copyright infringement on its members' behalf.”). The court cited its *HathiTrust* opinion but did not acknowledge the district court's application of the *Hunt* test. See *Google*, 804 F3d at 208 n 1, citing *HathiTrust*, 755 F3d at 94.

¹⁵⁸ See *HathiTrust*, 902 F Supp at 451–55.

¹⁵⁹ *Klamath Irrigation District v United States*, 113 Fed Cl 688, 697 (2013).

legal rights.¹⁶⁰ Association members retain their own individual right to sue, and they merely let the association bring a claim that supports all its members' interests. Indeed, courts have often distinguished between these two types of standing issues.¹⁶¹ The two positions can therefore be reconciled: When an individual wants to *assign* the right to sue to whomever they desire, an ownership interest in the copyright must be provided too. When a copyright holder wants only to have a party represent her interests in a suit without giving up any legal interests in the copyright, the question becomes whether the chosen representative in question has *his own* right to sue *on behalf* of the copyright holder. This depends on whether the relationship in question justifies the third party acting as a representative. Thus, the restriction on assignee standing does not necessarily preclude all third-party standing, especially given that associational standing “rebut[s] the background presumption . . . that litigants [in this case, the association in question] may not assert the rights of absent third parties.”¹⁶²

The formal differences between assignee standing and associational standing also mean that associational standing does not face many of the same issues as assignee standing. This makes much of the rationale for precluding assignee standing inapplicable to associational standing. First, there are restraints on associational standing when there are major conflicts of interest between the association's lawsuit and its members' interests.¹⁶³ A court has flexibility in such situations: it can “consider whether other approaches less drastic than denying group standing could protect the interests of the members from the dangers presented by this conflict,” or it can deny standing outright.¹⁶⁴ The potential for court oversight reduces the concern that the association might

¹⁶⁰ See Part I.B.

¹⁶¹ See, for example, *Connecticut State Dental Association v Anthem Health Plans, Inc.*, 591 F3d 1337, 1353–54 (11th Cir 2009) (rejecting the argument that an association has no standing because it did not receive an assignment from its members); *Waterfall Homeowners Association v Viega, Inc.*, 283 FRD 571, 579 (D Nev 2012) (“Homeowners could assign their claims to an association outright, obviating the representational standing issue, but that does not appear to be the case here.”).

¹⁶² *United Food*, 517 US at 557.

¹⁶³ See *Polaroid Corp v Disney*, 862 F2d 987, 999 (3d Cir 1988) (“[A]ssociational standing has never been granted in the presence of serious conflicts of interest either among the members of an association or between an association and its members.”). See also note 50 and accompanying text.

¹⁶⁴ *Retired Chicago Police Association v City of Chicago*, 76 F3d 856, 865 (7th Cir 1996) (quotation marks omitted).

not act as a good representative for the copyright owners' interests. In contrast, once a legal claim is properly assigned, the assignees are considered independent of the assignor and can do as they wish in court.¹⁶⁵ If a copyright owner assigns his right to sue to another party, that party has complete control over the legal claims, without providing any insurance of adequate representation. An association, however, is merely suing on behalf of its members, allowing the court to monitor whether the association's claim is representative of its members' interests.

Second, the "individual participation" inquiry of the associational standing test (that is to say, the third prong) acts as a screen for situations in which it is improper to aggregate claims into a single party, a restriction that does not exist for the assignment of claims. In other words, if a claim is assignable, there is nothing stopping a group of people from assigning their claims to any single person, regardless of whether it is appropriate. On the other hand, the third prong of the associational standing test allows the court to "focus[] on the administrative convenience of pursuing a case prosecuted by an associational representative" when deciding whether the party can bring claims on behalf of the group.¹⁶⁶ If a court decides associational standing is inappropriate in a certain situation, it has the flexibility to deny standing under this prong, which minimizes opportunistic behavior. For example, an association cannot just recruit a handful of members in order to pursue a claim of its choosing or to allow its members to get around other procedural requirements, such as those for class actions.¹⁶⁷ With assignee standing, on the other hand, such judicial controls are unavailable.¹⁶⁸

¹⁶⁵ See *American Society for Testing & Materials v Corpro Companies, Inc.*, 292 F Supp 2d 713, 718 (ED Pa 2003) ("Where an assignment is effective, the assignee stands in the shoes of the assignor and assumes all of his rights.").

¹⁶⁶ *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 277 FRD 52, 62 (D Mass 2011) (quotation marks omitted).

¹⁶⁷ See, for example, *Telecommunications Research & Action Center on Behalf of Checknoff v Allnet Communication Services, Inc.*, 806 F2d 1093, 1095–96 (DC Cir 1986) (Ginsburg) (rejecting associational standing because only five to six association members were involved and because the suit seemed like an attempt to get around the requirements for a class action).

