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July 13, 2016

Laura Prather
Haynes and Boone, LLP,
600 Congress Ave., Suite 1300,
Austin, TX 78701

Dear Ms. Prather,

The Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice held a hearing on "Examining H.R. 2304, the SPEAK FREE Act" on Wednesday, June 22, 2016 at 1:00 p.m. in room 2226 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Wednesday, August 10, 2016 to John Coleman at john.coleman@mail.house.gov or 362 Ford House Office Building, Washington, DC, 20002. If you have any further questions or concerns, please contact John Coleman on my staff at 202-225-2825.

Thank you again for your participation in the hearing.

Sincerely,



Bob Goodlatte
Chairman

Enclosure

Laura Prather
July 13, 2016
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Questions for the record from Representative Trent Franks:

1. Would you like to supplement your testimony with any additional information?

U.S. HOUSE OF REPRESENTATIVES

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
CONSTITUTION AND CIVIL RIGHTS**

**EXAMINING H.R. 2304,
the SPEAK FREE Act**

**Supplemental Statement of
Laura Lee Prather, Partner
Haynes and Boone, LLP
Austin, Texas**

**On Behalf of
The Public Participation Project**

August 10, 2016

SUPPLEMENTAL TESTIMONY OF LAURA LEE PRATHER

Mr. Chairman and Members of the Subcommittee:

I am Laura Prather, a partner at the law firm of Haynes and Boone LLP in Austin, Texas and a member of the Board of Directors of the Public Participation Project, a nonprofit organization formed for the purpose of educating the public about Strategic Lawsuits Against Public Participation (SLAPPs), and the consequences of these types of destructive lawsuits. I was honored to appear before this Committee on June 22, 2016 to testify in favor of the SPEAK FREE Act. I submit the following testimony to supplement the record regarding additional support obtained for passage of the legislation from the business community, to address certain issues presented in the Motion Picture Association of America (“MPAA”) testimony, and to provide further information about the need for passage of federal Anti-SLAPP legislation.

First, since the hearing on the SPEAK FREE Act, the Council for Better Business Bureaus has signed on in support of this legislation. The Council for Better Business Bureaus (“CBBB”) is the umbrella organization for all BBBs in the U.S. and is dedicated to fostering honest and responsive relationships between businesses and consumers – instilling consumer confidence and advancing a trustworthy marketplace for all. Because the CBBB has found SLAPP suits deter its mission of advancing marketplace trust and fostering honest discussions between businesses and consumers, it is supportive of the SPEAK FREE Act.

Second, the MPAA has indicated in its testimony a need to expand the breadth of the statute to include any other conduct done in connection with a public interest or public issue, and the PPP would be supportive of such expansion because the purpose of the legislation is to reach all cases brought to stymie efforts of the public to be engaged in discourse about public issues and interests. The MPAA also indicates a concern about the reach of the SPEAK FREE Act to intellectual property

claims. As indicated in my response to Chairman Franks' question when he asked me to provide examples of federal question SLAPP cases being filed to circumvent state Anti-SLAPP laws, the majority of these cases are "dressed up" as copyright or trademark claims, *i.e.* *City of Inglewood v Joseph Teixeira*, Cause No. 15-cv-01815 (C.D. Cal.) (improper use of Copyright Act to avoid Anti-SLAPP laws); *Tobinick v. Novella*, Cause No. 15-14889 (11th Circuit) (improper use of Lanham Act to avoid Anti-SLAPP laws). The reality is that there are a tremendous number of censorious copyright and trademark cases being filed in an effort to avoid Anti-SLAPP protections.¹ Therefore, a wholesale exemption of intellectual property claims from the SPEAK FREE Act is not the answer. A balance would need to be reached between the ability to reach the anti-piracy concerns of those who are counterfeiting works and protecting legitimate news organizations and citizens reporting on public concerns. The PPP is committed to working with the Committee and MPAA to address this issue in a tailored fashion that does not harm the overall goals of the bill.

Finally, I am attaching two additional articles that address the need for passage of the SPEAK FREE Act as Exhibits B and C to my testimony. They can also be found at the following links:

<http://thehill.com/blogs/pundits-blog/the-judiciary/287719-speak-free-act-prevents-slapp-in-face-to-free-speech> and <http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused>

I would like to thank the committee on behalf of myself and the PPP for its interest in this issue and look forward to working with the Subcommittee to achieve consensus on a federal Anti-SLAPP bill that protects the First Amendment rights of all citizens.

¹ See John Tehranian's article "The New Censorship," 101 Iowa Law Review 245 (2015), downloadable at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514224 (Exhibit A).

EXHIBIT “A”

The New ©ensorship

John Tehranian

ABSTRACT: Copyright law has become the weapon par excellence of the 21st-century censor. Fueled by a desire to prevent one's perceived foes from making certain types of speech, an individual has no better friend. Copyright violations are ubiquitous. Liability can be massive. Copyright suits are difficult to fend off. And, perhaps most saliently to the sophisticated censor, the federal courts have almost systematically immunized infringement suits from explicit First Amendment defenses. Whether it is a creationist group using the Digital Millennium Copyright Act to force the takedown of critical materials put online by evolutionists, abortion-rights activists using copyright law to enjoin speech by pro-life forces, or a political commentator vindicating his exclusive rights to recordings of his shows to suppress criticism of a hate-filled rant, examples of this disingenuous use of copyright law abound. After surveying the growing use of copyright law for the purposes of censorship, this Article examines just how this trend undermines both the vitality of our copyright regime and public discourse; how some courts have attempted to deal with this problem through the use of procedural machinations, including early adjudication of cases through motions to dismiss; and how the law might better respond as a whole to ensure that copyright law is used to vindicate the appropriate economic interests of rightsholders, rather than to serve as a transparent proxy to censor cultural or political opponents.

* Irwin R. Buchalter Professor of Law, Southwestern Law School. I would like to thank Peter Afrasiabi, Chris Arledge, David Fagundes, Eric Goldman, Lindsey Hay, and Deidré Keller for their helpful comments and suggestions.

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I. INTRODUCTION

It is a book. It poses no threat to national security. There is nothing particularly salacious or ribald about its content. It does not defame anyone, living or dead. Indeed, it is entirely fictional. And, if it were banned by a third-world dictatorship, we would be calling for economic sanctions against the country for such an outrageous act of censorship, writing letters of protest through Amnesty International, and characterizing its incarcerated publisher as a prisoner of conscience. Thankfully, we think to ourselves, it would not happen in a free society such as ours, with its guarantee of First Amendment protections and commitment to free speech. After all, in the United States, we protect even the most repulsive and dangerous forms of speech from prior restraint. Courts will not stop neo-Nazis from marching through the streets of an Illinois town so that they can spread their message of hate among a sizable population of Holocaust survivors, despite the significant threat of violence.¹ And courts will not enjoin newspapers from publishing excerpts to sensitive, classified government documents acquired through the commission of a felony, despite the potentially grave national security concerns.²

Yet for all of our rhetorical solicitude to the freedom of expression, we are left with a curious fact that defies our expectations and, perhaps, even calls into question our very sense of the First Amendment: you cannot find this book in any American bookstore, since a court would give little pause about granting its publisher an unpleasant stay in a federal penitentiary.

This book is really *any* work that constitutes a copyright infringement. In historical times, such a work would necessarily have been a pirated copy of someone else's work—a scenario that does not seem to implicate serious First Amendment concerns since any defense by the infringer would involve the dubious right to make speech that is, by all rights, entirely someone else's. In the past, after all, copyright law only protected against literal one-to-one reproductions.³ But the scope of copyright law has expanded dramatically, especially over the past century.⁴ Among other things, it now covers both literal and non-literal takings and, perhaps most importantly, grants copyright holders the exclusive right to create

1. See *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977).

2. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

3. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that the unauthorized German translation of Harriet Beecher Stowe's novel, *Uncle Tom's Cabin*, did not constitute infringement because it was transformative and not a mere slavish reproduction).

4. See NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 55 (2008) ("It has been largely since Congress enacted the Copyright Act revision of 1976 that copyright's scope and duration have burst from their moorings, growing with unwonted precipitousness and force."); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 230–31 (2008) (noting how, in the years following the Civil War and into the modern era, "the scope of copyright protection and the tests for infringement were expanded well beyond verbatim copying and came to cover increasingly abstract and remote zones of similarity to the protected work").

any derivative—a concept that has systematically been defined expansively.⁵ As a result, works that contain much of one’s own speech and original content can constitute infringements, subject to both injunctive relief and damages if these works are deemed an unauthorized derivative—i.e., a work that draws upon underlying, pre-existing content that belongs to someone else.⁶ Infringements, therefore, can encompass a musical composition with an original melody and original lyrics that happens to lift a bass hook from an old James Brown number;⁷ a movie with a unique setting and storyline that features a character from *Star Trek*;⁸ or, to take a recent example, a fanciful reverse postmodern bildungsroman where Holden Caulfield, now a 76-year-old on the run from a nursing home, confronts his creator, J.D. Salinger.⁹

Consider the outcome of this last case. In 2009 and shortly before his passing, infamous recluse Salinger came out of hiding, at least legally speaking, to seek an injunction restraining publication of the novel *60 Years Later*, an unauthorized send-up of *The Catcher in the Rye*, purportedly authored by one John David California.¹⁰ Salinger argued that the work constituted a blatant infringement of his

5. 17 U.S.C. §§ 101, 106(2) (Supp. I 2013) (granting copyright owners the exclusive right to prepare derivative works based upon the copyrighted work and defining derivative works expansively to constitute any “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted”); see also Bracha, *supra* note 4, at 231 (“By the dawn of the twentieth century, the accumulation of specific entitlements and the expanding scope of protection would lead to the emergence of a general logic of derivative works in copyright thinking. Under this mode of thinking, copyright would be conceived of as the right to control any aspect of the intellectual work, irrespective of medium, format, or form.”); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1248 (arguing that “the broad exclusive right of copyright owners to prepare derivative works has swallowed up the ability of transformative users to escape infringement liability, thereby undermining the key goal of the federal copyright regime”).

6. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 481 (2d Cir. 2004) (noting that “[a]s long as a defendant’s work incorporates protectable elements of the plaintiff’s work, the plaintiff is entitled to relief” under federal copyright law, regardless of the value of defendant’s contributions to the allegedly infringing work).

7. For example, numerous cases have held that the slightest unauthorized sample can result in a finding of infringement, even if (and regardless of whether) a significant and expressive new musical work is created through use of the sample. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (holding that any unauthorized sample of a sound recording, no matter how small, constitutes copyright infringement); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15, equating the Seventh Commandment with the law of copyright, admonishing “[t]hou shall not steal,” and rejecting a fair-use defense in a music sampling case).

8. Cf. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7–10 (C.D. Cal. April 25, 1989) (finding that an unauthorized script for a potential sequel to the *Rocky* movies violated the copyright to the characters in the *Rocky* franchise held by Sylvester Stallone).

9. See generally *Salinger v. Colting (Salinger I)*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (granting injunction enjoining the sale of *60 Years After* as an unauthorized derivative work based on *Catcher in the Rye*, regardless of the originality of contributions by the author of *60 Years After*).

10. John David California is the pseudonym of author Fredrik Colting. *Id.* at 253.

copyright.¹¹ In *60 Years Later*, the author certainly used the Holden Caulfield character from *Catcher in the Rye*, but its literal borrowing was otherwise largely limited to the use of certain (common and non-protectable) catchphrases or idioms related to the Caulfield character.¹² Despite the defendant's claims of fair use and First Amendment protection, the federal district court ruled in Salinger's favor and issued an injunction to enjoin publication and distribution of *60 Years Later* after finding that Salinger was likely to prevail on the merits of the case.¹³ On appeal, the Second Circuit affirmed the holding.¹⁴ In the process, both the district court and Second Circuit showed little compunction about issuing what amounted to a prior restraint against speech—a step that would be strongly discouraged in virtually any other context.

The result of *Salinger* is no outlier. Indeed, it is typical. Almost 15 years ago, Mark Lemley and Eugene Volokh published their seminal analysis of copyright exceptionalism, *Freedom of Speech and Injunctions in Intellectual Property Cases*.¹⁵ As Lemley and Volokh argued, courts have historically disfavored any prior restraint of speech¹⁶ and, in a wide array of cases ranging from libel to obscenity claims, have regularly denied applications for preliminary injunctions to suppress even the clearest violations of the law.¹⁷ All the while, however, courts have shown little hesitation in granting preliminary injunctions in cases of copyright infringement, even when the injunction amounts to a clear prior restraint of speech.¹⁸ Thus, courts are deeply reluctant to enjoin hateful rallies that may stir the most painful emotions and incite violence;¹⁹ they hesitate to stop the dissemination of vile

11. See generally *id.*

12. *Id.* at 263–67.

13. *Id.* at 269.

14. See *Salinger v. Colting (Salinger II)*, 607 F.3d 68, 83–84 (2d. Cir. 2010) (affirming district court's finding that Salinger was likely to prevail on merits but remanding case for full consideration of factors from *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), before injunction could issue).

15. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

16. *Id.* at 156–57.

17. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (deeming prior restraints invalid in all but the most extreme circumstances).

18. See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1406 (9th Cir. 1997) (enjoining publication of *The Cat NOT in the Hat!*, a satirical examination of the OJ Simpson trial based on Dr. Seuss's *The Cat in the Hat*), *cert. dismissed*, 521 U.S. 1146 (1997); *Warner Bros. Entm't Inc., v. RDR Books*, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008) (enjoining publication of *The Lexicon*, an encyclopedia of all things *Harry Potter*); *Twin Peaks Prod., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993) (finding that defendants' book about television program *Twin Peaks* infringed copyrights in teleplays for series); *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 268 (S.D.N.Y. 1997) (holding that *Seinfeld Aptitude Test*, trivia book on all things *Seinfeld*, constituted unauthorized derivative work that infringed Castle Rock's copyright in *Seinfeld* television program).

19. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (invalidating, on First Amendments grounds, a St. Paul ordinance that banned cross burning); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (protecting, under the First Amendment, the right of neo-Nazis to march and spread their message of hate at a rally in the town of Skokie, Illinois).

untruths that may irreparably injure someone's reputation;²⁰ and they may not prevent the publication of classified military documents whose release may cost American lives.²¹ Yet, they have no problem issuing a court order that, if violated, would haul individuals to hoosegow for simply printing a work of complete fiction, such as *60 Years Later*, that, in their view, likely infringes someone's copyright. Lemley and Volokh, among others, have questioned this trend and argue that, even though copyright is characterized as a form of property, courts should not continue to overlook the important expressive interests at play in the use of copyright materials.²²

To be sure, scholars have questioned the expansion of copyright law at the expense of expressive interests for at least three decades.²³ As a result, there is no shortage of scholarship on the tension between copyright and the direct exercise of free speech rights.²⁴ But, despite the exhaustive work done on the link between copyright and expressive freedoms, there are still uncharted areas. This Article seeks to explore one such area: the use of copyright law as a vehicle to silence one's cultural or political opponents.

As this Article argues, copyright law has become the weapon *par excellence* of the 21st-century censor. Fueled by a desire to prevent one's perceived foes from making certain types of speech, an individual has no better friend than copyright law. Copyright violations are ubiquitous. Liability can be massive. Copyright suits are difficult to fend off. And, perhaps most saliently to the sophisticated censor, the federal courts have almost systematically immunized infringement suits from explicit First Amendment defenses. Whether it is a creationist group using the Digital Millennium Copyright Act ("DMCA") to force the takedown of critical materials put online by evolutionists;²⁵ abortion-rights activists bringing infringement litigation to enjoin speech by pro-life forces;²⁶ military personnel using copyright claims to suppress photographs documenting human-rights abuses;²⁷ or a political commentator suing to vindicate the exclusive rights to

20. See, e.g., *Near*, 283 U.S. at 723 (rejecting, on First Amendment grounds, an attempt to enjoin publication of anti-Semitic and libelous news article).

21. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (rejecting, under the First Amendment, a government attempt to enjoin publication of the Pentagon Papers).

22. Lemley & Volokh, *supra* note 15, at 182–85.

23. David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 281 (2004) ("For over thirty years scholars have suggested ways judges might use the First Amendment to limit Congress's power to grant authors exclusive rights in their works.").

24. See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

25. Sam Bayard, *Creationist–Atheist Brouhaha over DMCA Takedown Notices*, DIGITAL MEDIA L. PROJECT (Sept. 20, 2007), <http://www.dmlp.org/creationist-atheist-brouhaha-over-dmca-take-down-notices>.

26. *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012).

27. *Four Navy SEALs v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005).

recordings of his shows as a means of suppressing criticism of his hate-filled rant,²⁸ examples of this disingenuous use of copyright law abound.

In the past century, courts have carefully developed strong First Amendment checks to prevent parties from imposing tort liability against their ideological adversaries when they exert their expressive rights. Now, would-be censors have converted losing tort claims, such as defamation,²⁹ false light,³⁰ invasion of privacy,³¹ and intentional infliction of emotional distress³² (immunized, as they are, by the First Amendment), into viable copyright infringement claims that punish their foes for legitimate speech-related activity. These censorious efforts troublingly utilize the apparatus of the state (via a state-granted monopoly) to silence and suppress disfavored speech.

In surveying the growing use of copyright law for the purposes of censorship, Part I of this Article identifies the problem and examines how this trend undermines both the vitality of our copyright regime and our public discourse. Drawing on a panoply of recent examples from the federal courts, this Article demonstrates how, increasingly, cynical invocations of copyright law have become the preferred vehicle for would-be censors to silence their opponents' viewpoints—often on important cultural and political issues—and to suppress information they would rather hide from public scrutiny. Courts themselves have not been oblivious to the challenges posed by such censorious suits. Part II, therefore, considers how federal judges have attempted to deal with the issue through the use of procedural machinations, including early adjudication through Rule 12 motions, to mitigate the adverse impact of such disputes on litigants and the public interest. However, as Part II argues, these efforts have fallen short. Limitations on the employment of Rule 12, the factual nature of the (affirmative) fair-use defense, inconsistent application of fees standards, and the availability of extra-judicial relief under the DMCA's takedown regime have all combined to render extant judicial responses ineffective.

As such, Part III contemplates how the law might better respond to the growing cynical use of copyright to censor speech on matters of political import and public interest. This Part of the Article takes particular care in defining the issue, lest the ultimate remedies to it overreach and adversely impact legitimate copyright-enforcement efforts. An exegesis of the relevant case law indicates that two traits typically help distinguish censorious copyright litigation from appropriate (even if ill-advised)³³ enforcement by content owners. In censorious cases, (1) a

28. *Brave New Films 501(C)(4) v. Weiner*, No. C 08-04703 SI, 2009 WL 1622385, at *1 n.1 (N.D. Cal. June 10, 2009); *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008).

29. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

30. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967).

31. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

32. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

33. For example, there was nothing especially censorious about the RIAA's high-profile campaign against file sharing by individuals in the early days of peer-to-peer technology. However, some might

plaintiff lacks a legitimate economic motivation to preserve its rightful market for the licensing of its copyrighted works; and (2) a defendant's use of the copyright work advances the expression of basic facts or commentary on matters of public concern. On the legislative front, the Article considers the adoption of a federal anti-SLAPP³⁴ statute that would apply to litigation characterized by these two features. The Article also contemplates the potential value in reforming Section 512(f)'s cause of action for abuse of the DMCA takedown regime. More fundamentally, the Article advocates judicial development of a "*New York Times v. Sullivan*"-style check on infringement liability whenever a suit meets the two criteria (plaintiff's lack of legitimate economic interest and defendant's advancement of certain speech interests) that characterize censorious litigation. Ultimately, this Article posits that copyright law should vindicate the appropriate economic interests of rightsholders, not serve as a transparent proxy to suppress the expressive activities of cultural or political opponents.

II. THE RISING TIDE OF CENSORIOUS USES OF COPYRIGHT LAW

The censorious use of copyright law is frighteningly easy. We begin with two hypothetical examples that demonstrate how putative rightsholders can readily make disingenuous and strategic use of copyright law to effectively suppress disfavored speech in dramatic ways. Though the hypotheticals may seem fanciful at first, we will see how the concepts and facts in these illustrations have played out in numerous actual cases in recent years. As these whimsical and real examples both demonstrate, the censorious use of copyright law is a growing problem that threatens both to subvert basic expressive freedoms and undermine the proper functioning of the copyright regime.

A. COPYRIGHT AND CENSORSHIP: TWO HYPOTHETICALS

1. How Copyright Law Can Make All of Your Online Reviews Positive

With the growth of such websites as Yelp! and Angie's List, individuals can now access reviews of professional service providers in a way that is easier, timelier, and more direct than ever before. Such review websites are not without their problems.³⁵ However, they can function as valuable repositories of consumer

argue that the litigation was ill advised, given its high costs (both economically and in terms of the fallout in the court of public opinion). See Matthew Sag, *Piracy: Twelve-Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 133 (2006) (noting how "[n]umerous commentators have warned the recording industry that suing its own customers is not a winning business strategy, and that it is risking both a normative and technological backlash"). For further discussion on the distinction between censorious and non-censorious (though arguably ill-advised) copyright litigation, see *infra* Part IV.A.

34. SLAPP is an acronym for "Strategic Lawsuit Against Public Participation." See *infra* text accompanying note 149.

35. See, e.g., *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1125 (9th Cir. 2014) (noting but rejecting a claim for unfair competition against Yelp! for its alleged practices of manipulating user reviews to induce

information and can serve as a way to increase market efficiency and to reward effective service providers and punish poorer ones. But let's say a doctor—one with seriously subpar medical skills—does not like receiving negative reviews online. After all, negative reviews—even if wholly truthful or mere expressions of opinion—are not good for business. Under the First Amendment, however, there is little the doctor can do about any such reviews that patients may post online, so long as they do not rise to the level of libel. In fact, besides protecting the expressive rights of the patients, the First Amendment serves a valuable public interest here by enabling consumers to obtain intelligence about medical service providers. But the doctor wants to remain in business, and the negative reviews are a real thorn in his side.

Thankfully for the doctor—but not for his patients and the public weal—copyright law provides a potential way around the “problem.” Following the advice of an intellectual property attorney,³⁶ the doctor amends the terms of his standard patient-intake agreement (which virtually no one reads and almost everyone signs). A new provision in the agreement reads as follows:

For good and valuable consideration, including but not limited to the provision of medical services, receipt of which is hereby acknowledged, the undersigned, Patient X (“Assignor”), hereby sells, assigns, transfers, and sets over and agrees to sell, assign, transfer and set over unto Dr. Y and his successors, licensees and assigns (“Assignee”), in perpetuity, exclusively and irrevocably, free and clear of any lien or obligation, and irrespective of any work made-for-hire implications, all rights (whether now known or hereinafter devised or invented), title and interest in and to any and all reviews Assignor may write that regard or relate to Dr. Y's provision of medical services (the “Copyrighted Works”), including, without limitation, any and all intellectual property rights and copyrights therein (including any and all registrations, renewals, extensions and revivals thereof) in the United States and throughout the rest of the world, together with any and all existing or future claims and causes of action against third parties.

With this simple provision in place, the doctor has a potentially potent weapon to fight (completely truthful and fairly reflective) reviews that are otherwise wholly protected under the First Amendment. If a patient places a negative review on an online website, the doctor can legitimately claim that he is the copyright holder to said review.³⁷ As such, he has exclusive control over, *inter alia*, the review's

business to buy advertising and creating its own negative reviews for businesses who decline to advertise with it).

36. I am grateful to Adam Losey for providing the genesis of this idea.

37. This example is not merely hypothetical. Using form contracts provided by an entity known as Medical Justice, professionals such as Dr. Stacy Makhnevich, a dentist practicing under the sobriquet the “Classical Singer Dentist of New York,” have attempted to do just such a thing. Dr. Makhnevich's standard patient in-take agreement—ironically titled a “Mutual Agreement to Maintain Privacy”—

reproduction, distribution, and public display.³⁸ He can therefore serve a DMCA takedown notice to any website upon which the patient has placed the review and effectively force its removal.³⁹ Of course, there are arguments that such a provision may not be enforceable as a matter of public policy or on other grounds. For example, California recently passed a law preventing businesses from contracting with customers to prevent them from posting negative reviews on websites such as Yelp.⁴⁰ But it is worth noting that it took a specific law to outlaw the practice in California, which suggests that the enforceability of such provisions was at least viable prior to the passage of the new legislation (and continues to remain viable in other states without such an express ban). Moreover, a “neutral” copyright transfer pertaining to all reviews (both good or bad) would presumably get around the ban in California and, on top of that, could be deemed unimpeachable on preemption grounds.⁴¹

Thus, with the doctor’s new patient-intake agreement, copyright law has taken away what the First Amendment has given.⁴² And, as a society, we are poorer for it. Legitimate consumer speech related to the marketplace can be squelched by enterprising service providers who know their intellectual property law well

requires that patients agree not to “denigrate, defame, disparage, or cast aspersions upon the Dentist” and, should they write an online review about the dentist, the copyright thereto would be transferred to the dentist. When her patient, Robert Lee, posted negative reviews on Yelp and DoctorBase about her, she successfully used DMCA takedown notifications to remove them. She also threatened copyright infringement litigation against Lee. Ultimately, Lee sued her and Medical Justice instead, claiming, *inter alia*, that his reviews were protected under the fair-use doctrine. Neither Medical Justice nor Dr. Makhnech defended the suit so no decision on the merits was reached. See Joe Mullin, *Dentist Who Used Copyright to Silence Her Patients Is on the Run*, ARS TECHNICA (July 28, 2013, 5:00 PM), <http://arstechnica.com/tech-policy/2013/07/dentist-who-used-copyright-to-silence-her-patients-is-on-the-run/>.

38. See 17 U.S.C. § 106 (Supp. I 2013).

39. To maintain their safe harbor from copyright liability for user-generated content, an online service provider such as Yelp or Angie’s List must meet the requirements of 17 U.S.C. § 512(c) (Supp. I 2013), which requires them to, *inter alia*, remove access to materials claimed to be infringing upon receipt of a takedown notice under 17 U.S.C. § 512(c)(3). It is worth noting that the doctor could also, theoretically, even sue his own patient—not for defamation, of course, but for copyright infringement—for placing the review online.

40. See Niraj Chokshi, *California Protects the Right to Yelp Without Penalty*, WASH. POST: GOVBEAT (Sep. 10, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/10/california-protects-the-right-to-yelp-without-penalty/>.

41. See 17 U.S.C. § 301 (Supp. I 2013).

42. To be sure, contract law (and the courts’ regular willingness to enforce one-sided terms and conditions in contracts of adhesion with consumers) definitely shoulders some of the blame, but the problem is still, fundamentally, a copyright one. Copyright damages (and not contract damages) are what give teeth to the threat of liability. In addition, Internet Service Providers (“ISPs”) may have no contractual relationship with the doctor but nevertheless would face liability under this scenario if they do not remove the allegedly infringing reviews and that liability stems from copyright, not contract, law. On top of that, as explored *infra*, the problem also stems from the particular nature of the DMCA takedown regime, which incentivizes ISPs to immediately take and keep down allegedly infringing content in order to maintain their safe harbor (and avoid the specter of copyright infringement, not contract breach, liability). As such, the negative reviews will likely be removed without question—a result dictated by the DMCA, not contract law. See *infra* Part III.B

enough to take advantage of this potential circumvention of expressive rights by integration of such a provision into their terms-of-service agreements.

2. How Copyright Law Can Shut Down the Activities of Overzealous Activists

Consider an example that is more politically charged and relates, arguably, to the type of core speech that has traditionally received the greatest protection under the First Amendment. Imagine a doctor providing family planning services who, in that capacity, offers abortions to patients who wish to terminate their pregnancies. The doctor's practice is located in an area with a sizeable and vocal pro-life presence. Besides seizing upon their First Amendment rights to protest the clinic by carrying signs on the public sidewalks surrounding it, a group of the pro-life activists has also started a website that provides information about their views, including why they believe abortion is a form of murder and why *Roe v. Wade* was wrongly decided. On one section of their website, the activists provide a complete listing of doctors in the county who provide abortion services. The page contains the photographs, names, and addresses of these doctors and exhorts visitors of the site to "tell the doctors how you really feel about their murderous activities." With the website's exposure of personal identification materials and its potentially nefarious entreaty, the doctor has reason to believe that her safety, and that of her family, may be in jeopardy. Naturally, she considers her legal options to see if she might force the site's shutdown or, at the very least, removal of the most menacing materials.

Not surprisingly, the First Amendment limits her options and presents a challenge to any efforts to shut down the website, as it provides speakers with wide immunization from liability for all but the most extreme speech. The usual exceptions to the First Amendment may not apply to the speech here. There is nothing fraudulent or untruthful about the speech. And though the website may drive individuals with antisocial inclinations towards acts of violence, the commentary on the site may not meet *Brandenburg's* strict standard (requiring intent, imminence, and likelihood) before the government can impose liability for incitements to lawlessness.⁴³ Finally, as offensive, dangerous, and irresponsible as they might be, the menacing comments on the website relate to core political speech on a heated issue—the type of expressive activity for which the First Amendment traditionally provides the greatest protection.⁴⁴ In fact, in a related

43. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that speech advocating the use of force or crime can only be proscribed if the speaker, with intent, utters speech "directed to inciting or producing imminent lawless action" and the speech "is likely to incite or produce such action").

44. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1099 (9th Cir. 2002) (Kozinski, J., dissenting) ("[P]ublic speeches advocating violence' [are given] substantially more leeway under the First Amendment than 'privately communicated threats.'"); see also HENRY H. PERRITT, JR., *LAW AND THE INFORMATION SUPERHIGHWAY: 2004 CUMULATIVE SUPPLEMENT* 93 (2d ed. 2004) ("[S]peech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment.").

(albeit more extreme) scenario, the Ninth Circuit initially found that using a website to disclose the names and addresses of abortion providers and offer rewards to those who were able, by nonviolent means, to stop providers from continuing to perform abortions constituted a form of protected First Amendment speech. The court reached this result even though the site may have implicitly encouraged violence against the doctors through its use of “Wanted”-styled bulletins and “Guilty” posters called “Nuremburg Files” that linked the doctors to the perpetrators of the Holocaust.⁴⁵ As long as such a site does not contain imminent and direct exhortations to specific acts of violence, free speech rights trump the potential threat to individual safety.

Thus, the activities of the abortion activists in our hypothetical remain protected under the First Amendment. But, there is a curious way out of this apparent dilemma for the doctors. So that pro-life activists can better identify these medical professionals, the site naturally features photographs of the doctors. The photographs, unsurprisingly, are shots taken from the doctors’ own marketing materials and websites. The site features 200 such photographs of doctors from around the country. These photographs enjoy protection under copyright law. Thus, by reproducing, distributing, and publicly displaying these photographs without the authorization of copyright holders, the pro-life activists have committed 200 acts of copyright infringement. Each act of infringement, if willful, is potentially subject to the imposition of up to \$150,000 in statutory damages and the recovery of attorneys’ fees.⁴⁶ Of course, one might argue that the doctors got lucky in that the website owners made unauthorized use of their photographs. But, in order to attack one’s adversaries, one often makes use of those adversaries’ intellectual property.⁴⁷ That use could consist of doctor photographs, as here, or it could consist of other materials, such as informational videos, as in (the very real case of) *Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform*.⁴⁸

All of a sudden, in our hypothetical, the activists have exposed themselves to liability in excess of \$30 million, and the doctors (assuming they own or obtain the copyright or exclusive license to their photographs) can sue the activists for willful copyright infringement. This is the case even though the use of the photographs

45. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 244 F.3d 1007, 1012 (9th Cir. 2001), *rev’d en banc*, 290 F.3d 1058 (9th Cir. 2002) (narrowly reversing by a 6–5 margin).

46. Of course, to be eligible for statutory damages, the photographs need be timely registered with the Copyright Office. *See* 17 U.S.C. § 412 (Supp. I 2013).

47. The ease and ubiquity of infringement, the existence of digital fingerprints that evidence and memorialize infringement, and the draconic remedies for copyright infringement combine to allow aggrieved parties wanting to censor their adversaries to gin up a viable and potentially lethal infringement claim.

48. *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012). In the suit, the Northland Family Planning Clinic, an abortion provider, sued the Center for Bio-Ethical Reform for copyright infringement for making a video that used excerpts from Northland’s own informational abortion video interspersed with graphic images of bloody fetuses, citations to scripture, and jarring music. *Id.* at 966–67.

was related to the activists' exercise of their speech rights. In fact, one could argue there is no better way for the activists to effectuate their message than by making the identities of the doctors as visible as possible with the use of their images. While the activists may draw on these circumstances to build an affirmative defense of fair use, the success of such a defense is not remotely assured. Moreover, there is no Rule 11 basis to expurgate the suit—although it is a cynical means to route around the First Amendment limitations that would preclude any non-copyright basis to shut down the activists' website, the claims clearly meet the prima facie elements for infringement liability. And if plaintiffs wish to hold out for an exorbitant sum of money to vindicate their copyright interests, the law (at least in some circuits) actively encourages their right to do so: plaintiffs can ignore reasonable offers of judgment under Rule 68, in some circuits, which only shift costs, not fees, in copyright matters.⁴⁹ And, to avoid an adverse fees judgment, the plaintiffs can always place the copyrights to the photographs in a judgment-proof LLC with no other assets.⁵⁰ In short, the aggrieved doctors now have the necessary leverage to get what they want—removal of content on the website that would otherwise be protected under the First Amendment—and would not enjoy such leverage without resort to copyright law.

B. COPYRIGHT AND CENSORSHIP: THE GROWING THREAT

Our abortion hypothetical features a sympathetic plaintiff—after all, she seeks to impose liability on those who might be causing a legitimate threat to her safety.