¹⁶⁸ See *id.* at 1097–98 (Bork concurring) (arguing that if a party wanted to avoid the restraints on associational standing, it could either pursue a class action or assign its rights to the association). See also *Paoloni v Goldstein*, 200 FRD 644, 647–48 (D Colo 2001) ("Judge Bork recognized that the association could avoid associational standing concerns if members assigned the association their rights.").

Finally, to the extent that there is unease at the idea of a market for copyright infringement claims,¹⁶⁹ there is little potential for such a market if associational standing is allowed. Copyright holders cannot just sell their individual claim to any association without any further ties; the holder must actually be an association member, and the association must satisfy the *Hunt* test. There is also little risk that associations will “buy” individuals (that is, entice individuals to join the group) to gain their claims. The decision to litigate is based on whether the suit will benefit its membership as a whole, not just the interests of a few selected members. For one, the claim has to protect interests that are “germane to the organization’s purpose,”¹⁷⁰ so this would presumably preclude claims that were motivated purely by the association’s financial interest.¹⁷¹ In addition, the large majority of claims that will be allowed under associational standing will be for injunctive and declaratory relief.¹⁷² This minimizes the importance of any one claim. An association has little reason to spend undue resources on an individual’s claim when that claim will likely neither result in monetary relief from which the association can directly benefit nor have a large impact on a claim for injunctive relief that is based on the collective membership interest. This is especially true when courts have the power to block an association’s

¹⁶⁹ This was perceived as one of the concerns of the *Silvers* majority. See *Silvers*, 402 F3d at 905 (Bea dissenting) (“[T]he underlying premise upon which the Majority relies is that there should not be an aftermarket in causes of action for copyright infringement.”). The concern would be that, as one amicus argued, “a market develop[s] in which speculators with no relationship to the copyrighted work pay a small sum . . . in exchange for the ability to pursue a high volume of nuisance settlements or unwarranted jury verdicts.” *Id.* at 904 n 12 (Bea dissenting). Arguably, though, this is not even an issue because “the market will account for the fact that a copyright holder is selling accrued causes of action and not the underlying copyright.” *Id.* at 905 (Bea dissenting).

¹⁷⁰ *Hunt*, 432 US at 343. This is the second prong of the *Hunt* test.

¹⁷¹ Though there is not much guidance from the Supreme Court on the application of the second prong of the *Hunt* test, see *Retired Chicago Police Association*, 76 F3d at 607 (“This second prong has received little elaboration by the Supreme Court.”), there is case law that interprets this prong as requiring “an organization’s litigation goals be pertinent to its special expertise and the grounds that bring its membership together,” *Humane Society of the United States v Hodel*, 840 F2d 45, 56 (DC Cir 1988), and as “ensur[ing] a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing,” *id.* at 58.

¹⁷² See note 44 and accompanying text. The PROs discussed in Part I.D offer a unique example in which monetary relief might be available for associations, but that is because of the unique representative capacity in which PROs act for their members. And even there, the PROs do not seek out individuals based on current claims, but rather compete for general membership based on membership terms.

suit when the aggregation is inappropriate or when the association's suit conflicts with its members' interests. Given these reasons, there is little, if any, risk that individual claims will be auctioned to the highest bidder.

Thus, the restriction on assignee standing does not provide guidance on the associational standing issue. At the very least, the standing provision of the Copyright Act's relationship to associational standing should be interpreted and examined specifically without heavy reliance on the assignee standing cases.

B. The Errors of the Courts That Reject Associational Standing

The courts that rejected associational standing do not provide persuasive interpretations of the Copyright Act in regard to whether the statute allows for associational standing. The *HathiTrust* courts based their conclusions on cases (*ABKCO*, *Eden Toys*, *Silvers*) that did not deal with associational standing, but rather with assignee standing.¹⁷³ As described in the preceding Section, such cases are not very persuasive on this issue. In addition, the Second Circuit missed one of the key points of *ABKCO* because it took a sentence from the opinion out of context. *ABKCO* discussed whether a party that purchased a copyright acquired the right to bring an infringement claim on any previously accrued causes of action.¹⁷⁴ The Second Circuit in *HathiTrust* quoted the case for the proposition that “the Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf.”¹⁷⁵ In *ABKCO*, however, this sentence was itself a reference to *Eden Toys*, and it came in a paragraph that merely described the background law in regard to standing under the Copyright Act.¹⁷⁶ The actual analysis done by the *ABKCO* court is at odds with the simple proposition that ownership is always required to bring a copyright claim. Indeed, according to the *ABKCO* court, “*ABKCO*'s right to bring the claims arises not out of its ownership of the copyright, but from its ownership of the claims themselves which it purchased.”¹⁷⁷ Therefore, a more accurate reading is that, though a copyright holder cannot just choose

¹⁷³ See Part II.A.