49. Under Rule 68, a defendant can make an offer of judgment to a plaintiff on a claim and, if the plaintiff declines the offer of judgment and the ultimate “judgment that the offeree finally obtains is not more favorable than the unaccepted offer,” then “the offeree must pay the costs incurred after the offer was made.” FED. R. CIV. P. 68. If the underlying statute giving rise to the cause of action defines fees as a species of costs, the Supreme Court has held that fees shift for Rule 68 purposes. See *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (allowing an award of fees under Rule 68 to a non-prevailing party when fees are defined as costs in the underlying statute). In these circumstances, courts award fees to a non-prevailing party when the prevailing party earns at trial less than the offer of judgment. See *id.* Since it states that “the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs,” Section 505 of the Copyright Act appears to qualify for *Marek* treatment and the shifting of fees under Rule 68. 17 U.S.C. § 505 (Supp. I 2013). Yet the various circuit courts are split on this issue. Some courts have shifted awards of fees to non-prevailing defendants when a judgment ultimately obtained by the plaintiff is not more favorable than the unaccepted offer. See, e.g., *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (holding that a Rule 68 award of costs includes attorneys’ fees, even if the defendant is not the prevailing party); *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 361–62 (S.D.N.Y. 2006) (holding that a Rule 68 award of costs includes attorneys’ fees, even if the defendant is not the prevailing party). Others have refused. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1048–51 (9th Cir. 2011); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 645–47 (7th Cir. 2001) (holding that, for a claim of copyright infringement, “only prevailing parties can receive attorney’s fees pursuant to Rule 68”). In the latter circuits, plaintiffs are therefore not incentivized to accept reasonable settlement offers out of fear of later facing an adverse fees judgment.

50. Many copyright holders now move their copyrights into special purpose LLCs whose sole function is litigating infringement claims. These LLCs are frequently undercapitalized. Thus, a defendant may be limited in collecting a judgment for attorneys’ fees against one of these LLCs, especially if the copyright’s own value is de minimis.

But, if we believe she should be provided remedies at all, it is not because of a copyright infringement. The copyright remedy is sought only because of its power and its broad immunization from First Amendment defenses. In cases that are far less sympathetic, and on both sides of political aisle, plaintiffs are increasingly turning to copyright as an end-run around the First Amendment. With alarming regularity, overeager copyright enforcement has increasingly become the preferred legal tool of the modern censor.

The copyright-as-censorship threat is not just the stuff of seemingly wild hypotheticals by an imaginative law professor. Just a few years ago, conservative talk show host Michael Savage sued the Council on American–Islamic Relations (“CAIR”), an advocacy group whose mission is to promote understanding of Islam and to protect the civil liberties of Muslim-Americans.⁵¹ CAIR had excerpted approximately four minutes of a two-hour Savage broadcast without authorization in a commentary piece calling attention to and protesting Savage’s invective.⁵² During that 2007 broadcast, Savage had “declared the Quran to be ‘a book of hate,’ [and] denigrated Muslims as ‘throwbacks’ who should be deported ‘without due process,’” declaring that “I don’t want to hear one more word about Islam.”⁵³ Savage then told Muslims to “[t]ake your religion and shove it up your behind. I’m sick of you,” and he exhorted his fans to “[s]peak it out at the supermarket! Tell them what you think of Islam. Tell them what you think of Muslims. Tell them what you think of these things.”⁵⁴

Savage’s religious invective drew widespread criticism and, to draw further attention to his controversial statements, CAIR appended one of its own internet articles with excerpts of the broadcasts.⁵⁵ Entitled *National Radio Host Goes on Anti-Muslim Tirade*, the article critiqued Savage’s vitriol and encouraged “radio listeners of all faiths to contact companies that advertise on Michael Savage’s nationally syndicated radio program to express their concerns about the host’s recent anti-Muslim tirade.”⁵⁶ In short, the use of Savage’s broadcast appeared to be a quintessential form of commentary and criticism, immunized from liability both under the strictures of copyright law’s fair-use doctrine and the First Amendment.⁵⁷ Savage, however, felt that CAIR had illicitly impinged on his

51. *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008).

52. *Id.*

53. Plaintiff Brave New Films’ Notice of Motion and Motion for Partial Summary Judgment at 1, *Brave New Films 501(C)(4) v. Weiner*, No. CV 08-04703 SI, 2009 WL 1622385 (N.D. Cal. June 10, 2009) No. CV 08-04703 SI, 2009 WL 527974.

54. *Id.* at *3.

55. *National Radio Host Goes on Anti-Muslim Tirade*, COUNCIL ON AM.–ISLAMIC RELATIONS (Nov. 1, 2007), <http://www.cair.com/press-center/press-releases/2768-national-radio-host-goes-on-anti-muslim-tirade.html>.

56. *Id.*

57. *See Savage*, 2008 WL 2951281, at *6.

exclusive dominion over his intellectual property; he therefore sued the organization for copyright infringement in a California federal district court.⁵⁸

To its credit, the court quickly dispensed with the suit by granting a motion for judgment on the pleadings on the basis that the fair-use doctrine protected CAIR's actions as a matter of law.⁵⁹ However, CAIR was left absorbing the costs of defending a meritless suit because the court declined to award it fees.⁶⁰ Although the court admitted that "[p]laintiff's Copyright Act claim was 'never strong and was litigated anemically,'"⁶¹ the court also denied defendant's request for an award of fees.⁶² The court affirmed this opinion upon a motion for reconsideration.⁶³

But by denying CAIR's motion for fees, the court failed to deter overreaching claims. So it should not be surprising that, shortly thereafter, Savage attempted to silence other groups by using similarly tenuous claims over the same piece of intellectual property.⁶⁴ This time Savage targeted Brave New Films, which had incorporated one minute of Savage's comments—only a quarter of CAIR's use—as part of a media piece it had prepared on his anti-Muslim views and had posted on YouTube.⁶⁵ Despite the court's ruling of fair use over the exact same footage in the CAIR case, Savage's company—Original Films—claimed that Brave New Films had infringed its rights.⁶⁶ The company filed a takedown notice with YouTube pursuant to the DMCA.⁶⁷ YouTube removed the video just after Brave New Films took out a full-page advertisement in the *New York Times* with a link to the video.⁶⁸ The blow to Brave New Films was significant; the takedown thoroughly neutered the power of its concentrated (and expensive) outreach campaign. Although Brave New Films ultimately sued so that it could have its use of the video restored, the damage had

58. *Id.* at *2.

59. *Id.* at *15.

60. *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-06076 SI, 2009 WL 188848, at *1 (N.D. Cal. Jan. 26, 2009) (denying CAIR's request for fees).

61. *Id.* (quoting *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-06076 SI, 2008 WL 4890892, at *2 (N.D. Cal. Nov. 12, 2008)).

62. *See id.*

63. *Id.*

64. Joan Brunwasser, *Brave New Films Sues Shock Jock Michael Savage*, OPEdNEWS (Oct. 10, 2008, 4:19 PM), <http://www.opednews.com/articles/Brave-New-Films-Sues-Shoc-by-Press-Release-081010-626.html>.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See Plaintiff Brave New Films' Notice of Motion and Motion for Partial Summary Judgment at *7, Brave New Films 501(C)(4) v. Weiner*, No. CV 08-04703 SI, 2009 WL 1622385 (N.D. Cal. June 10, 2009) No. CV 08-04703 SI, 2009 WL 527974. ("As a result of that takedown notice, YouTube removed not only 'Michael Savage Hates Muslims' from Brave New Films' channel, but disabled Brave New Films' entire channel at a critical time in the presidential election cycle, rendering unavailable a large number of videos that expressed important political views, and just as Brave New Films ran a full-page ad in the *New York Times*.").

already been done. Savage's disingenuous and abusive use of copyright law silenced his critics at precisely the right moment.⁶⁹

Copyright law has also made an unusual and unexpected appearance at the front lines of the so-called "culture war[s]"⁷⁰ in recent years. For example, both sides of the gay marriage debate have actively taken to the use of copyright law to censor the perspectives of their political foes. In 2009, Stand for Marriage Maine ("SFMM"), a group supporting a ballot measure to overturn Maine's legalization of same-sex marriage, put together a campaign advertisement shortly before the November 3rd vote on the issue. In the spot, SFMM used a 20-second excerpt from a National Public Radio ("NPR") story to advance SFMM's view that legalization of same-sex marriage could result in children being taught about gay sex in schools.⁷¹ To the disappointment of some of its own political allies,⁷² NPR successfully brought a DMCA claim to have the spot removed from YouTube and other Internet sites, effectively eliminating the ability of the spot to gain views on the eve of the election.⁷³

NPR's actions mimicked those of some organizations against same-sex marriage, who have acted with similarly disingenuous appeals to copyright law. In 2009, the National Organization for Marriage ("NOM"), a non-profit dedicated to the fight against legalization of same-sex marriage in the United States, launched a \$1.5 million advertising campaign entitled *Gathering Storm* in key battleground states.⁷⁴ When audition footage from *Gathering Storm* leaked, MSNBC's Rachel Maddow played excerpts on her talk show to criticize the underlying assumptions

69. See Stipulation and Order Dismissing Complaint at *2, *Brave New Films 501(C)(4) v. Weiner*, No. 308CV04703 2009 WL 3413839 (N.D. Cal. Sept. 11, 2009).

70. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

71. Ben Sheffner, *NPR Makes Copyright Claim over Anti-Same-Sex Marriage Ad; Another Political Fair Use Fight*, COPYRIGHTS & CAMPAIGNS (Oct. 21, 2009, 8:23 PM), <http://copyrightsandcampaigns.blogspot.com/2009/10/npr-makes-copyright-claim-over-anti.html>.

72. For example, *Queerty*, a leading gay-rights blog, bemoaned that no matter how repulsive SFMM's views were, NPR's tactic was regrettable for its lack of respect for free speech and unfettered political debate. See *Stand for Marriage Maine Is Hateful, But They Should Be Able to Use NPR's Report*, QUEERTY (Oct. 21, 2009), <http://www.queerty.com/stand-for-marriage-maine-is-hateful-but-they-should-be-able-to-use-nprs-report-20091021/>.

73. Even if someone accused of uploading infringing content on a user-generated content site that receives a DMCA takedown notification fights the notification with a counter-notification under 17 U.S.C. § 512(g), it takes typically 10 to 14 business days for the materials to be restored—well past Election Day. See Sheffner, *supra* note 71 ("NPR's takedowns are especially harmful because even if SFMM sends DMCA counter-notices, sites generally won't restore the videos until 10–14 business days have elapsed, in order to maintain their safe harbor claim. Thus the videos won't reappear until well after the Nov. 3 election. So NPR's copyright claims, even if meritless, will achieve their intended, speech-silencing effect." (internal citation omitted)). Plus, even after a counter-notification, the filer of the original DMCA takedown notice can file suit and have the materials permanently removed, pending resolution of the civil action.

74. Kate Pickert, *A Storm Over Gay Marriage*, TIME MAG. (Apr. 10, 2009), <http://content.time.com/time/nation/article/0,8599,1890523,00.html>.

and merits of the campaign.⁷⁵ NOM promptly claimed that Maddow had infringed its copyrights to the footage and successfully served takedown notices to YouTube to remove any “infringing” clips of Maddow’s show.⁷⁶

All the while, NOM faced copyright issues of its own. Celebrity-news blogger Perez Hilton, who has been on the receiving end of numerous copyright infringement suits himself,⁷⁷ filed DMCA takedown notices to have copies of the actual *Gathering Storm* advertisements removed from YouTube because they drew on three seconds of footage from his personal video blog.⁷⁸ NOM had used the footage—in which Hilton attacked Miss California Carrie Prejean for her response to his question about same-sex marriage at the 2009 Miss USA Competition—to argue that same-sex marriage proponents were silencing traditional-marriage advocates on illegitimate grounds.⁷⁹

From controversial issues ranging from same-sex marriage and abortion to evolution and creationism, this pattern of copyright abuse has repeated itself on both sides of the political aisle. As pro-choice activists have attempted to silence pro-life speech with disingenuous copyright infringement suits,⁸⁰ creationists have tried to stifle evolutionist critiques of their activities with similarly cynical claims.⁸¹ Instead of engaging in robust free speech to convince the public of the merits of their respective views, organizations at the front lines of leading cultural and political issues have waged a proxy war against each other through the prism of copyright law by raising infringement claims as a means to silence their opponents.

75. Kevin Poulsen, *Anti-Gay-Rights Group Gets MSNBC Clip Pulled from YouTube*, WIRED (Apr. 13, 2009, 2:53 PM), <http://www.wired.com/2009/04/anti-gay-rights/>.

76. *Id.*

77. See, e.g., *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2007). As Ben Sheffner has argued, “Perez Hilton (né Mario Lavandeira) may be the unlikeliest copyright enforcer on earth. The blogger rose to fame by posting photos of celebrities—without permission from the copyright owners—and defending himself from the inevitable lawsuit by claiming that his crude scribbling of penises, cocaine, and semen on the subjects’ faces rendered his conduct fair use.” Ben Sheffner, *Perez Hilton, Copyright Copy? Blogger Issues Takedown Notice over Anti-Gay-Marriage Ad*, COPYRIGHTS & CAMPAIGNS (May 1, 2009, 9:18 AM), <http://copyrightsandcampaigns.blogspot.com/2009/05/perez-hilton-copyright-cop-blogger.html>.

78. Sam Bayard, *Perez Hilton Sends DMCA Takedown Over Anti-Gay-Marriage Ad*, DIGITAL MEDIA L. PROJECT (May 4, 2009), <http://www.dmlp.org/blog/2009/perez-hilton-sends-dmca-takedown-over-anti-gay-marriage-ad>.

79. Perez Hilton called Prejean a “dumb bitch.” *Id.*

80. See *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012) (ultimately granting summary judgment to defendants on the basis of fair use); *supra* note 48 and accompanying text; see also Rebecca Tushnet, *Abortion Criticism as Fair Use: Parody/Satire Mucks up the Analysis Once Again*, REBECCA TUSHNET’S 43(B)LOG, (June 28, 2012), <http://tushnet.blogspot.com/2012/06/abortion-criticism-as-fair-use.html>.

81. In 2007, when a group of atheists operating as the Rational Response Squad (“RRS”) used seminar materials from Creation Science Evangelism (“CSE”) to prepare video criticisms of the CSE’s teaching on creationism, CSE cried foul through claims of copyright infringement. See Bayard, *supra* note 25. RRS initially had all of its videos removed and account banned from YouTube as a result. *Id.* Ironically, through its terms and conditions, CSE’s own website appeared to have waived any copyright interest to its videos by claiming the videos were “not copyrighted” and encouraging their dissemination. *Id.*

As one can safely conclude, this is hardly what the Framers of the Constitution had in mind when they envisioned how political differences might be resolved in the 21st century.

C. *COPYRIGHT AS CENSORSHIP AND THE TENSION BETWEEN INTELLECTUAL PROPERTY AND THE FIRST AMENDMENT*

Thus far, we have only talked about the ability of putative rightsholders to use copyright law as a vehicle of censorship. The issues raised here are not unique to copyright law and, in fact, extend potentially to all aspects of our intellectual property regime. For example, the property interests that rightsholders have in logos and brands (i.e., trademark law) and in names, voices, and likenesses (i.e., right-of-publicity law) regularly clash with expressive interests. As Eric Goldman has bemoaned, putative rightsholders have increasingly misused intellectual property interests in trademark and publicity rights to squelch disfavored speech. Referring to publicity rights, Goldman has observed that its “doctrinal boundaries are so amorphous/shapeless that plaintiffs often feel they’ve got a good case when . . . the defendant makes a unwanted reference to a person.”⁸² Goldman also points to the “larger trend of plaintiffs misusing IP laws to scrub online content,”⁸³ including through the cynical invocation of trademark law.

Thus, censorship issues can arise in all of our intellectual property regimes, where speech activities are potentially converted into property infringements. However, the cynical circumvention of First Amendment protections is especially pronounced, troubling, and pressing in copyright jurisprudence for several reasons.

First, the First Amendment defenses available in copyright law are far less generous than those developed in both right-of-publicity and trademark jurisprudence.⁸⁴ Right-of-publicity statutes typically contain absolute exemptions for certain types of activities, such as non-commercial use or news reporting. Moreover, states such as California have adopted very broad transformative-use defenses to right-of-publicity claims.⁸⁵ Similarly, trademark law has developed the *Rogers v. Grimaldi*⁸⁶ test, which strongly protects the unauthorized use of trademarks in any artistic work. Defendants in trademark cases also enjoy various

82. Eric Goldman, *Siblings Use Publicity Rights to Try to Block Sister from Blogging about Mom—In re Reynolds*, TECH. & MKTG. L. BLOG (April 27, 2014), <http://blog.ericgoldman.org/archives/2014/04/siblings-use-publicity-rights-to-try-to-block-sister-from-blogging-about-mom-in-re-reynolds.htm>.

83. *Id.*

84. Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 9–47 (2013).

85. Importantly, the transformative-use test used in California as a defense to any right-of-publicity violation is far broader than copyright’s transformative-use consideration, which is embodied as just one part of one factor in the four-part fair-use balancing test. *Compare* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807, 808 & n.10 (setting out transformative-use test), *with* 17 U.S.C. § 107 (Supp. I 2013).

86. *See generally* *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

forms of fair use that courts have generally read broadly.⁸⁷ By sharp contrast, courts have interpreted copyright's fair-use doctrine far more narrowly. In the process, they "have frequently converted the defense into an inquiry on necessity—an analytical gambit that has attached liability to a broad range of expressive, nonparodic, and transformative activities."⁸⁸ Indeed, there is perhaps no more explicit proof of the dramatic difference between juridical approaches to First Amendment defenses in copyright law versus trademark and right-of-publicity law than how courts have treated conjunctive intellectual property claims brought over the exact same nucleus of facts. On numerous such occasions, courts have immunized defendants from trademark and right-of-publicity claims on First Amendment grounds but have allowed joined copyright claims based on the same activities to trump expressive concerns.⁸⁹

Second, a *prima facie* claim for copyright infringement is much easier to make out than a trademark or right-of-publicity claim. A potential defendant need merely reproduce, publicly display, distribute, or create a derivative version of someone else's work to commit an act of copyright infringement—regardless of whether the use is commercial/for-profit or wholly non-commercial.⁹⁰ Trademark infringement, by contrast, requires a likelihood of consumer confusion.⁹¹ Right-of-publicity violations typically necessitate some sort of *commercial* misappropriation.⁹² So, it is far more common for any given individual or group to run afoul of copyright law than trademark or right-of-publicity law.