¹⁷⁴ See *ABKCO*, 944 F2d at 980. The discussion was one topic in a complicated appeal regarding the payment of damages over a previous finding of copyright infringement.

¹⁷⁵ See *HathiTrust*, 755 F3d at 94 (quotation marks omitted), quoting *ABKCO*, 944 F2d at 980.

¹⁷⁶ See *ABKCO*, 944 F2d at 980, citing *Eden Toys*, 697 F2d at 32 n 3.

¹⁷⁷ *ABKCO*, 944 F2d at 981.

any third party to bring a copyright claim on his behalf (which is true even with regard to representative suits given that the chosen representative must meet certain requirements), copyright ownership is not necessarily essential to standing.¹⁷⁸ This reading of *ABKCO* makes the *HathiTrust* opinions unpersuasive.

The issue brought up by *AIME*—that copyright infringement suits will always require the individual participation of the copyright owner and so will always fail the *Hunt* test¹⁷⁹—is also inapt. The district court relied on *Marder v Lopez*¹⁸⁰ for the proposition that individual copyright owners' participation is required,¹⁸¹ yet *Marder* only deals in relevant part with how a plaintiff must establish copyright ownership for a copyright infringement claim.¹⁸² Though sometimes copyright ownership will be challenged to the extent that individuals will have to prove their ownership, this does not necessarily preclude associational standing in all cases. There are cases in which association members have suffered from an alleged infringer's activities but the ownership of the copyrights at issue are not challenged.¹⁸³ In such cases, the only issue would be whether the alleged infringers violated at least one exclusive right, which does not necessarily require individual participation given that the focus would be on the alleged infringers' actions rather than on the members' actions. Even if ownership is challenged, for members "who still own all or part of the copyright to their work," individual participation is not required to prove the first element of a copyright infringement claim, as that information is publicly available on the United States Copyright Office's Registry.¹⁸⁴ Only if the members are beneficial owners would some individual participation be required. As the *Google* court reasoned, though, even that limited

¹⁷⁸ See also *Silvers*, 402 F3d at 911 (Bea dissenting) ("Thus, under the holding in *ABKCO*, ownership of the copyright is not a requirement for the enforcement of accrued claims assigned to the assignee (*ABKCO*) so long as the claims arose during the period when the assignor (*Bright Tunes*) was the owner of the copyright.").

¹⁷⁹ See *AIME*, 2011 WL 7447148 at *4.

¹⁸⁰ 450 F3d 445 (9th Cir 2006).

¹⁸¹ See *AIME*, 2011 WL 7447148 at *4.

¹⁸² See *Marder*, 450 F3d at 453. The plaintiff in the case could not establish copyright ownership because the plaintiff signed a release that discharged the defendants from liability. See *id.*

¹⁸³ See *CBS Broadcasting, Inc v EchoStar Communications Corp*, No 98-2651, slip op at 12 (SD Fla Mar 31, 2003) (stating that there is undisputed testimony that each station has a license, and that the members of the associations at issue are these stations).

¹⁸⁴ *Google*, 282 FRD at 390.

amount of participation would not necessarily defeat associational standing, especially given that “[t]he alternative—forcing association members to pursue their claims individually—would be burdensome and inefficient” in certain situations.¹⁸⁵

In addition, though the *AIME* court noted that the scope of the relief will be limited by the individual members’ copyrights,¹⁸⁶ this again depends on the type of relief requested. As the Supreme Court held in *United Food*, “‘individual participation’ is not normally necessary when an association seeks prospective or injunctive relief for its members.”¹⁸⁷ An association can request an injunction that prevents the alleged infringer from using association members’ copyrights in a manner that would not require individualized participation. For example, the association could request the alleged infringer stop its activities with respect to works that association members have registered with the association, and nothing more—exactly the type of relief requested by the associational plaintiffs in *Google*.¹⁸⁸

Finally, as the district court noted in *Google*, “the third *Hunt* prong is not an Article III standing requirement; it is prudential,” which gives courts discretion in deciding whether to grant associational standing when “the first two prongs are met.”¹⁸⁹ Thus, the third prong should not be used to reject associational standing outright, especially if there are other considerations that prove to be persuasive. It may be that, though some limited amount of individual participation will be practically required in the case, other equitable reasons weigh in favor of granting standing. Depending on the level of scrutiny applied, a court can tolerate some amount of individual participation if it believes it is just to do so. This is similar to what the *Google* district court did.¹⁹⁰ Satisfying

¹⁸⁵ *Id.*

¹⁸⁶ See *AIME*, 2011 WL 7447148 at *4.

¹⁸⁷ *United Food*, 517 US at 546.

¹⁸⁸ See *Google*, 282 FRD at 391.

¹⁸⁹ *Id.* See also *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 277 FRD at 62:

[O]nce an association has satisfied the first two prongs of the associational standing test, a court can be assured of “adversarial vigor in pursuing a claim for which member Article III standing exists,” and the third question focuses on the “administrative convenience” of pursuing a case prosecuted by an associational representative.

¹⁹⁰ See *Google*, 282 FRD at 391 (reasoning that “[e]ven if there were room for disagreement over whether the third *Hunt* prong has been met in this case, associational standing would still be appropriate,” and then exploring the equitable reasons for why the associations in the case should have standing).

the third prong should be a case-by-case determination, so associational standing should not be precluded under the Copyright Act as a matter of law.

C. Application of Statutory Interpretation Principles

Traditional principles of statutory interpretation show that associational standing should be allowed under the Copyright Act, especially given that the cases rejecting assignee standing are unpersuasive. First, this Comment explores the common-law presumption for applying background standing doctrine. Then, it explains why it is appropriate to follow this presumption.

1. There is a common-law presumption in statutory interpretation to apply background standing doctrine.

There is a long-standing presumption that “Congress is understood to legislate against a background of common-law adjudicatory principles.”¹⁹¹ Though a clear statement from Congress is not necessarily required to overcome this presumption,¹⁹² plain statements are required for “the protection of weighty and constant values.”¹⁹³ In the context of standing principles, the Supreme Court has said that “Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated”¹⁹⁴ and that “[i]n no event [] may Congress abrogate the Art[icle] III minima [for standing].”¹⁹⁵ The Court has also directly recognized the importance of standing doctrine.¹⁹⁶ Indeed, the doctrine of associational standing satisfies both constitutional and prudential standing requirements, and there is no reason to expect that Congress did not intend for normal standing principles

¹⁹¹ *Astoria Federal Savings & Loan Association v Solimino*, 501 US 104, 108 (1991). See also *Isbrandtsen Co v Johnson*, 343 US 779, 783 (1952) (“Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles.”).

¹⁹² See *Astoria*, 501 US at 108.

¹⁹³ *Id.*

¹⁹⁴ *Bennett v Spear*, 520 US 154, 163 (1997).

¹⁹⁵ *Gladstone Realtors v Village of Bellwood*, 441 US 91, 100 (1979). See also note 27 and accompanying text.

¹⁹⁶ See *Allen v Wright*, 468 US 737, 750 (1984) (“The Art. III doctrine that requires a litigant to have ‘standing’ to invoke the power of a federal court is perhaps the most important of these [justiciability] doctrines.”), abrogated on other grounds by *Lexmark International, Inc v Static Control Components, Inc*, 134 S Ct 1377, 1387–88 (2014).

to apply under the Copyright Act, especially when there is no explicit restriction of standing to individual copyright holders.¹⁹⁷ The Supreme Court has even stated that associational standing represents a relationship that is “sufficient to rebut the background presumption (in the statutory context, about Congress’s intent) that litigants may not assert the rights of absent third parties,” which removes the typical barrier to representational standing.¹⁹⁸

This principle, that common-law standing doctrine applies unless otherwise negated, is available here, regardless of the reluctance shown in *Silvers* to apply common-law standing doctrine in intellectual property cases.¹⁹⁹ The *Silvers* court’s conclusory statement that there is “a presumption that, when we consider standing under a statutory scheme involving intellectual property, common law doctrine does not apply” has many issues.²⁰⁰ The case on which *Silvers* relies to establish this “presumption,” *Crown Die & Tool Co v Nye Tool & Machine Works*,²⁰¹ dealt in relevant part only with whether a patent owner can assign the right to litigate a patent infringement claim to an assignee, which does not involve representational standing doctrine.²⁰² The language in *Crown Die* that deals with applying the common law to intellectual property states only that “[p]atent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment”²⁰³ and that “no [patent] rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.”²⁰⁴ Though the Court does say that a patent owner cannot assign the right to sue to one person and assign the patent to another person,²⁰⁵ there is no reason to expand this conclusion to omit common-law standing doctrine in general. Indeed, the *Crown Die* Court never even had the opportunity to consider the implications of its stance in regard to associational standing,

¹⁹⁷ See *Silvers*, 402 F3d at 885 (“The statute does not say expressly that *only* a legal or beneficial owner of an exclusive right is entitled to sue.”).