Third, the damages regime in copyright law is dramatically more favorable than the corresponding remedies provided in trademark and right-of-publicity law.⁹³ In trademark law, monetary recovery is typically limited to actual damages

87. Bartholomew & Tehranian, *supra* note 84, at 48–52.

88. *Id.* at 9.

89. See, e.g., *Walt Disney Prods., Inc. v. Air Pirates*, 581 F.2d 751, 758–59 (9th Cir. 1978) (affirming grant of summary judgment for plaintiff and rejecting fair-use and First Amendment defenses on copyright claim but denying summary judgment on trademark infringement claim); *Ty, Inc. v. Publ'ns Int'l, Ltd.*, No. 99 C 5565, 2000 WL 1499449, at *9, *15 (N.D. Ill. Oct. 6, 2000) (rejecting defendant's fair-use and First Amendment defenses and granting plaintiff's motion for summary judgment on copyright claim while refusing to grant summary judgment on plaintiff's trademark infringement claim), *rev'd*, 292 F.3d 512 (7th Cir. 2002); *Jackson v. MPI Home Video*, 694 F. Supp. 483, 492 (N.D. Ill. 1988) (issuing preliminary injunction against defendant for copyright infringement yet refusing to grant such an injunction on publicity rights claim); see also *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001) (stating that copyright law does not raise "the same concern under the First Amendment" of suppressing ideas as trademark law); *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829, 836–38 (S.D. Ind. 2011) (granting motion for dismissal of right-of-publicity claim on basis that material was protected under First Amendment, but refusing to dismiss accompanying trademark claim).

90. 17 U.S.C. § 501 (Supp. I 2013).

91. 15 U.S.C. § 1114 (Supp. I 2013).

92. See, e.g., CAL. CIV. CODE § 3344(a) (West 2015) (limiting California's statutory right-of-publicity claim to knowing use of "another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services" (emphasis added)).

93. See *supra* notes 46–49 and accompanying text.

or a disgorgement of profits.⁹⁴ Importantly, there are also no statutory, or presumed, damages available unless one engages in counterfeiting.⁹⁵ Right-of-publicity remedies vary by state; but even where statutory damages are available, they are comparatively small. California's right-of-publicity statute, for example, provides just \$750 in statutory damages per violation.⁹⁶ By sharp contrast, plaintiffs in copyright cases can qualify for statutory damages of up to \$150,000 per willful act of infringement.⁹⁷

Finally, and perhaps most importantly, copyright violations are ubiquitous and, with the existence of digital fingerprints, far more traceable than ever before.⁹⁸ To be fair, the disingenuous invocation of copyright law to achieve an alternate means to silence one's foes is not an entirely novel tactic. Even pre-internet plaintiffs occasionally drew upon the gambit. For example, some three decades ago, Larry Flynt, the founder of *Hustler* magazine, filed such a suit against the Reverend Jerry Falwell for reproducing copies of a *Hustler* parody advertisement about Falwell in fundraising literature sent to members of his Moral Majority. Flynt sued largely in retaliation for Falwell's prior legal action against him; in a case that famously ended up before the Supreme Court, the Reverend had brought claims against *Hustler* for intentional infliction of emotional distress for running that very same advertisement, which suggested that Falwell's first sexual experience was with his mother.⁹⁹ Not surprisingly, Falwell lost his claims against Flynt,¹⁰⁰ and Flynt lost his claims against Falwell.¹⁰¹ The respective reasons both parties failed to receive legal relief reveals something important about copyright jurisprudence. Falwell's intentional infliction claim famously failed on express First Amendment grounds.¹⁰² By contrast, Flynt's copyright claim against Falwell failed on fair-use grounds, an affirmative defense for which Falwell bore the burden of proof.¹⁰³

Flynt's infringement claims against Falwell became realizable (though not ultimately victorious) because Falwell literally had a printing press at his disposal, so he could reproduce thousands of copies of the *Hustler* advertisement to include in his fundraising literature. Possessing the ability to duplicate and distribute

94. 15 U.S.C. § 1117 (Supp. I 2013).

95. *Id.* § 1117(b).

96. CAL. CIV. CODE § 3344(a) (West 2015).

97. 17 U.S.C. § 504(c)(2) (Supp. I 2013).

98. See JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU, at xvi, 86 (2011).

99. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

100. *Id.* at 57.

101. *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986).

102. *Falwell*, 485 U.S. at 48.

103. The First Amendment was not entirely absent from the district court's fair-use decision, which was affirmed by the Ninth Circuit, but, by the court's own admission, it played only a small role in the decision. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985) ("Although the First Amendment does not provide a defense to copyright infringement, when an act of copying occurs in the course of a political, social or moral debate, the public interest in free expression is one factor favoring a finding of fair use."), *aff'd*, 796 F.2d 1148 (9th Cir. 1986).

copyrighted works on a mass scale was relatively unusual a generation ago; it was something only businesses or wealthy individuals could do. Today, however, almost anyone can engage in such conduct with ease: most of us have, by way of smartphones, scanners, and computers connected to the Internet, the tools of massive digital reproduction and distribution at our fingertips. As such, we all come into contact with, and unwittingly violate, copyright law (i.e., by meeting the elements of a prima facie case of infringement) dozens of times a day.¹⁰⁴ With the existence of digital fingerprints and technologies such as Google's cache,¹⁰⁵ Tin Eye's Reverse Image Search,¹⁰⁶ or the Internet Archive's Wayback Machine,¹⁰⁷ our acts of infringement are easily traceable and potentially preserved for all-time, should someone seek to make us a target of infringement litigation. As a result, we are all vulnerable to such "gotcha" suits if we have a sufficiently aggrieved party looking to censor our expressive activities. And, notably, the consequences of such suits are far more severe now than they were in 1985, when Flynt sued Falwell. Back then, statutory damages amounted to a maximum of \$10,000 per act of infringement or \$50,000 per willful act of infringement.¹⁰⁸ Today, they are triple that rate—\$30,000 per act of infringement or \$150,000 per act of willful infringement.¹⁰⁹

Thus, while there are legitimate concerns about the ability of rightsholders to exploit other intellectual property regimes to suppress First Amendment rights, the problem is particularly pressing in the realm of copyright. The ubiquity of infringement, the relative ease of making out a prima facie case, the narrow nature of the available defenses, and the stiff penalties available for infringement have all combined to make copyright an especially luring regime for would-be censors. The development of hearty First Amendment checks to such claims as invasion of privacy, defamation, and imminent incitements of lawlessness over the past century has (rightfully) precluded aggrieved parties from pursuing traditional tort causes of action against their ideological adversaries for their speech-related

104. TEHRANIAN, *supra* note 98, at 2.

105. Through its web-crawling activities for its search engine, Google usually makes caches of websites available for several weeks.

106. Tin Eye provides a reverse image search that enables a rightsholder of an image to find uses of said image through the internet. See TIN EYE REVERSE IMAGE SEARCH, <https://www.tineye.com> (last visited Aug. 29, 2015).

107. INTERNET ARCHIVE: WAYBACK MACHINE, <https://archive.org/web/> (last visited Aug. 29, 2015) (indexing and archiving, by its own count, over 430 billion web pages, many going years back).

108. See 17 U.S.C. § 504(c) (1986) (current version at 17 U.S.C. § 504(c) (Supp. I 2013)). In 1976, they were \$250 minimum, \$5,000 maximum; in 1978, they increased to \$10,000 maximum for ordinary infringement or \$50,000 maximum for willful infringement. See Copyright Act of 1976, Pub. L. No. 94-553, § 504(c), 90 Stat. 2541, 2585. In 1989, they were raised to \$20,000 maximum for ordinary infringement or \$100,000 maximum for willful infringement. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §10, 102 Stat. 2853, 2860. In 1999, they were raised to \$30,000 maximum for ordinary infringement or \$150,000 maximum for willful infringement. See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, § 2, Pub. L. No. 106-160, 113 Stat. 1774.

109. 17 U.S.C. § 504(c)(2).

activities. Now, however, would-be censors have converted their losing tort claims into viable copyright infringement claims for those same activities.

III. THE FEDERAL COURTS' RESPONSE: AN ASSESSMENT OF THE GOOD, THE BAD, AND THE UNAVOIDABLE

As we have seen, the disingenuous use of copyright law as a censorship tool has become an especially pronounced problem in the past decade. However, this trend has not been without pushback. Indeed, it would be wrong to claim that the system is entirely broken, as the federal courts have responded with some tenacity to the growing threat of censorious copyright litigation. When such cases reach a decision on the merits, the courts have typically denied the infringement claims. In some instances, they have even gone out of their way to enable early adjudication of such claims at the Rule 12 stage.¹¹⁰ In other instances, they have not only rebuked such claims, but also awarded fees to prevailing defendants as a means of deterring such disingenuous uses of copyright litigation in the future.¹¹¹ But the response is not all positive, and, in some ways, the problem has grown. Although some courts have entertained early adjudication of fair-use issues, most have declined. The resulting situation means that defendants with even the most ironclad fair-use defenses still have to face backbreaking expenses in litigation—including exposure to discovery—in order to successfully vindicate their rights. The courts have also issued enough binding and troubling precedent to make censorious cases viable. And, finally, part of the problem is out of the hands of the courts: the extra-judicial relief provided to copyright holders under the DMCA has made censorious uses of copyright law, without reliance on courts, all too easy.

A. EARLY ADJUDICATION AND ITS LIMITS

1. Evaluating the Merits on a Motion to Dismiss

To begin with, when censorious copyright cases have reached a decision on the merits, the federal courts have frequently denied infringement claims and found fair use. Courts have rejected, on summary judgment, a widow's attempt to raise copyright infringement claims when a documentary about her husband did not turn out as favorably as she had hoped.¹¹² They have rebuked, on summary judgment, a husband's disingenuous attempt to raise copyright infringement claims based on his wife's production of unsavory materials about him in a contentious divorce and custody proceeding.¹¹³ They have denied, on summary judgment, an abortion provider's claims of copyright infringement against a pro-life group for the latter's unauthorized lacing of the former's informational videos

110. FED. R. CIV. P. 12(b)(6) (allowing for a motion to dismiss on the grounds that, as a matter of law, relief cannot be granted on the claim asserted).

111. See *infra* Part III.A.2.

112. Hofheinz v. AMC Prods., Inc., No. CV-00-5827 (CPS), 2003 WL 25293919, at *1 (E.D.N.Y. Apr. 23, 2003).

113. Bond v. Blum, 317 F.3d 385, 390 (4th Cir. 2003).

with bloody fetuses, citations to scripture, and jarring music.¹¹⁴ And, mostly famously, they repudiated, on summary judgment, Larry Flynt's attempts to drum up an infringement claim against his arch-nemesis, the Reverend Jerry Falwell, for Falwell's specious intentional infliction suit against Flynt and Falwell's unauthorized use of an excerpt from *Hustler* magazine in his fundraising materials.¹¹⁵

In a small minority of cases, courts have even allowed consideration of the merits of copyright claims at even earlier stages of litigation, including in Rule 12 motions.¹¹⁶ Holdings embracing such a tactic have enabled the victims of censorious copyright litigation to escape suits pre-discovery, before the expenditure of extensive attorneys' fees. Perhaps the most significant of such decision is *Brownmark Films, LLC v. Comedy Partners*.¹¹⁷ In *Brownmark*, the Seventh Circuit held, for the first time, that courts within its jurisdiction can dispose of copyright infringement claims based on a fair-use defense at the Rule 12 stage.¹¹⁸ Among other things, the court emphasized the need, especially post-*Iqbal*,¹¹⁹ to protect defendants who are the victims of unmeritorious cases from the burdens and costs of discovery and trial.¹²⁰ As a result, the court quickly dispensed with a suit brought against the makers of *South Park* for their unauthorized use of the timeless video to the sophisticated and elegant ditty *What What (In the Butt)* with their (similarly sophisticated and elegant) parodic "paean to anal sex."¹²¹

2. Bearing the Costs of Censorious Infringement Litigation

On occasion, federal courts have also taken the additional step of awarding fees to the defendants to deter the filing of such improper infringement suits. In *Bond v. Blum*, for example, William Bond drummed up a copyright infringement claim in order to prevent damaging information from coming to light in a custody

114. *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 966 (C.D. Cal. 2012) (granting summary judgment to defendants on the basis of fair use); see also *supra* note 48 and accompanying text.

115. *Hustler Magazine Inc. v. Moral Majority Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986).

116. See, e.g., *Denison v. Larkin*, 64 F. Supp. 3d 1127, 1128 (N.D. Ill. 2014) (granting a motion to dismiss, on fair-use grounds, infringement claims brought by an attorney for the State Bar's unauthorized reproduction of her blog in disciplinary hearings against her); *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008) (granting a motion to dismiss infringement claims by Michael Savage for a civil-rights group's unauthorized use of excerpts from his radio show to call attention to his controversial statements therein).

117. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).

118. *Id.* at 691–92.

119. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that Fed. R. Civ. P. 8 dictates that "only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" (citation omitted)).

120. *Brownmark*, 682 F.3d at 691 ("We are sympathetic to the goal of curtailing nuisance suits . . .").

121. *Id.* at 689.

proceeding.¹²² Specifically, Bond had authored an (unpublished) autobiographical manuscript detailing how he beat his father to death with a hammer when he was 17.¹²³ His ex-wife managed to obtain a copy of the manuscript and produced it as an exhibit in custody proceedings to demonstrate that her former husband would not provide an environment suitable for children.¹²⁴ Bond then sued his ex-wife and her law firm for copyright infringement, tenuously yet tenaciously arguing that they had engaged in the unauthorized reproduction of his copyrighted manuscript.¹²⁵ The trial court found the defendants' use of the manuscript squarely protected by the fair-use doctrine and awarded fees to the defendants on the grounds that the infringement case was "not a close one."¹²⁶ As the trial court held, the suit "was frivolous" and "motivated by a desire to suppress the underlying facts of" the plaintiff's work—not to protect the creative expression embodied in the manuscript.¹²⁷ The Fourth Circuit affirmed the decision.¹²⁸

Similarly, a court granted attorneys' fees to the defendant in *Hofheinz v. AMC Productions* based on the litigation's censorious motivation—the plaintiff's dislike of how the defendants had portrayed her late husband in a documentary.¹²⁹ In the case, the widow of renowned filmmaker James Nicholson, the co-founder of American International Pictures, unilaterally retracted what appeared to be a valid grant of permission for the use of movie clips, posters, and photographs in a documentary about her late husband when she did not approve of the movie's final cut.¹³⁰ She then sued for infringement.¹³¹ The court awarded fees to the defendants on the grounds that the plaintiff brought the case for improper purposes.¹³² Specifically, the timing of her retraction strongly suggested an ulterior motive to ensure that the documentary showcased "her late husband in a more favorable light."¹³³ The court found the claim objectively unreasonable and frivolous, thereby warranting an award of fees to the defendants.¹³⁴

122. Bond v. Blum, 317 F.3d 385, 390 (4th Cir. 2003).

123. *Id.*

124. *Id.* at 391.

125. *Id.*

126. *Id.* at 398.

127. *Id.* at 397–98.

128. *Id.*

129. Hofheinz v. AMC Prods., Inc., No. CV-00-5827 (CPS), 2003 U.S. Dist. LEXIS 16940, at *20–21 (E.D.N.Y. Sept. 1, 2003).

130. *Id.* at *3–5.

131. *Id.* at *5–6.

132. *Id.* at *18–19.

133. *Id.* at *18.

134. *Id.* at *20–21.

3. The Limits of Early Adjudication: Two Examples from the Military and Business Worlds

However, for every *Bond v. Blum* or *Hofheinz v. AMC*, there are countless cases where courts do not grant fees to prevailing defendants,¹³⁵ or because of the sheer cost and uncertainty of litigation, the cases never reach a decision on the merits in the first place. And, despite the *Brownmark* precedent, courts have largely limited early adjudication of copyright cases to instances involving the issue of substantial similarity, not fair use.¹³⁶ When courts have addressed fair-use claims, they have typically balked at employing such gate-keeping functions, even post-*Iqbal*, on the grounds that fair use is an affirmative defense (rather than a prima facie element of an infringement claim) and a mixed question of law and fact.¹³⁷ Most courts have consequently declined to follow *Brownmark's* lead.

Consider two examples, both of which—with their use of trumped-up photograph-infringement claims as a vehicle to silence criticism—evoke the abortion hypothetical presented earlier. In *Katz v. Chevaldina*—a case whose facts smack of classic copyright-as-censorship—the district court rejected a defendant's

135. See, e.g., *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982) (reversing grant of attorneys' fees to defendants when plaintiffs brought copyright infringement claim for unauthorized use of copies of plaintiffs' pornographic movie as part of a local government's nuisance abatement action on the grounds that the plaintiffs "have offered explanations for their prosecution of this suit, which, in the opinion of this court, reflect a sincere interest in the settlement of close legal questions" and that the plaintiffs "initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal"); *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-06076 SI, 2009 WL 188848, at *1 (N.D. Cal. Jan. 26, 2009) (denying prevailing defendant's request for fees).