¹⁹⁸ *United Food*, 517 US at 557.

¹⁹⁹ See *Silvers*, 402 F3d at 885 (“Copyright is a creature of statute, so we will not lightly insert common law principles that Congress has left out.”).

²⁰⁰ *Id.* at 888.

²⁰¹ 261 US 24 (1923).

²⁰² See *id.* at 38–40.

²⁰³ *Id.* at 40.

²⁰⁴ *Id.* (quotation marks omitted).

²⁰⁵ See *Crown Die*, 261 US at 44.

because the decision predates associational standing by more than a half century.²⁰⁶ Nothing requires reading it as “effectively creat[ing] a presumption” against *all* common-law standing doctrine,²⁰⁷ which might explain why *Silvers* is the only opinion that has cited *Crown Die* for such a presumption.

In addition, many major developments in intellectual property law actually involve importing common-law principles into these statutory regimes, which weighs against interpreting *Crown Die* as requiring a hard line against common-law standing doctrine.²⁰⁸ In particular, the manner in which the Supreme Court imported contributory liability into the copyright regime shows that courts should read in common-law principles into the Copyright Act when applicable. The landmark case of *Sony Corporation of America v Universal City Studios, Inc.*,²⁰⁹ involving the home-recording feature of video tape recorders, imported contributory liability into the Copyright Act—despite the fact that “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another.”²¹⁰ Part of its reasoning for allowing such a claim was that “vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”²¹¹ This rationale could likewise be extended to associational standing doctrine. Associational standing has been applied in a wide variety of cases and statutory schemes.²¹² In addition, associational standing “is merely a species” of representational standing, which “identif[ies]

²⁰⁶ See text accompanying note 34.

²⁰⁷ *Silvers*, 402 F3d at 888.

²⁰⁸ See also *id.* at 895 (Berzon dissenting) (“I do not find the majority’s reliance on *Crown Die* persuasive in the current circumstances. . . . I find no support for such a broad statement [that there is a presumption against common-law standing doctrine], given the significant changes to copyright law since *Crown Die* was decided.”) (citation omitted).

²⁰⁹ 464 US 417 (1984).

²¹⁰ *Id.* at 434–35.

²¹¹ *Id.* at 435.

²¹² See generally, for example, *Association of American Physicians & Surgeons, Inc v Texas Medical Board*, 627 F3d 547 (5th Cir 2010) (holding that the plaintiff association had associational standing under 42 USC § 1983 for relief against constitutional violations); *Oregon Advocacy Center v Mink*, 322 F3d 1101 (9th Cir 2003) (holding that a law office had associational standing on behalf of incapacitated criminal defendants under the Protection and Advocacy for Mentally Ill Individuals Act of 1986); *Pennsylvania Psychiatric Society v Green Spring Health Services, Inc.*, 280 F3d 278 (3d Cir 2002) (holding that the association could have standing under ERISA to bring a claim on members’ behalf).

the circumstances in which it is just” to allow litigants to assert the rights of absent third parties.²¹³

Thus, common-law standing principles such as associational standing should not be precluded in copyright infringement cases as a first principle. Rather, their application should depend on whether Congress addressed them in the Copyright Act. If the Copyright Act is silent on these standing issues, then background common-law standing doctrine should apply.

2. Applying background standing doctrine is appropriate in this context.

The text of the statute does not preclude the presumption to apply common-law standing doctrine. Though one could argue that Congress clearly meant to restrict associational standing in § 501(b) by expressly listing only legal and beneficial owners—*expressio unius est exclusio alterius*—that principle is unpersuasive here. For one, the listing of specific types of parties able to bring a suit has not stopped associational standing from being applied in other contexts.²¹⁴ Second, this principle is just “an aid to construction, not a rule of law.”²¹⁵ It applies only in cases in which it is fair to say that Congress meant for the exclusion to apply.²¹⁶ In the context of associational standing, there is no reason to think that Congress considered whether organizations can bring copyright infringement claims on behalf of their members and

²¹³ *Sony*, 464 US at 435.

²¹⁴ See, for example, *Southern Illinois Carpenters Welfare Fund v Carpenters Welfare Fund of Illinois*, 326 F3d 919, 922 (7th Cir 2003) (“[W]e do not think that by confining the right to sue . . . to plan participants and beneficiaries Congress intended to prevent unions from suing on behalf of participants.”). The statute in that case merely stated that “[a] civil action may be brought by a participant or beneficiary.” 29 USC § 1132(a)(1). See also *Small v General Nutrition Companies, Inc.*, 388 F Supp 2d 83, 95–96 (EDNY 2005) (rejecting the argument that Congress intended the Americans with Disabilities Act to preclude associational standing when the statute in question, 42 USC § 12188(a)(1), states only that standing is given to any person who was subjected to discrimination on the basis of disability or to any person who has reasonable grounds to believe that such discrimination is about to happen).

²¹⁵ *United States v Castro*, 837 F2d 441, 443 n 2 (11th Cir 1988), quoting 73 Am Jur 2d Statutes § 121.

²¹⁶ See *Marx v General Revenue Corp.*, 568 US 371, 381 (2013) (quotation marks and citations omitted):

We have long held that the *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.

rejected that possibility, especially in light of how little this provision was discussed in the legislative reports. Both the House and Senate Reports state only:

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.²¹⁷

Though this language might clarify that the owner of each particular right has the right to sue, the reports provide little guidance on how to interpret the statute in light of associational standing doctrine.²¹⁸ An association bringing a suit on behalf of its members is not claiming to have any right in the copyright itself.²¹⁹ Rather, it is effectively bringing a single action that represents its various members' rights, providing its members (the actual copyright owners) with the benefits described above. The fact that similar listings of parties have not precluded associational standing in other contexts and that there is no reason to think Congress even considered this issue outweigh applying the *expressio unius* principle here to preclude associational standing. Because of this, courts should instead follow the presumption that common-law standing doctrine, specifically associational standing, applies.

Supporting the application of this presumption is the principle that "the Copyright Act must be construed in light of [its] basic purpose [to stimulate artistic creativity]."²²⁰ Allowing associational standing furthers this goal. Though Congress intended only a limited monopoly over copyrighted material, allowing associations to bring suits on behalf of their members does not broaden the substantive rights in the work. Rather, it merely creates efficiencies in enforcing the rights already conferred. Specifically, associational standing allows litigants to take advantage of the "pre-existing reservoir of expertise and capital" of the given association and provides a straightforward method for litigating

²¹⁷ HR Rep No 94-1476, 94th Cong, 2d Sess 159 (1976), reprinted in 1976 USCCAN 5659, 5775; *Copyright Law Revision*, S Rep No 94-473, 94th Cong, 1st Sess 141 (1975).

²¹⁸ This is especially true given that the foundational case for modern associational standing doctrine, *Warth*, was decided in 1975, a year before the language in 17 USC § 501(b) was enacted into law. See generally *Warth*, 422 US 490. See also Copyright Act of 1976 § 501(b), 90 Stat at 2584, 17 USC § 501(b).

²¹⁹ See *Klamath Irrigation District*, 113 Fed Cl at 697 ("[I]t is well-accepted that associational standing does not stem from any actual assignment of rights, but hinges on the relationship between the association and the interests of its members.").

²²⁰ *Sony*, 464 US at 432.

group interests without forcing individual suits or going through the complex requirements for class actions.²²¹ Though this might expand the monopoly over the copyright in the sense that it offers another procedural avenue to assert these rights, the idea of the “limited monopoly” is about the appropriate scope of public access to the work.²²² Expanding the ways in which a copyright holder can enforce the copyright does not impact the extent of public access. Rather, it just offers a new way to police the access already conferred. Indeed, sometimes this might be necessary for practical enforcement of the copyright, as seen in the case of PROs discussed in Part I.D. Associations, like the PROs of the music industry, allow for economies of scale that justify enforcement against instances of copyright infringement that would not make sense for an individual copyright holder to pursue, and this benefits the copyright system as a whole.²²³ Thus, the common-law presumption that associational standing applies should control here.

D. Policy Justifications

There are also two main policy reasons to allow associational standing under the Copyright Act. First, allowing associational standing provides unique benefits as compared to class actions and improves judicial economy in mass infringement suits. Second, associational standing serves as an efficient sorting mechanism for copyright holders who want to come together to litigate mass infringement.

1. Associational standing creates benefits for both sides of a mass copyright infringement suit.

Associational standing provides for mass representation in a way that creates unique benefits and avoids many of the pitfalls of the other primary mass representation lawsuit mechanism, the class action. Both sides benefit from avoiding enlarged class action litigation expenses: plaintiffs avoid dealing with the complexity of class certification requirements, and defendants know who they are dealing with at the litigation’s outset rather than estimating liability based on an amorphous class of some unfixed

²²¹ *Brock*, 477 US at 289–90.

²²² *Sony*, 464 US at 429.