136. For example, some circuits have determined that, when both the copyrighted work and the allegedly infringing work are before the court and capable of examination and comparison, district courts may entertain a motion to dismiss as a vehicle for resolving the issue of substantial similarity as a matter of law. See, e.g., *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143–44 (8th Cir. 1989) (determining that a district court could properly decide substantial similarity as a matter of law on a motion to dismiss); *Christianson v. West Publ'g Co.*, 149 F.2d 202, 203 (9th Cir. 1945) ("There is ample authority for holding that when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss."). As such, district courts have increasingly found the issue of substantial similarity subject to adjudication on a motion to dismiss, if the case is appropriate. See, e.g., *Rosenfeld v. Twentieth Century Fox Film*, No. CV 07-7040 AHM, 2008 WL 4381575, at *6 (C.D. Cal. Sept. 25, 2008) (citing *Christianson* for the proposition that substantial similarity may be considered on a motion to dismiss); *Thomas v. Walt Disney Co.*, No. C-07-4392 CW, 2008 WL 425647, at *2 (N.D. Cal. Feb. 18, 2008) (deciding substantial similarity on a motion to dismiss); *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130–31 (C.D. Cal. 2007) (citing *Christianson* and determining that substantial similarity may be decided on a motion to dismiss); *Identity Arts v. Best Buy Enter. Servs. Inc.*, Nos. C 05-4656 PJH, C 06-1631 PJH, 2007 WL 1149155, at *5 (N.D. Cal. April 18, 2007) (finding no obstacle to addressing substantial similarity on a motion to dismiss under Rule 12(c)); *Gal v. Viacom Int'l, Inc.*, 403 F. Supp. 2d 294, 305 (S.D.N.Y. 2005) ("[T]here is ample authority for the proposition that a district court may make that determination [of substantial similarity] on a motion to dismiss for failure to state a claim under Rule 12(b)(6)."); *Cory Van Rijn, Inc. v. Cal. Raisin Advisory Bd.*, 697 F. Supp. 1136, 1145 (E.D. Cal. 1987) (granting motion to dismiss based on lack of substantial similarity).

137. Cf. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact.").

attempt to argue fair use at the Rule 12 stage.¹³⁸ Irina Chevaldina wrote several blogs that criticized the business activities of Raanan Katz, a noted Florida “real estate developer and minority owner of the Miami Heat.”¹³⁹ When Chevaldina wrote several caustic pieces charging Katz with both immorality and illegality in his business dealings, she used a photograph to identify him for her audience.¹⁴⁰ Katz sued, claiming that he owned the copyright to the photograph and that Chevaldina had engaged in copyright infringement.¹⁴¹ The court refused to address the fair-use issue at the Rule 12 stage and expressly declined to follow *Brownmark*, claiming that, among other things, fair use was a mixed question of fact and law not appropriate for resolution pre-discovery.¹⁴² As the court concluded, it is a “general rule that fair-use defenses are not ripe for determination before the summary judgment stage.”¹⁴³ Katz’s suit therefore marched on, despite the fact that it was a transparent attempt to impose liability against Chevaldina for her speech-related activities on a matter of legitimate public concern, a view buttressed when a unanimous Eleventh Circuit panel decided Chevaldina’s fair-use defense resoundingly in her favor almost two years later.¹⁴⁴

In an even more politically charged example, four Navy SEALs sued the Associated Press and a reporter when, in the wake of the high-profile scandal at Abu Ghraib, they ran a story that alleged the SEALs had abused Iraqi prisoners.¹⁴⁵ Among other things, the story’s photos showed the SEALs “sitting on, lying atop, or stepping on detainees, some of whom are hooded,” and depicted “military personnel pointing a firearm at a prisoner’s bloody head at point blank range.”¹⁴⁶ The SEALs claimed that that publication of the photographs constituted an invasion of their privacy (their faces were shown in some of the photographs) and an infringement of their copyright interests.¹⁴⁷ Based largely on newsworthiness grounds, the *Four Navy SEALs* court did not hesitate to dismiss the privacy-related claims on the motion to dismiss.¹⁴⁸ However, the court declined to dismiss the infringement claim, deeming the issue “inappropriate for determination in a 12(b)(6) motion, since fair use is an affirmative defense to an infringement claim.”¹⁴⁹

138. Katz v. Chevaldina, 900 F. Supp. 2d 1314, 1315–16. (S.D. Fla. 2012).

139. *Id.* at 1315.

140. *Id.*

141. *Id.*

142. *Id.* at 1315–17.

143. *Id.* at 1316.

144. Katz v. Chevaldina, No. 14-14525, at *12 (11th Cir. Sept. 17, 2015) (denying Katz’s infringement claims and holding that “every reasonable factfinder would conclude the inclusion of the Photo in [Chevaldina’s] blog posts constituted fair use”).

145. *Four Navy SEALs v. Associated Press*, 413 F. Supp. 2d 1136, 1140 (S.D. Cal. 2005).

146. *Id.* at 1141.

147. *Id.* at 1142.

148. *Id.* at 1144.

149. *Id.* at 1148.

The differing results on the privacy and copyright claims in the *Four Navy SEALs* suit are of particular note. Since the privacy claims were grounded in state law, they were properly subject to the special motion to strike under California’s Anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) statute, which allows pre-discovery challenges to any lawsuit “based upon an act in furtherance of the right to free speech.”¹⁵⁰ For such suits, defendants can force a plaintiff to present admissible evidence showing a probability of prevailing on the merits of the claim.¹⁵¹ Failure to do so results in significant consequences: the suit is dismissed, and a defendant is automatically granted its attorneys’ fees.¹⁵² Thus, under the anti-SLAPP statute, the court was indisputably able to consider the merits of the privacy claims at the very outset of the case, and the plaintiffs faced swift repercussions for bringing a censorious claim without merit. When the plaintiffs failed to show a probability of success on the merits, the court not only dismissed the privacy claims but also granted the defendants their fees.¹⁵³ By contrast, as a federal cause of action, copyright claims enjoy immunity from special motions to strike under the anti-SLAPP statute. The infringement claims therefore survived, despite their similarly suspect nature. Meanwhile, numerous other courts have declined to adjudicate fair-use issues at the Rule 12 stage.¹⁵⁴ As Eric Goldman has concluded, “[s]uccessful fair use defenses on a motion to dismiss are exceptionally rare.”¹⁵⁵ Thus, the inapplicability of the anti-SLAPP statute to copyright claims and the courts’ general refusal to consider a fair-use defense—no matter how solid—at the pre-discovery stage have combined to make copyright claims particularly valuable weapons for litigious censors.

As such, even when there is an unusually strong fair-use defense to an allegation of infringement, a defendant will often face protracted litigation and substantial costs, no matter how meritorious its position. In many instances an underfunded defendant must kowtow to a plaintiff’s infringement claims, even if the former is ultimately in the legal right. Of course, such an objection could be lodged against litigation of any sort, as well-heeled plaintiffs can often leverage the costs and uncertainty of litigation to wrest concessions from smaller defendants that they would not otherwise receive if the parties enjoyed similar resources. But it is particularly so in copyright law, where, unlike state-law claims that might be subjected to an early motion to dismiss or motion to strike (per an anti-SLAPP

150. *Id.* (citing CAL. CIV. PROC. CODE § 425.16(b) (West 2015)).

151. CAL. CIV. PROC. CODE § 425.16(b).

152. *Id.* § 425.16(c).

153. There is a potential strategic lesson here too for the plaintiffs: they should not have brought the state-law claims for privacy invasion since those are subject to the anti-SLAPP statute; they should have solely relied on copyright law.

154. See, e.g., *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (noting that “in light of a court’s narrow inquiry at this stage and limited access to all potentially relevant and material facts needed to undertake the analysis, courts rarely analyze fair use on a 12(b)(6) motion”).

155. Eric Goldman, *Blogger Wins Fair Use Defense . . . On a Motion to Dismiss!*—*Righthaven v. Realty One, TECH. & MKTG. L. BLOG* (Oct. 21, 2010), http://blog.ericgoldman.org/archives/2010/10/righthaven_defe.htm.

statute, as in the *Four Navy SEALs* case), there is no such early adjudication mechanism and interpretations of Rule 68, and the ability of losing plaintiffs to avoid fees liability¹⁵⁶ can make plaintiffs uncompromising in their demands.

B. THE DMCA SAFE HARBOR, EXTRAJUDICIAL RELIEF, AND THE CENSORSHIP PROBLEM

Furthermore, it is not just in litigation where the copyright-as-censorship problem arises. Overbroad legal claims (especially those backed by censorious motives) are particularly pernicious in copyright law because of the powerful extrajudicial relief that copyright law provides to alleged rightsholders. In the digital age, much use of copyrighted content takes place online, particularly on social networking sites. These uses are governed by the DMCA's safe harbor provisions, which provide Internet Service Providers ("ISPs") operating sites containing user-generated content with a strong incentive to reactively remove content that is the subject of any copyright claim in order to preserve their conditional immunity from infringement liability.¹⁵⁷ While senders of DMCA takedown notifications may be obligated to consider fair use in their assessment of whether the material is infringing (though they are not strongly incentivized to do so),¹⁵⁸ ISPs are under no such obligation. Indeed, in a move that incentivizes ISPs to strongly err on the side of taking down allegedly infringing materials rather than leaving them up, ISPs are specifically immunized from liability for the good faith removal of materials, "regardless of whether the material or activity is ultimately determined to be infringing."¹⁵⁹ It is consequently no surprise that, upon receipt of a proper DMCA takedown notice, ISPs will regularly take the materials down and keep them down, absent counter-notification (and, then, only if the plaintiff does not pursue litigation; if litigation is pursued, the ISP is under no obligation to restore access to the material and, in fact, strongly incentivized to do the opposite).¹⁶⁰ Failure to take down infringing materials upon proper notification could result in an ISP losing its valuable immunity from infringement liability¹⁶¹—a potentially disastrous

156. See *infra* text accompanying notes 204–08.

157. See 17 U.S.C. §§ 512(c), (i) (Supp. I 2013) (conditioning receipt of the DMCA safe harbor from infringement liability on compliance with, inter alia, the designation of an agent for receipt of takedown notices, removal of infringing material upon receipt of takedown notifications, and termination of the accounts of repeat infringers under appropriate circumstances).

158. See *infra* Part IV.B.2 (discussing § 512(f) reform).

159. 17 U.S.C. § 512(g)(1).

160. See 17 U.S.C. § 512(c)(1)(C) (conditioning receipt of the DMCA safe harbor on expeditious removal of "the material that is claimed to be infringing or to be the subject of infringing activity" upon receipt of a DMCA takedown). Of course, ISPs have a strong incentive to draw users to their sites with alluring content, infringing or otherwise. As such, they are often not as proactive as rightsholders might like in affirmatively removing materials without rightsholder notification or preventing the initial uploading of infringing materials in the first place. See Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 95 (2010) ("From the provider's point of view, terminating any customer's access is a distasteful prospect because every user's continued access translates into revenue for the provider and users whose access is terminated can usually take their business to a competitor.").

161. See 17 U.S.C. § 512(c)(1)(C).

consequence to any Web 2.0 business. As a result, without even relying on litigation, a rightsholder can frequently have speech that makes unauthorized use of their copyrighted materials (even if it likely constitutes fair use) effectively removed from the online world.

Thus, even when courts get the ultimate result right and acknowledge the lack of a meritorious claim for infringement, a plaintiff can achieve the success they are seeking—the silencing of their opponents’ views—through the DMCA takedown procedure. Consider the Michael Savage example given earlier where, by issuing takedown notifications, Savage managed to have his opponents’ outreach work against him effectively wiped from the internet for a critical period—the time of his opponents’ advertising blitz. Specifically, Savage forced the removal of critical videos on YouTube just after his opponents had provided links to them in an expensive *New York Times* media buy.¹⁶²

Other censorious actors have also enjoyed success outside of the courtroom through the use of dubious DMCA takedown notifications. Ecuadorian President Rafael Correa has used DMCA takedown notifications to suppress speech critical of his regime by claiming copyright ownership of parts of video footage being distributed online to substantiate charges of corruption against him.¹⁶³ The English Defence League (“EDL”), a rightwing extremist religious group based in the United Kingdom, has used the DMCA to take down critical commentary about it from a website monitoring hate group activities because the site featured a 16-word quotation from one of the EDL’s members without permission.¹⁶⁴ AIDS denialists behind a documentary entitled *House of Numbers*—which argues that AIDS is not an actual illness, but a conspiracy to sell anti-viral medication—have used DMCA takedowns to actively remove videos that feature clips from *House of Numbers* to discredit the denialists’ claims.¹⁶⁵ And, in a deeply ironic example, an ex-wife used a purported copyright interest she obtained from her late husband when he committed suicide to prevent, through DMCA takedown notifications, online

162. See Plaintiff Brave New Films’ Notice of Motion and Motion for Partial Summary Judgment at 7, *Brave New Films 501(C)(4) v. Weiner*, No. CV 08-04703 SI, 2009 WL 1622385 (N.D. Cal. Feb. 27, 2009) No. CV 08-04703 SI, 2009 WL 527974 (“As a result of that takedown notice, YouTube removed not only ‘Michael Savage Hates Muslims’ from Brave New Films’ channel, but disabled Brave New Films’ entire channel at a critical time in the presidential election cycle, rendering unavailable a large number of videos that expressed important political views, and just as Brave New Films ran a full-page ad in the *New York Times*.”).

163. Glen Garvin, Opinion, *Glen Garvin Commentary: Phony Copyright Claims Exploit Holes in U.S. Internet Law*, COLUMBUS DISPATCH (Dec. 19, 2013, 5:35 AM), <http://www.dispatch.com/content/stories/editorials/2013/12/19/phony-copyright-claims-exploit-holes-in-u-s--internet-law.html>.

164. Cory Doctorow, *UK Website Taken Down by Spurious Copyright Complaint Regarding UK Ultra-Right Groups*, BOINGBOING (Oct. 10, 2012, 5:52 PM), <http://boingboing.net/2012/10/10/uk-website-taken-down-by-spuri.html>.

165. Cory Doctorow, *AIDS Deniers Use Bogus Copyright Claims to Censor Critical YouTube Videos*, BOINGBOING (Feb. 15, 2014, 3:00 PM), <http://boingboing.net/2014/02/15/aids-deniers-use-bogus-copyrig.html>.

distribution of his suicide note—a note that placed responsibility for his untimely passing squarely on her.¹⁶⁶

Of course, users of copyrighted content with strong fair-use claims can force the ISP's hands by filing counter-notifications to require restoration of the allegedly infringing materials online.¹⁶⁷ However, counter-notification procedure is not without its own significant problems. First, as evidenced by the Michael Savage example, the DMCA takedown procedure usually results in a significant period of time where access to the allegedly infringing material is removed online—a period that lasts *no less* than the entire term from receipt of the initial takedown notification to ten business days after receipt of a proper counter-notification.¹⁶⁸ If would-be censors time their DMCA takedown notices carefully, they can have materials removed online during a particularly damaging interval (as in the Savage case), regardless of how good a fair-use claim there might be for the use of those materials. Second, if a DMCA takedown claimant is unwavering in its position and files suit in federal court within ten business days of receipt of the counter-notification, the ISP is under no obligation to restore access to the materials at all.¹⁶⁹ Thus, for a plaintiff hell-bent on asserting its rights—in court even, if need be—counter-notification is ineffective as a means to undo the removal of materials online.

C. CENSORSHIP UNDER JUDICIAL IMPRIMATUR

Finally, when cases go to litigation and arrive at a decision on the merits, the federal courts do not always get them right. As a result, there is some dangerous and controlling precedent that has only empowered censorious uses of copyright

166. Mike Masnick, *Ex-Wife Allegedly Using Copyright to Take Down Husband's Suicide Note*, TECHDIRT (Apr. 25, 2014, 12:09 PM), <https://www.techdirt.com/articles/20140425/11184127030/ex-wife-allegedly-using-copyright-to-take-down-husbands-suicide-note-where-he-blames-their-custody-battle.shtml>. When Chris Mackney took his own life on December 23, 2013, he was in the midst of an acrimonious and lengthy custody battle with his ex-wife, Dina. He left behind a lengthy suicide note denouncing her, her family, and her lawyers. During the last months of his life, Chris had maintained a blog detailing his difficult custody battle with Dina and his suicide note immediately generated attention online, where it was reproduced by numerous websites advocating for greater rights for fathers in family courts. Dina clearly did not appreciate her name being dragged through the mud, but the First Amendment precluded action—except under copyright law. So, as the presumptive heir to Chris's estate, she claimed copyright ownership in the suicide letter and promptly began serving DMCA takedown notifications to have the work removed online. For a sample of Dina's takedown notices, see Letter from Rachelle E. Hill, attorney for Dina Mackney, to A Voice for Men, LLC (April 15, 2014), <http://www.avoicemen.com/wp-content/uploads/sites/2/2014/04/Letter-to-AVOICEFORMEN.COM-redacted.pdf>. In the process, she not only made headway in having the contents of the note scrubbed from cyberspace, she threatened to undo her husband's final dying wish—that his side of the story be known to the world.