²²³ See *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1, 20–21 (1979) (describing how a blanket public performance license was necessary in the music industry to avoid thousands of individual negotiations, and that a performing rights society “provides the necessary resources for blanket sales and enforcement”).

size. This promotes the availability of settlement options.²²⁴ In addition, if it is just the association that is bringing the claim and there is no class action, the parties can settle without having to meet the requirements of FRCP 23(e), which is what undermined the attempted settlement agreement in *Google*.²²⁵ Even if the plaintiffs still desire to pursue a class action, associational standing can complement the class action process by having an association serve as one of the class representatives, which ensures the members' interests are directly litigated rather than being indirectly resolved as part of the class action. This is discussed in the following paragraph.²²⁶ Judicial economy is also saved by avoiding the long and complicated issues involved in class actions. For example, there is no need to certify a class when the association brings a claim only for its members, as the group to be represented is already defined. The Supreme Court also recognized that the specialized expertise and resources of associations "can assist both courts and plaintiffs" and can ensure the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."²²⁷ Though there might be a fear that associational standing will allow litigants to avoid the procedural requirements for class actions, courts have the ability to screen out improper attempts at aggregation that are meant to circumvent these requirements, as discussed in Part III.A.²²⁸

The district-court opinion in *Google* shows how associational standing can be desirable in the context of a class action. In deciding to allow associational standing for the associational representatives in the class action, the district court considered how "[t]he alternative—forcing association members to pursue their claims individually—would be burdensome and inefficient."²²⁹ The court also noted how the association had provided those benefits that the Supreme Court described in *Brock*, arguing that "the Authors Guild has played an integral part in every stage of

²²⁴ If an association settles a claim on behalf of its members, then claim preclusion principles should apply, though it is a complicated issue. See notes 63–65 and accompanying text.

²²⁵ See *Authors Guild v Google, Inc*, 770 F Supp 2d 666, 669–70, 677 (SDNY 2011) (denying the settlement agreement in part because it "contemplates an arrangement that exceeds what the Court may permit under Rule 23").

²²⁶ See also note 33 and accompanying text (discussing how an association can be a class representative in a class action).

²²⁷ *Brock*, 477 US at 289.

²²⁸ See notes 166–67 and accompanying text.

²²⁹ *Google*, 282 FRD at 390.

this litigation.”²³⁰ It concluded that, because Google did not conduct an “individualized evaluation” as to whether its use of each work was fair use but rather “treated the copyright holders as a group, the copyright holders should be able to litigate on a group basis.”²³¹ Instead of letting only the individual plaintiffs carry on with the suit, the court believed that the Authors Guild brought a unique benefit to the case, and so allowed it to continue participating as a party.

The efficiency that associational standing provides—that is, avoiding multiple nonexpert plaintiffs bringing almost indistinguishable individual suits by providing the ability to litigate group interests as a single, expert party with preexisting resources—is especially important given that the legal system does prevent inefficient lawsuits when more efficient options are available. For example, courts disallow certain types of class actions when there are more efficient litigation options.²³² This concern for efficiency means that we should promote efficient litigation mechanisms over inefficient mechanisms. Applying this to the context of associational standing, the law should encourage litigants to take advantage of the efficiency created by associational standing rather than rely on less-efficient individual suits or class actions that preclude parties with more experience and resources from taking part.

2. Associational standing serves as an efficient sorting mechanism for mass infringement suits.

The value of associational standing as a sorting mechanism for mass infringement suits is shown by the model provided by Professor Eugene Kontorovich to analyze standing.²³³ He proposes that entitlements are generally “negative,” in that they allow the

²³⁰ Id at 391, citing *Brock*, 477 US at 289.

²³¹ *Google*, 282 FRD at 391.

²³² See, for example, FRCP 23(b)(3) (“A class action may be maintained if . . . the court finds . . . that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”); *General Telephone Co of the Southwest v Falcon*, 457 US 147, 159 (1982) (rejecting class certification because “the maintenance of respondent’s action as a class action did not advance ‘the efficiency and economy of litigation which is a principal purpose of the procedure’”).

²³³ See generally Eugene Kontorovich, *What Standing Is Good For*, 93 Va L Rev 1663 (2007). Though Kontorovich focused on constitutional entitlements, he also pointed out that “[a]s a positive matter, the analysis of standing’s consequences for statutory rights is much the same as for constitutional entitlements.” Id at 1720. Because this Comment is only concerned with the positive implications of his framework, it does not consider the normative implications for statutory entitlements that he proposes. See id at 1720–23.

entitlement holder to be free of certain kinds of action.²³⁴ The values individuals attach to these entitlements, however, differ: the value is the difference between the welfare derived from the action that the entitlement prevents W and the cost of challenging the action in court C .²³⁵ The value of the entitlement to the individual, therefore, is $W - C$.²³⁶ To simplify the discussion for this Comment, only W will be relevant.