167. See 17 U.S.C. § 512(g)(2)–(3) (Supp. I 2013).

168. See *id.* § 512(g)(2)(C).

169. *Id.*

law. The Ninth Circuit's recent published decision in *Monge v. Maya Magazines, Inc.* provides a vivid illustration of this.¹⁷⁰

On the surface, the dispute at issue in *Monge* hardly seems the stuff of immense political or social import. In 2007, Latin American celebrities Noelia Lorenzo Monge and Jorge Reynoso married each other in a secret Las Vegas ceremony. For whatever reason, they wanted to keep the existence of their nuptials quiet, and they repeatedly and vigorously denied any allegation that they had wed.¹⁷¹ In 2008, however, *Maya* magazine obtained smoking gun documents showing that Monge and Reynoso had been lying to their fans and the general public.¹⁷² A former Reynoso bodyguard had found wedding photographs of Monge and Reynoso and, after his attempts at blackmailing the couple had failed, he sold copies of the photographs to *Maya* for \$1,500.¹⁷³ *Maya* then published some of the photographs in a feature article on the secret marriage.¹⁷⁴ The photographs naturally played a key, if not instrumental, role in the article as they directly refuted Monge and Reynoso's repeated denials and formed the crux of the news story.¹⁷⁵

For their part, Monge and Reynoso did not take the outing of their marriage quietly. Just like the doctors in our hypotheticals involving online reviews and pro-life activism, Monge and Reynoso obtained an assignment of the copyright to the photographs and pursued litigation—not to vindicate any real value in the copyrighted work but as a means of suppressing speech. Specifically, they sued *Maya* for copyright infringement for its unauthorized reproduction, distribution, and public display of the photographs.¹⁷⁶ And although a district court originally found *Maya's* activities protected under the fair-use doctrine, the Ninth Circuit ultimately reversed and deemed *Maya* liable for infringement, arguing *Maya's* actions constituted an unauthorized use of the heart of a series of unpublished creative works for the highly commercial purpose of tabloid journalism with resulting deprivation of the rightsholders' decision to license (or not license) those works (particularly their first publication rights) as they wished.¹⁷⁷

With its published decision in *Monge*, the Ninth Circuit empowered the use of copyright law as a potent tool of censorship. Parties seeking to suppress speech on

170. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

171. *Id.* at 1168–69.

172. *Id.* at 1169.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1170.

177. The Ninth Circuit's majority faulted *Maya* for "rely[ing] solely on the sensational photos" rather than publishing "other supporting evidence such as a marriage certificate" to make its point. *Id.* at 1170, 1179 (arguing that *Maya's* "reporting purpose could have been served through publication of the couple's marriage certificate or other sources rather than copyrighted photo"). The dissent disagreed that use of the marriage certificate would have sufficed and posited that "*Maya's* use of the photos was . . . integral to exposing to the public the depth of their relationship and the actual events of their secret Vegas wedding night—the venue, the clothing, the after-party. Contrary to the majority's contentions, a mere marriage certificate would not suffice." *Id.* at 1188 (Smith, J., dissenting).

matters of public import can circumvent First Amendment concerns by achieving their censorious ends via infringement claims. As Judge Milan Smith cautioned in his dissent in the case,

Under the majority's analysis, public figures could invoke copyright protection to prevent the media's disclosure of any embarrassing or incriminating works by claiming that such images were intended only for private use. The implications of this analysis undermine the free press and eviscerate the principles upon which copyright was founded. Although newsworthiness alone is insufficient to invoke fair use, public figures should not be able to hide behind the cloak of copyright to prevent the news media from exposing their fallacies.¹⁷⁸

The *Monge* decision provides future plaintiffs with significant cover for such disingenuous uses of copyright law to punish legitimate free speech on matters of public interest. Besides governing seemingly frivolous celebrity scandals, the *Monge* precedent could just as easily be used to attach liability to the next publisher of the *Pentagon Papers* or other materials containing eminently newsworthy secrets.¹⁷⁹

All told, despite some positive pushback from the courts, disingenuous uses of copyright as a tool of censorship continue to abound. Next, in Part III of the Article, we consider how we might potentially remedy the censorious use of copyright to better protect expressive activities while also continuing to preserve the ability of rightsholders to gain redress for legitimate infringements of their copyrights.

IV. ADDRESSING THE COPYRIGHT-AS-CENSORSHIP PROBLEM

To formulate any fix, one must first accurately define the problem. In short, any reform effort should not strike too broadly in a way that inadvertently impacts the ability of copyright holders to protect their warranted property interests. We therefore begin our focus on reform by considering how the law might effectively distinguish between cynical uses of copyright law to effectuate censorship and legitimate (albeit, sometimes unsuccessful) uses of copyright law to vindicate justifiable rights. Such a distinction is not easy to make, of course, and it may be tempting to resort to such unsatisfying aphorisms as "I know it when I see it."¹⁸⁰

178. *Id.* at 1184.

179. In critiquing the *Monge* decision, Andrew Baum warns that "those who normally cheer expanded protection for copyrighted works should view [the *Monge* decision] with some trepidation." Andrew Baum, *Private Affairs/Public Rights: Can Copyright Be Used to Protect Newsworthy Secrets?*, LANDSLIDE 1, 1–5 May–June 2013, at 6–9. He cautions that *Monge* might, for example, legitimately prevent the press from reproducing emails confirming an affair denied by a general and his book-writing mistress (i.e., General Petraeus and Paula Broadwell) or the secret same-sex relationship of a gay-bashing congressman. See *id.* at 6–9. [dam/aba/publications/landslide/2013_may_june/ABA LAND_v005n05__private_affairspublic_rights_can_copyright_be_used_to_protect_newsworthy_secrets.authcheckdam.pdf](http://www.aba/publications/landslide/2013_may_june/ABA LAND_v005n05__private_affairspublic_rights_can_copyright_be_used_to_protect_newsworthy_secrets.authcheckdam.pdf).

180. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

But a careful comparison of cases on both sides of the censorious/non-censorious ledger yields some key diagnostic factors. With these guidelines in mind, we then examine three separate proposals to combat the copyright-as-censorship problem.

A. *DISTINGUISHING BETWEEN CENSORIOUS RESORTS TO COPYRIGHT LAW AND OTHER (POTENTIALLY ILL-ADVISED BUT NONETHELESS LEGITIMATE) ENFORCEMENT EFFORTS*

Almost all copyright claims have the ability to adversely impact the freedom of speech. But the censorious use of copyright is distinct from the general impediments to users' expressive rights that are inherent to most copyright litigation. And to attack the former problem, we must recognize how to distinguish it from the latter.

1. Distinguishing Economic Interests from Censorious Motives: A Dancing Toddler and *Harry Potter*

Consider the infringement claims at issue in the widely discussed *Lenz v. Universal* case.¹⁸¹ The dispute began with Stephanie Lenz's YouTube post of a 29-second video of her children excitedly dancing to Prince's 1980s classic *Let's Go Crazy*. While thousands of YouTube users found the video adorable, Universal (the copyright holder to the *Let's Go Crazy* sound recording) and Prince (the recording artist) did not.¹⁸² Universal, with Prince's support, deemed the clip infringing and served a takedown notice under the DMCA to have it removed from the site.¹⁸³ But Lenz strongly disagreed, claiming the use was an indisputable instance of fair use. She not only served a DMCA counter-notification but also filed suit against Universal and Prince in federal court for willfully misrepresenting to YouTube that her actions constituted infringement.¹⁸⁴

Universal's uncompromising desire to force the removal of a seemingly sweet¹⁸⁵ recording of children taken by their mother gained widespread media attention and condemnation as a quintessential example of copyright overreach by rightsholders.¹⁸⁶ But, while Universal's actions may have been bad form, ill advised, or unremittingly avaricious, they were not censorship. Although Universal's actions may be problematic and cause us to question current copyright law on other

181. See generally *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

182. Prince and Universal issued a statement making clear that they intended to scrub the internet of user-generated content making use of Prince's works without authorization as a matter of principle. *Id.* at 1152 (quoting statement to ABC News). Ironically, while Prince takes his intellectual property rights quite seriously, he may not feel the same way about other peoples' real property rights. See, e.g., Stephen M. Silverman, *Prince Sued for Painting House Purple*, PEOPLE MAG. (Mar. 21, 2006, 2:00 PM), <http://www.people.com/people/article/0,,1175339,00.html> (detailing NBA superstar Carlos Boozer's suit against Prince for painting his house purple without permission).

183. *Lenz*, 572 F. Supp. 2d at 1152.

184. *Id.* at 1152–53.

185. Mainstream audiences apparently did not consider that the child was dancing to a song replete with references to phone sex and "purple bananas."

186. See, e.g., Chris Francescani, *The Home Video Prince Doesn't Want You to See*, ABC NEWS (Oct. 26, 2007), <http://abcnews.go.com/TheLaw/home-video-prince/story?id=3777651>.

grounds, that subject is beyond the scope of this Article and the specific censorship issue it identifies and addresses.

To be sure, Universal's exertion of rights conflicted with Stephanie Lenz's expressive rights. Universal's infringement claim directly interferes with Lenz's ability to show her children's unbridled love for *Let's Go Crazy*. But no matter what one might think of Universal's actions, it is fair to say that they were not primarily motivated by a desire to suppress Lenz's speech. Rather, the point of Universal's infringement claim was to maximize profits and control the use of a work to which it possessed a copyright. Universal's desire, at the end of the day, was to wrest license fees (sync licenses) for any such uses of its song in derivative videos. Universal's work has actual market value and Universal regularly and aggressively exploits its market value. It has no political agenda except to make money and control. And, Universal did not appear to object to the particular content or the context of the use. Indeed, the message of the use was totally irrelevant to Universal's choice to halt the use.¹⁸⁷

Or, to take another example, consider a Warner Brothers suit against the makers of an unauthorized *Harry Potter* encyclopedia.¹⁸⁸ Warner litigates not because they disapprove of the particular take that the encyclopedia has on the *Harry Potter* universe. Rather, it sues to protect the economic market for *Harry Potter* and Warner's exclusive right to produce its own definitive treatise on the *Harry Potter* world. Warner's actions undoubtedly inflict a cost on the defendant's expressive rights—the author of the *Harry Potter* encyclopedia will not be able to share his particular take on the *Harry Potter* universe with the world. But, Warner's motivation has nothing to do with the suppression of the defendant's speech or his particular message per se.

In both the Universal and Warner Brothers examples, economics ultimately drive the action, not a desire to suppress the particular message of the unauthorized user of the copyrighted materials. By contrast, censorious copyright suits are chiefly motivated by the rightsholder's thirst to silence the content of the unauthorized user's speech. Thus, a pro-choice group will sue a pro-life group in order to suppress the latter's criticism of the former's informational videos;¹⁸⁹ a prominent radio talk show host will sue a civil-rights group to prevent criticism and dissemination of his hate speech;¹⁹⁰ and, a disgruntled widow will sue a filmmaker for infringement of certain materials featured in a documentary when that documentary depicts her deceased husband in a light less flattering than she had

187. *Lenz*, 572 F. Supp. 2d at 1152 (noting Universal and Prince's intention, as a matter of principle, to scrub the internet of all user-generated content making unauthorized use of Prince's songs).

188. See *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 546–47 (S.D.N.Y. 2008) (holding that, although the encyclopedic guide to *Harry Potter* was transformative, it took "too much original expression" and ultimately infringed Warner's copyright).

189. See *Northland Family Planning Clinic, Inc. v. Ctr. For Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012).

190. See *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008).

hoped.¹⁹¹ In all of these cases, the plaintiffs do not seek to exploit a legitimate market for their work. Pro-choice groups would not license their informational videos to pro-life groups for criticism; inflammatory radio talk show hosts would not license their programs for use by civil-rights watchdogs; and individuals do not license materials to documentarians making unfavorable documentaries about deceased love ones. In all of these cases, the use to which the defendants put the work was diametrically opposed to the purpose for which the works were created. As such, their unauthorized use did not interfere with a legitimate licensing market that the creator could have intended to exploit. The absence of a legitimate economic motivation to preserve a rightful market for rightsholders is a hallmark (though not sufficient condition) of copyright-as-censorship cases.

2. Distinguishing Dignitary Concerns from Censorious Motives: Separating Fiction from Fact

That said, it is worth noting that not all copyright suits lacking an economic driver are censorious in nature. Consider suits seeking to vindicate dignity or privacy interests. When he sues the publisher and author of an unauthorized sequel to *Catcher in the Rye*, J.D. Salinger may want to preserve the right not to have his works made public or his interest in protecting his works from unwanted exposure or derivation. When it sues an author and publisher for a critical recasting of *Gone with the Wind*, the Margaret Mitchell estate may want to protect the novel from unwanted derivations that undermine the integrity of the work. Or, when they sue Republican politicians for misappropriating their songs, Jackson Browne¹⁹² and Don Henley¹⁹³ may not wish for their creative output to become associated with causes that might undermine the perceived meaning of their works. In each of these instances, rightsholders are acting, at least partially, on non-economic dignity or privacy interests that courts have deemed legitimate. Of course, there may be censorious motives at play behind such litigation. After all, the Mitchell estate was particularly uncomfortable with *The Wind Done Gone*—not just because it was an unauthorized recasting of *Gone with the Wind*, but precisely because of its content.¹⁹⁴ Among other things, *The Wind Done Gone* made Ashley Wilkes gay and mocked *Gone with the Wind* for its antiquated perspectives on race.¹⁹⁵ And one can only imagine that Browne and Henley might have been far more comfortable with a liberal, rather than conservative, politician making (unauthorized) use of their

191. See *Hofheinz v. AMC Prods., Inc.*, No. CV-00-5827 (CPS), 2003 U.S. Dist. LEXIS 16940 (E.D.N.Y. Sept. 1, 2003).

192. See *Browne v. McCain*, 612 F. Supp. 2d 1125 (C.D. Cal. 2009) (denying motion to dismiss copyright (and trademark) infringement claims for use of his song in television commercial supporting McCain's presidential campaign).

193. See *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) (rejecting trademark infringement claim but granting summary judgment on copyright infringement claim for unauthorized use of songs in political advertisement for Senate candidate Chuck DeVore).

194. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (2001).

195. *Id.* at 1270.

songs. In each instance, therefore, a desire to suppress the defendants' particular expression may have served as an animating factor in the decision to file suit. But it was not the primary motivator.

Just as importantly, all of the works at issue in these cases were highly creative in nature. Thus, efforts to limit the rights of defendants to make use of these works would not result in a denial of the defendants' right to express basic facts or to comment on matters of public concern. Salinger may, in some sense, be "censoring" creative expressions about his book and character when he litigates his derivative-works right; and recognizing Salinger's ability to do so may make for a poor public-policy judgment, especially when the goal of the copyright regime is to encourage progress in the arts. But, Salinger was not suppressing facts. Monge, by contrast, was censoring something vital to the reporting of basic facts on a news item. The SEALs sought to suppress visual evidence of their alleged acts of torture. And William Bond sought to cover up facts about his history of patricide that may speak to his fitness as a parent in a custody proceeding.

Of course, one could argue that Monge, the Navy SEALs, and Bond all possessed dignity interests that deserve recognition—privacy interests in personal photographs or unpublished manuscripts that reveal deeply intimate details about one's life. However, the works at issue in those cases were not just creative in nature but also highly factual. Since attempts to limit use of these works necessarily implicates the rights of users to express basic facts and comment on matters of public concern, society can, and should, have greater rights to make unauthorized use of factual works than creative ones—a principle already enshrined in the second factor of the fair-use balancing test.¹⁹⁶ The photos in *Monge*, for example, provided incomparable evidence of a matter of public concern—the purported marriage that Monge had denied.¹⁹⁷ William Bond's autobiography provided incomparable insight into his state of mind when he killed his father—a seemingly relevant fact in the custody proceedings involving his children.¹⁹⁸ And there is no better way to convey to your audience just how offensive a parody advertisement¹⁹⁹ or hate-filled rant²⁰⁰ might be than to provide a copy of the advertisement or rant along with critical commentary so as to convey the content and nature of the advertisement or rant.

In censorious suits, a plaintiff's primary motivation is a desire to suppress the defendants' particular message or the context of their use. However, motivation can be difficult to independently determine. But as we have seen, two traits typically characterize censorious copyright suits and can indicate the bad faith at

196. See 17 U.S.C. § 107 (Supp. I 2013); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

197. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1169 (9th Cir. 2012).

198. *Bond v. Blum*, 317 F.3d 385, 390 (4th Cir. 2003).

199. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

200. *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008).

play. First, in censorious suits, the plaintiff usually lacks a legitimate economic motivation to preserve a rightful market for the licensing of its copyrighted works.²⁰¹ Second, in censorious suits, use of the work at issue strongly advances the expression of basic facts or commentary on matters of public concern. With these indicia of censorious resorts to copyright law in mind, we now turn our attention to what potential reforms might address the issue of copyright-as-censorship, both to protect expressive rights and the richness of debate on issues of political import and to also preserve the functioning of the copyright system for the vindication of legitimate property interests rightsholders have in their creative works.