An example shows how this analysis works. Say there are two people, X and Y, who have a musical composition copyright in a song. One of the exclusive rights included in the copyright is the right to publicly perform the musical work.²³⁷ X, an established songwriter, loses \$100 when someone publicly performs his copyrighted song without permission, making his $W = -\$100$. He represents a “negative value” entitlement holder, who would have a welfare loss if the action prevented by the entitlement, in this case the performance of his song without his permission, occurs.²³⁸ Y, an amateur songwriter, actually gains \$100 when someone performs his song without permission (he values the exposure more than any license he could get). His W is \$100, making him a “positive value” entitlement holder, which means he has a welfare gain and a positive W if the song is played without his permission.²³⁹

Now say there are two associations, the Pay Guild and the Free Guild. The Pay Guild believes everyone should pay to perform its members’ musical composition copyrights and will seek injunctions against those who perform the songs but do not pay.²⁴⁰ The Free Guild, however, wants its members’ works to be exposed to the public, and so it promotes the free public performance of those works.²⁴¹ Thus, X, a negative-value entitlement holder, would join the Pay Guild, and Y, a positive-value entitlement holder, would join the Free Guild, given that copyright holders are free to join whatever associations they want and assumedly would join only associations that are in line with their interests.

²³⁴ See *id.* at 1676.

²³⁵ See *id.*

²³⁶ Note that “ C [] is always a negative number,” and “ W may be positive or negative.” *Id.*

²³⁷ See 17 USC § 106(4).

²³⁸ Kontorovich, 93 Va L Rev at 1676 (cited in note 233).

²³⁹ See *id.* The existence of positive-value entitlement holders rests on the idea that legal injury is different from actual harm; a legal injury can cause a harm or benefit depending on how the person views or feels about the injury. See *id.* at 1676–77.

²⁴⁰ Examples of real-life “Pay Guilds” include PROs and the Authors Guild.

²⁴¹ Though a real-life “Free Guild” is hard to find, a formal organization is not required to understand this analysis. For example, the authors who did not join the Authors Guild in the opening hypothetical could be seen as a “Free Guild.”

For simplicity, assume the Pay Guild and Free Guild both have ten members each, and so, if we take the sums of each member's W in each association, the Pay Guild's W is $-\$1000$ and the Free Guild's W is $\$1000$.

As a final element, say a bar plays songs from members of both guilds every night. Because the Pay Guild's W is a larger negative number than X's W , it is the better litigant, as it has the most at stake (and besides, X will benefit if the Pay Guild wins).²⁴² In addition, if the Pay Guild brings a lawsuit for its members, that does not affect the ability of the bar to play the songs of the Free Guild members, because copyrights are discrete units. Whatever enforcement the Pay Guild seeks for its members' copyrights does not affect what happens with the Free Guild members' copyrights. In other words, the Pay Guild's members can remedy their loss in the most efficient manner, while the Free Guild's members can still retain their benefit, leading to the ideal situation. This reflects the real-life position of performing rights societies, as described above.

Thus, by allowing associational standing in mass copyright infringement suits, courts will be allowing an ideal plaintiff to bring the claims, with little risk of affecting the rights of other, positive-value entitlement holders who wish to be kept separate from the litigation. Rather than try to define the relevant group in court through the class certification process—which in this situation might run into issues of defining an appropriate class given that there are copyright holders who could benefit from the alleged infringement²⁴³—associational standing lets the copyright holders freely sort themselves into the relevant groups that will promote their interests.

CONCLUSION

Associational standing is an important part of standing doctrine that provides unique benefits to litigants. Because the text of the Copyright Act does not resolve this question, courts

²⁴² This fits Kontorovich's explanation that "[i]f members of the injured class all have nonpositive values, and the principle relief sought is injunctive . . . then a plaintiff with a greater negative value may be a fine representative of the class." Kontorovich, 93 Va L Rev at 1677 (cited in note 233). This does assume, however, that the association's members share the same value type—that is, they are all nonpositive-value entitlement holders.

²⁴³ See *Authors Guild, Inc v Google Inc*, 721 F3d 132, 134 (2d Cir 2013) (noting that Google's argument—that the proposed class might not be representative because there are a large number of copyright holders who benefit from the alleged infringement—"may carry some force").

have offered differing positions on whether associational standing is allowed. This Comment argues that the opinions that have refused associational standing rested on erroneous reasoning. In addition, traditional principles of statutory interpretation show that the presumption in favor of applying associational standing is not rebutted by the statutory text. Policy supports this interpretation, as associational standing can be seen as an effective sorting mechanism for mass infringement suits and can provide unique benefits that class actions do not offer. Therefore, courts should allow associations to bring copyright infringement claims on behalf of their members under the Copyright Act.