B. THINKING ABOUT REFORM

The censorious use of copyright occurs both extra-judicially and through the litigation process. Reform efforts should therefore focus on remedying both the abuse of DMCA takedown notifications for suppressive purposes and the disingenuous use of copyright litigation to punish one's ideological adversaries for their speech on matters of public import. To that end, we discuss two potential mechanisms for accomplishing these goals: the enactment of a federal anti-SLAPP statute to deter censorious copyright litigation and the revitalization of Section 512(f) claims to deter censorious use of the DMCA takedown regime. We then consider a third proposal that would require judicial, rather than legislative, action: the adoption of a "*New York Times v. Sullivan*"-style First Amendment check on a narrow but pernicious class of infringement claims—the censorious ones.

1. A Federal Anti-SLAPP Statute

As we have seen, courts have not been oblivious to the growing use of copyright litigation for censorious purposes and, in some instances, they have developed mechanisms for the early adjudication (and dismissal) of such suits. But the use of such mechanisms has not been entirely satisfactory. First, resort to Rule 12 to achieve early adjudication of cases may be well intentioned but appears to betray the strictures of the Federal Rules of Civil Procedure. Technically speaking, courts are not supposed to consider facts or materials extraneous to a complaint at the Rule 12 stage.²⁰² And, historically, fair use has been viewed as a mixed question of law and fact.²⁰³ Courts have regularly questioned whether they have the right to make a fair-use determination through a Rule 12 motion. For example, when John McCain's campaign raised a fair-use defense on a motion to dismiss Jackson Browne's claims for infringement for the unauthorized use of the song

201. As the Supreme Court has held, "use that has no demonstrable effect upon the market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984)).

202. *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002).

203. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 544 (1985).

Running on Empty in a campaign advertisement related to U.S. energy policy, the court balked.²⁰⁴ As the court noted, “in light of a court’s narrow inquiry at this stage and limited access to all potentially relevant and material facts needed to undertake the analysis, courts rarely analyze fair use on a 12(b)(6) motion.”²⁰⁵

In addition, fair use is an affirmative defense. While it may be tempting to decide the issue on a Rule 12 motion, it is probably not technically proper to do so, as a defendant bears the burden on any affirmative defense.²⁰⁶ If courts are not supposed to consider facts outside of a complaint on a Rule 12 motion, it is unlikely (absent injudicious concessions by the plaintiff) they will have access to sufficient facts to legitimately uphold a defendant’s burden to prove its fair-use defense. When courts have agreed to consider fair-use defenses on a motion to dismiss, they have typically only done so as a result of poor pleading by the plaintiff—wherein factual admissions in the complaint actually made the fair-use defense for the defendant.²⁰⁷ Thus, the ability of Rule 12 motions to dispense with meritless infringement claims is limited and, though appealing, more expansive use of them would seem to violate the procedural dictates of and constraints on Rule 12.

Secondly, in practice, courts have been far more inclined to consider substantial similarity rather than fair use at the Rule 12 stage. Such a tactic may make sense when one considers fidelity to the strictures of Rule 12—namely, if the court has access to the allegedly infringed and the allegedly infringing work, it can make a comparison and determine, as a matter of law, whether there is no plausible claim for infringement without running afoul of Rule 12 limitations. But the availability of Rule 12 relief on substantial-similarity issues does little to alleviate the copyright-as-censorship problem since, as we have seen, most such cases involve fair-use defenses.

Third, while some courts have allowed early adjudication of fair-use issues,²⁰⁸ most have not. This becomes particularly problematic when a roll of the dice (for

204. *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009).

205. *Id.*

206. *See, e.g., Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 550 (S.D.N.Y. 2013) (“Because fair use is an affirmative defense, the burden of proof rests with the party relying on the defense.”).

207. *See, e.g., Denison v. Larkin*, 64 F. Supp. 3d 1127, 1132 (N.D. Ill. 2014) (“Additionally, although a plaintiff need not plead facts in the complaint to defeat potential affirmative defenses, where ‘the allegations of the complaint itself set forth everything necessary to satisfy [an] affirmative defense,’ the plaintiff pleads himself out of court.” (quoting *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009))); *Scott v. WorldStarHipHop, Inc.*, No. 10 Civ. 9538(PKC)(RLE), 2011 WL 5082410, at *8 (S.D.N.Y. Oct. 25, 2011) (admitting that, as an affirmative defense, fair use is “not normally an appropriate grounds for dismissing a claim on a Rule 12(b)(6) motion” but that it can be addressed if the defense “appears on the face” of plaintiff’s complaint); *see also Levingston v. Earle*, No. CV-12-08165-PCT-JAT, 2014 WL 1246369, at *2 (D. Ariz. March 26, 2014) (failing to address the propriety of adjudicating fair use on a motion to dismiss given its status as an affirmative defense).

208. *See, e.g., Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 967 (C.D. Cal. 2007) (considering and granting a motion to dismiss on fair use grounds while assuming that such relief is available on a 12(b)(6) motion on the basis that courts “may conduct a fair use analysis, as a matter of law, where the facts are presumed or admitted”).

example, to which judge a particular case is assigned) determines a court's willingness to bend the strictures of Rule 12 to make a pre-discovery decision on a fair-use defense. It also encourages forum shopping. Ideally, similarly situated copyright defendants should equally enjoy an early substantive review of a viable fair-use defense.

Finally, even where courts do engage in early adjudication of cases and the defendant's fair-use claim resoundingly carries the day, courts have been reluctant to issue fee awards against plaintiffs. Such solicitude to censorious copyright plaintiffs only encourages more such litigation in the future.²⁰⁹ It also fails to make the victims of meritless and censorious infringement litigation whole.

With these observations in mind, reform efforts would ideally introduce a consistent and uniform procedural mechanism for addressing the copyright-as-censorship problem. And the procedure would give victims of such claims the ability to escape litigation at an early juncture and would also deter plaintiffs from bringing such claims in the future. One solution for a consistent methodology for early evaluation of censorious copyright litigation might come in the form of anti-SLAPP statutes that many states have implemented. California's anti-SLAPP iteration, for instance, allows defendants to bring an early motion to strike any cause of action arising from any "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."²¹⁰ For SLAPP-able causes of action brought under California law, a plaintiff must make an immediate showing of a probability of prevailing on the merits. Failure to do so results in dismissal of the claim, with prejudice, and an automatic award of fees to the defendant.²¹¹ Thus, the anti-SLAPP protocol allows victims of meritless litigation to dispose of suits early and, with its automatic grant of fees to prevailing defendants, makes plaintiffs think twice about bringing such litigation in the first place.

Consider how such an anti-SLAPP procedure might apply to the emblematic copyright-as-censorship cases we have discussed. California's anti-SLAPP law defines matter of public issue or interest broadly,²¹² literally encompassing "any issue in which the public is interested," including matters wholly between private parties and even tabloid fodder.²¹³ Because copyright-as-censorship cases characteristically involve activities that advance the expression of basic facts or commenting on matters of public concern, the suits would undoubtedly qualify for anti-SLAPP treatment under a federal provision worded similarly to California's. Thus, for example, the infringement claims in *Four Navy SEALs* (allegations of torture against members of the armed services); *Katz* (allegations of corruption

209. See, e.g., *Savage v. Council on Am-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *1 (N.D. Cal. July 25, 2008).

210. CAL. CIV. PROC. CODE § 425.16(e) (West 2015).

211. *Id.* § 425.16(c).

212. Indeed, California Code of Civil Procedure section 425.16(a) mandates that the anti-SLAPP statute "shall be construed broadly."

213. *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (Cal. Ct. App. 2008).

against a prominent real estate developer); *Savage* (a hate-filled rant by a prominent radio talk show host and political commentator); and *Monge* (the marital status of a major Latin celebrity) would all be subject to an early showing by the plaintiff of a probability of prevailing on the merits.

In most instances, the availability of anti-SLAPP relief would have enabled defendants to escape the burdens of the litigation meant to dissuade their speech on matters of public import and, with the automatic award of fees, would have strongly deterred future plaintiffs from such abusive resorts to copyright law. In *Four Navy SEALs*, for example, the court could have disposed of the copyright claims just as it had done with the privacy claims under California's anti-SLAPP statute. The Associated Press and its reporter would not have continued to face the threat and expense of litigation on a disingenuous copyright claim aimed to punish the defendants' exposé of torture allegations against the plaintiffs. In *Katz*, a blogger would not be forced to defend herself against a real estate mogul's disingenuous infringement claims which simply served as a means to censor her reports on allegations of corruption and illegal conduct in the mogul's business dealings. In *Savage*, the automatic assessment of fees would have at least served as a powerful deterrent against the radio talk show host's subsequent (successful) action to suppress criticism of him for his incendiary views.

Of course, existence of a federal anti-SLAPP statute for copyright claims would not have helped in all of our examples of censorship. In *Monge*, for example, the court ultimately ruled against the fair-use defense. As such, the court would have denied defense efforts to strike the suit pursuant to an anti-SLAPP statute. Thus, the availability of anti-SLAPP relief could be limited to cases based on the hallmarks of censorious infringement litigation we described above (i.e., only where (1) the plaintiff lacks a legitimate economic motivation to preserve an established market for the licensing of its copyrighted works; and (2) defendant's use of the work at issue advances the expression of basic facts or comments on matters of public concern). As such, the existence of anti-SLAPP relief would not dissuade or diminish legitimate attempts by rightsholders to vindicate appropriate interests under the Copyright Act.

2. Section 512(f) Reform

Of course, adoption of a federal anti-SLAPP statute will not address the copyright-as-censorship issue entirely, especially when so much of the action occurs prior to the filing of litigation. As we have seen, putative rightsholders have exploited the DMCA's takedown procedure to scrub unfavorable materials online, even under the weakest of infringement claims. Thus, any solution to the copyright-as-censorship problem must address abuse of the DMCA takedown regime. Section 512(f) of the DMCA already provides a potential mechanism to punish such misconduct, but it needs revitalization.

The DMCA provides a powerful means for genuine rights holders to force ISPs to remove infringing content placed online at the direction of users.²¹⁴ But Congress recognized that such a weighty tool could lead to abuse, and it appeared to balance this mechanism by providing meaningful relief against complaining parties who overreach in their takedown demands for the removal of allegedly infringing materials online. Specifically, under Section 512(f), the DMCA creates a civil cause of action against those who “knowingly materially misrepresent . . . that material or activity is infringing”²¹⁵ in an online takedown notification. Typically, a person challenging a takedown notification will argue that the copyright owner made such a knowing and material misrepresentation by swearing to have “a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law” as required under Section 512(c)(3)(A)(v)’s requirement for proper takedown notices.²¹⁶ However, as it turns out, judicial interpretation of the mental state required to prove a knowing material representation has made success on a Section 512(f) action improbable. In the process, therefore, the courts have neutralized this valuable check on DMCA-takedown abuse that Congress had initially written into the Copyright Act.

For example, the leading case on the mens rea requirement in Section 512(f), *Rossi v. MPAA*, held that the “good faith belief” requirement was entirely subjective, not objective.²¹⁷ “A copyright owner cannot be liable simply because an unknowing mistake is made,” the court found, “even if the copyright owner acted unreasonably in making the mistake.”²¹⁸ Instead, the court required “a demonstration of some actual knowledge of misrepresentation” before imposing liability on a party serving a DMCA takedown.²¹⁹ Admittedly, in Stephanie Lenz’s on-going battle with Universal, the Ninth Circuit recently held that content owners must account for fair use when attesting, in their DMCA takedown notifications, that the alleged infringers activities’ were not “authorized . . . by law” under 17 U.S.C. § 512(c)(3)(A)(v).²²⁰ However, the ruling ultimately represented a pyrrhic victory for online users of copyrighted content. The Ninth Circuit still reaffirmed *Rossi*’s subjectivity standard and found that Stephanie Lenz could not show that defendants subjectively believed there was a high probability that her actions constituted fair use.²²¹ As the Court explained, so long as “a copyright holder forms

214. See 17 U.S.C. § 512(c) (Supp. I 2013) (providing for takedown notice procedure for infringing “information residing on systems or networks at direction of users”).

215. *Id.* § 512(f)(1).

216. *Id.* § 512(c)(3)(A)(v).

217. *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004). Numerous courts have adopted *Rossi*’s subjectivity standard. See *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 342-43 (D. Mass. 2013); *Third Educ. Group, Inc. v. Phelps*, 675 F. Supp.2d 916, 927 (E.D. Wis. 2009); *Dudnikov v. MGA Entm’t, Inc.*, 410 F. Supp. 2d 1010, 1013 (D. Colo. 2005).

218. *Rossi*, 391 F.3d at 1005.

219. *Id.*

220. *Lenz v. Universal Music Corp, NO. 13-16106*, at *11 (9th Cir. Sept. 14, 2015).

221. *Id.* at *21-22.

a subjective *good faith* belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder's belief even if we would have reached the opposite conclusion."²²²

Such a reading of "good faith belief" makes for troubling policy. A party issuing a takedown notice can escape Section 512(f) liability by possessing a subjective, good faith belief that the activity about which it complains constitutes infringement.²²³ This standard is particularly problematic given that some industries, institutions, and individuals have earnestly argued that virtually all uses of copyrighted works require licenses.²²⁴ As a result of these (inaccurate) beliefs, a veritable Kool-Aid defense arises: if a copyright holder "drinks the Kool-Aid" and genuinely subscribes to these views (and therefore lacks subjective bad faith in sending out an overreaching takedown notification), it cannot suffer liability under Section 512(f), no matter how objectively unreasonable its belief.

As one court noted, the subjective bad-faith requirement makes it all but impossible to prevail on a Section 512(f) claim:

Although there may be cases in which such considerations will arise, there are likely to be few in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation under 17 U.S.C. § 512(f).²²⁵

Modification of Section 512(f)'s bad-faith standard to reflect an objective, rather than subjective, standard for liability that encompasses consideration of fair-use defenses would revitalize Section 512(f) and provide a more potent remedy to guard against censorious and abusive uses of DMCA takedowns. Making statutory damages available for Section 512(f) violations could also help balance the playing field between senders and recipients of takedown notifications and assist in deterring censorious exploitation of the takedown regime. If infringers face statutory damages for violations of copyright, it is only fair that putative rightsholders hell-bent on exploiting the copyright regime for censorious purposes face similar damages for their actions.

222. *Id.* at *17 (emphasis in original).

223. 17 U.S.C. § 512(c)(3)(A)(v). The DMCA requires that the complaining party serving a takedown notice have a "good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." *Id.*

224. James Boyle, *Afterword* to KEITH AOKI ET AL., *TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW?* 67–70 (2006) (critiquing content creation industries' nurturing of a "permissions culture," where every use of a creative work purportedly requires permission and payment to a putative rightsholder). Such views are not without some support in relevant precedent. Indeed, cases such as *Bridgeport Music* have only bolstered such absolutist positions. See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (holding that any unauthorized sample of a sound recording, no matter how small, constitutes copyright infringement and cautioning all would-be users of copyrighted work to "[g]et a license or do not sample").

225. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008) (citing *Rossi*, 391 F.3d 1004).

3. A *New York Times v. Sullivan* for Censorious Uses of Copyright

Both the implementation of a federal anti-SLAPP procedure and a change in Section 512(f)'s mens rea standard would likely require legislative action. However, reform that addresses copyright's censorship problem need not only come from Congress. Courts could take certain steps. Admittedly, efforts to convince courts to introduce an explicit free-speech check on copyright cases have largely failed.²²⁶ But courts' reluctance to place an express First Amendment limit on *all* copyright enforcement may be one significant reason for that failure.

Notably, courts have had no problem with imposing carefully circumscribed First Amendment limitations on tort liability in a variety of scenarios. In *New York Times v. Sullivan*, the Supreme Court famously held that defamation claims brought by public officials should be subject to a critical First Amendment check: a showing that the defendant acted with actual malice by either intentionally disregarding the truth or acting with reckless indifference towards it.²²⁷ As the Court reasoned, allowing public officials to prevail on defamation claims based on mere negligence alone would cast too great a shadow on the First Amendment by chilling reporting on political matters.²²⁸ The Supreme Court has subsequently extended the holding of *New York Times* to all manner of defamation,²²⁹ false light,²³⁰ intentional infliction of emotional distress,²³¹ and invasion of privacy²³² cases involving public figures or matters of public concern.

Even in the intellectual property context, courts have independently created First Amendment defenses in specific circumstances. Federal courts have, despite the existence of statutory defenses including fair use, checked trademark liability on First Amendment grounds with the adoption of the *Rogers v. Grimaldi* artistic-relevance test.²³³ And California courts have, despite the existence of statutory

226. See Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 464 (2010) ("Even though there have been ever-increasing calls by intellectual property (IP) scholars for greater First Amendment scrutiny in copyright cases, there has been a virtually unrelenting rejection of First Amendment review in copyright cases.").

227. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)

228. *Id.* at 300 (Goldberg, J., concurring).

229. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (extending *New York Times Co. v. Sullivan* to requiring a showing of actual malice for imposition of punitive damages in defamation claims pertaining to a matter of public concern, even if the plaintiff is a private figure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (extending *New York Times Co. v. Sullivan* to requiring a showing of actual malice for liability in defamation claims brought by any public figures).

230. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

231. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

232. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

233. See generally *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under *Rogers*, so long as use of a plaintiff's trademark is "artistically relevant" to the defendant's expressive work, there can be no liability under the Lanham Act unless the defendant's use of the plaintiff's trademark is explicitly misleading—that is, making an *affirmative statement* of the plaintiff's *sponsorship* or endorsement, beyond the mere use of plaintiff's name or other characteristic. *Id.* at 1000–01. Besides the Second Circuit, which issued the *Rogers* decision, at least three other federal circuit courts have expressly adopted the test. See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 451–52 (6th Cir. 2003); *Mattel, Inc. v.*

defenses, checked right-of-publicity claims on First Amendment grounds with the adoption of the *Comedy III* transformative-use test.²³⁴ As such, courts might be more amenable to restricting First Amendment scrutiny of copyright enforcement to a limited range of cases—namely, those which fit the copyright-as-censorship mold. To that end, and based on our earlier discussion on distinguishing legitimate (albeit potentially non-prevailing) copyright enforcement efforts from those of a censorious nature, courts could deem a defendant's actions protected under the First Amendment and immunized from copyright liability as a matter of law where (1) the plaintiff lacks a legitimate economic motivation to preserve an established market for the licensing of its copyrighted works; and (2) the defendant's use of the work at issue advances the expression of basic facts or comments on matters of public concern.

To illustrate how application of this test would work in context, consider the surprisingly large number of recent cases where rightsholders have brought suit against the use of copyrighted works in the context of litigation proceedings, including as trial exhibits.²³⁵ Such suits typically represent quintessential copyright-as-censorship misadventures. In most cases, the plaintiff is seizing on an inherent part of the adjudicative process (the reproduction of documents relevant to the dispute in discovery or at trial) to gin up disingenuous claims of liability under copyright's favorable damages regime. However, on occasion, a plaintiff may be seeking to vindicate legitimate economic interests without censorious motivation. The test we have proposed can help distinguish between these two different scenarios.

As the Ninth Circuit noted back in 1992, "works are customarily reproduced in various types of judicial proceedings, including obscenity and defamation actions . . . and it seems inconceivable that any court would hold such reproduction to constitute infringement."²³⁶ Nevertheless, litigants—insufficiently disincentivized from such abusive and transparent tactics—continue to try.²³⁷ Take, for example, the ill-conceived infringement action brought by JoAnne N. Denison,

MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002); *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 269 & n.7 (5th Cir. 1999).

234. See generally *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807, 808 & n.10 (Cal. 2001). The *Comedy III* test provides that a defendant's expressive activity can serve independent and absolute defense to a prima facie violation of the right of publicity in California if it is sufficiently transformative, with the relevant inquiry being "whether the celebrity likeness is one of the raw materials from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." See *id.* at 800–01, 809.

235. See *infra* note 240; David Kluff, *When Can You Be Sued for Introducing Copyrighted Works at Trial? Almost Never, But Plaintiffs Keep Trying*, TRADEMARK & COPYRIGHT L. BLOG (Aug. 25, 2014), <http://www.trademarkandcopyrightlawblog.com/2014/08/when-can-you-be-sued-for-introducing-copyright-ed-works-at-trial-almost-never-but-plaintiffs-keep-trying/> (documenting the continued efforts of plaintiffs to bring such claims).

236. *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (quoting 3 NIMMER ON COPYRIGHT § 13.05(d) (1991)).

237. See *infra* note 240; Kluff, *supra* note 235.

an Illinois attorney charged with professional misconduct.²³⁸ When the Illinois State Bar instituted disciplinary proceedings against her through the Illinois Attorney Registration and Disciplinary Commission (“IARDC”), the IARDC used portions of her blog as evidence. Rather than fight the IARDC allegations on their merits alone, Denison sued for copyright infringement, claiming that the IARDC had violated her exclusive Section 106 rights by reproducing her blog as part of the disciplinary hearings, including as trial exhibits. Not surprisingly, Denison lost.²³⁹

Application of our test would have readily dispensed with Denison’s claim. On the first factor, Denison lacked a legitimate economic motivation to preserve an established market for the licensing of her blog. Denison’s censorious goals clearly drove the suit and, even in the unlikely event that her blog actually had any economic value, it was for use as a blog, not as an exhibit in a legal proceeding. As such, there was no conceivable basis that Denison was acting to protect her legitimate economic interests in licensing the blog. On the second factor, there is no doubt that IARDC’s use of Denison’s blog pertained to a matter of public concern. After all, the public proceeding concerned Denison’s fitness to continue to serve as an officer of the court. And the unauthorized use of Denison’s blog also advanced the expression of basic facts: it provided evidence that Denison had made certain statements that allegedly called her fitness to practice law into question. Having met both elements of our proposed test, Denison’s suit would face swift dismissal on First Amendment grounds.

For the same reasons, the two-factor test would have immediately dispensed with similarly meritless cases attempting to impose liability for the unauthorized use of copyright works in legal proceedings, including the *Bond v. Blum* example discussed earlier.²⁴⁰ But, just as importantly, our proposed test would counsel

238. See generally *Denison v. Larkin*, 64 F. Supp. 2d 1127 (N.D. Ill. 2014).

239. And the court dispensed of the case on a motion to dismiss—though it did not directly discuss the procedural propriety of so doing. See *id.*

240. See *supra* text accompanying note 113. The courts have decided numerous such cases in recent years. See, e.g., *Hollander v. Steinberg*, 419 Fed. Appx. 44, 48 (2d Cir. 2011) (affirming a grant of summary judgment to defendant on fair-use grounds in copyright infringement claim brought by attorney against opposing counsel for the appending of the attorney’s blog entries to a motion); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (rejecting, on fair-use grounds, infringement claims for the unauthorized reproduction of plaintiff’s copyrighted works for the purposes of preparing expert witness testimony); *Levingston v. Earle*, No. CV-12-08165-PCT-JAT, 2013 WL 6119036, at *3 (D. Ariz. Nov. 21, 2013) (challenging, sua sponte, plaintiff’s infringement claims on the grounds that use of excerpts of book and blog entries “as evidence in a judicial proceeding to show Plaintiff’s conduct toward Defendants” appears to constitute fair use, a conclusion the court ultimately adopted in *Levingston v. Earle*, No. CV-12-08165-PCT-JAT, 2014 WL 1246369 (D. Ariz. Mar. 26, 2014)); *Scott v. WorldStarHipHop, Inc.*, No. 10 Civ. 9538(PKC)(RLE), 2011 WL 5082410, at *1 (S.D.N.Y. Oct. 25, 2011) (dismissing infringement claim on the grounds that it was fair use to reproduce video of a classroom fight as part of a college’s student disciplinary proceedings related to the fight); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 630 (E.D. Penn. 2007) (granting summary judgment to defendants on fair-use grounds for copyright infringement claims brought against law firm for printing copies of the plaintiff’s archived website from archive.org as part of litigation proceedings); *Shell v. City of Radford*, 351 F. Supp. 2d 510, 512–13 (W.D. Va. 2005) (rejecting, on summary judgment, copyright infringement claim on the grounds that it was fair use for police officers

against immediate dismissal of certain legitimate infringement claims pertaining to the use of copyrighted works in litigation proceedings.

Consider *Ross v. Miller's Rexall Drugs, Inc.*, for example.²⁴¹ In the suit, defendant Rexall Drugs attempted to compel production, inspection, and copying several photographs that George Pearl, a Certified Professional Evidence Photographer, had taken in connection with the litigation. Plaintiff Ross had retained Pearl to take the photographs as demonstrative evidence. Defendant Rexall could easily have obtained licensed copies of the photographs from Mr. Pearl—he had offered to provide copies at his usual rate (\$15 per copy). However, Rexall found Pearl's rate objectionable and, in an attempt to save money, used a subpoena and cited the fair-use doctrine to justify its right to access and copy the photographs. The court rejected Rexall's attempt and held that, "[i]f every time Mr. Pearl was hired by a trial attorney to take photographs he was compelled through the discovery process to turn over his work at no cost to the opposing side, he would literally be forced out of business."²⁴² As David Kluff points out, this is a justifiable exception to the normal rule for rejecting attempts by copyright holders to prevent their works from being used in court.²⁴³ As he argues, unlike the typical censorious example, "the unauthorized copy is not being put to a transformative use, but rather to the same use for which the original was created: to be introduced as a trial exhibit."²⁴⁴ In other words, the infringement litigation merely seeks to protect the legitimate licensing value of the work in its established market. As such, Ross's infringement claim fails the first part of our proposed test and, therefore, would not face dismissal on First Amendment grounds.

A similar result would occur in *Images Audio Visual Productions, Inc. v. Perini Building Company*.²⁴⁵ In the suit, Perini had purchased from Images Audio Visual Productions ("IAVP") copies of photographs the latter had taken of a construction project. Needing some additional copies of the photographs for use as exhibits in an arbitration dispute concerning payment for the project, Perini approached IAVP for a rate quote. When IAVP's demand proved too rich, Perini took the photographs they already had in their possession and simply had a local reproduction service reproduce them instead. IAVP sued. Whatever the merits of IAVP's claim, it was clearly not IAVP's motivation to suppress the information captured in their

to make unauthorized use of certain photographs as part of a murder investigation); *see also* *Carpenter v. Superior Court*, 141 Cal. App. 4th 249, 252 (Cal. Ct. App. 2006) (reversing a superior court's decision to deny a plaintiff challenging a mental examination order access to written test materials on the grounds that they were protected under copyright law); *Evans v. Lerch*, 700 N.Y.S. 2d 400, 402 (N.Y. Sup. Ct. 1999) (rejecting plaintiff's refusal, on copyright grounds, to produce an unpublished manuscript as part of discovery in a medical-malpractice action).

241. *See generally* *Ross v. Miller's Rexall Drugs, Inc.*, No. D-66840, slip op. at 1 (Ga. Super. Ct. Oct. 12, 1990).

242. *Id.* at 3.

243. Kluff, *supra* note 235.

244. *Id.*

245. *See generally* *Images Audio Visual Prods., Inc. v. Perini Bldg. Co.*, 91 F. Supp. 2d 1075 (E.D. Mich. 2000).

photographs from coming to light in the legal proceeding. More fundamentally, the photographs were produced precisely for use as exhibits in litigation proceedings. As such, IAVP's infringement suit sought merely to protect the very licensing market for which the photographs were created. Indeed, as the court observed, "the [c]ourt cannot ignore the important distinction between copyrighted works that happen to capture information that proves relevant to subsequent litigation, and works that are intended to capture such information, specifically for the purpose of litigation."²⁴⁶ In the former cases, attempts to create infringement liability constitute a censorious exploitation of copyright law. Use of the copyrighted work advances the expression of basic facts and addresses a matter of public concern, and the rightsholder is not seeking to vindicate a legitimate economic market for the work (i.e., the very market for which it was created). In the latter cases, by contrast, "where judicial proceedings are one of the intended markets, the copyright holder is entitled to exercise control over the use of his works within this market."²⁴⁷

With the adoption of the actual malice requirement, the Supreme Court famously checked defamation liability in matters involving public figures or concerns.²⁴⁸ It then expanded this First Amendment restraint on tort liability for certain claims of intentional infliction of emotional distress,²⁴⁹ false light,²⁵⁰ and invasion of privacy.²⁵¹ These doctrinal innovations had a common goal: preventing the courts themselves from being used by private individuals as a means to wield the power of the state (through the imposition of legal liability) to effectively suppress speech on matters of public concern. However, despite the value of these innovations, the courts did not go far enough and left a gaping exception—copyright law. Agile and cynical litigants have exploited this loophole. This blind spot in the courts' jurisprudence has, in recent years, resulted in the wave of censorious infringement litigation that we have documented. Such litigation has raised the specter of severe liability for speech related to matters of public concern—precisely the type of liability from which the Supreme Court sought to protect defendants with *New York Times v. Sullivan* and its progeny. The adoption of a circumscribed First Amendment check on copyright claims—ones that pertain to matters of public concern where the plaintiff seeks to vindicate interests outside

246. *Id.* at 1086.

247. *Id.*

248. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring a showing of actual malice for liability in defamation claims brought by public officials); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring a showing of actual malice for imposition of punitive damages in defamation claims pertaining to a matter of public concern, even if the plaintiff is a private figure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (requiring a showing of actual malice for liability in defamation claims brought by public figures).

249. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

250. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

251. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

of the established market for the licensing of its copyrighted works—could serve as an important step towards combatting censorious infringement litigation.

V. CONCLUSION

Several hundreds years ago, copyright started out as a law of censorship. With its official chartering in 1557, the Worshipful Company of Stationers and Newspaper Makers (later known as just the Stationers' Company), a guild of London booksellers, implemented a register system. With royal backing, this system enabled the Company to prevent the publication of, as well as seize and destroy, any unauthorized works not duly authorized by the Company (and, implicitly, the Crown).²⁵² The entry of a book in the Register gave the publisher thereof a "cotype" and they enjoyed attendant rights thereto—rights which became known as "copyright."²⁵³ For a century and a half,²⁵⁴ the Company and the Crown combined to use copyright as an effective tool for censorship in England.²⁵⁵

Unfortunately, it appears that copyright has come full circle.²⁵⁶ Today, private litigants are increasingly exploiting the state-granted copyright monopoly to censor expressive activities by their adversaries. Infringement ubiquity, penalty severity, and First Amendment immunity have combined to create the perfect conditions for such censorious litigation to thrive. Though not insubstantial, efforts by the courts to curb this trend have ultimately failed, making reform a legitimate topic of conversation. To that end, we have considered three targeted, ameliorative efforts: (1) the enactment of a federal anti-SLAPP statute; (2) the implementation of Section 512(f) reform; and (3) judicial adoption of a limited First Amendment check on copyright claims where the plaintiff lacks a legitimate economic motivation to preserve an established market for the licensing of its copyrighted works and where defendant's use of the work at issue advances the expression of basic facts or comments on matters of public concern. These proposals are by no means exhaustive or necessarily curative. But whatever shape it may ultimately take, reform is needed—not only to vindicate the expressive rights of the political and

252. See Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 130 (June 2005) (S.J.D. dissertation, Harvard Law School), <https://law.utexas.edu/faculty/obracha/dissertation/pdf/chapter2.pdf>; see also *Our History: 16th–17th Century*, STATIONERS' COMPANY, <http://www.stationers.org/16th-17th-century.html> (last visited Aug. 29, 2015).

253. See Bracha, *supra* note 248, at 142, 170.

254. In 1694, Parliament declined to renew the Company's monopoly. W.S. Holdsworth, *Press Control and Copyright in the 16th and 17th Centuries*, 29 *YALE L. J.* 841, 855–58 (1920). A few years later, the power of the Company was permanently broken with the passage of the Statute of Anne in 1709, which allowed anyone to publish books in England and vested copyrights for only limited, rather than infinite, terms in order to advance public learning. Philip V. Allingham, *Nineteenth-Century British and American Copyright Law*, VICTORIAN WEB, <http://www.victorianweb.org/authors/dickens/pva/pva74.html> (last modified Aug. 29, 2013).

255. Rick Falkvinge, *The Copyright Monopoly Was Created as a Censorship Instrument—And Is Still Used as One*, TORRENT FREAK (Sept. 1, 2013), <https://torrentfreak.com/the-copyright-monopoly-was-created-as-a-censorship-instrument-and-is-still-used-as-one-130901/>.

256. I am indebted to David Fagundes for this insightful point.

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social adversaries who have found themselves on the receiving end of meritless infringement litigation meant to censor their speech, but also to strengthen the functioning of the copyright regime for legitimate rightsholders seeking protection of their appropriate “cotype” rights.

EXHIBIT “B”



July 15, 2016, 10:22 am

SPEAK FREE Act prevents SLAPP in face to free speech

By Jeremy B. Rosen



Getty Images

In 1966, a local branch of the NAACP instituted an economic boycott against white merchants in Claiborne County, Mississippi, in order to pressure elected officials to adopt several racial justice measures. In response, the merchants sued the NAACP for tortious interference with prospective economic advantage, and won \$3.5 million in state courts.

Though not referred to as such at the time, *NAACP v. Clairborne Hardware Co.* is a classic example of a strategic lawsuit against public participation, or a SLAPP. The lawsuit's sole purpose was to punish the NAACP's exercise of its fundamental right to free speech and to petition the government for a redress of grievances. After many years and significant cost for the NAACP, the United States Supreme Court finally overturned the verdict, holding that "the boycott clearly involved constitutionally protected activity."

Now just imagine how quickly this case would have been dismissed if the SPEAK FREE Act (HR 2034), currently working its way through Congress, had been on the books in 1966. The SPEAK FREE Act provides a mechanism for federal courts to promptly dismiss those baseless lawsuits that are designed to punish people for speaking out.

Sadly, Claiborne Hardware is just one of the countless examples of cases aimed at censoring free speech, and since the advent of the Internet, SLAPPs are only growing in popularity. It has become commonplace for the often well-financed targets of petition campaigns to sue those who are speaking out against them, who are often of more modest means.

This pattern frequently manifests itself where a developer sues the neighbors who are opposing a proposed development through local planning processes, where a person publicizes his or her honest opinion about a business in a Yelp review, and in countless other situations where people voice their opinions against powerful and established special interests.

At present, 28 states plus the District of Columbia have anti-SLAPP laws. Generally, these laws require SLAPP plaintiffs to demonstrate a probability of prevailing on their claims in order to proceed in court, when those claims are based on defendants' free speech or petitioning activities.

However, not all of the existing laws provide sufficient protection, and SLAPP plaintiffs have the ability to "forum shop" for a state without adequate free speech protections in which to file their lawsuit. At the end of the day, legal fees from SLAPP suits can bankrupt individuals simply for exercising their First Amendment rights.

Despite the clear need for such protection, there are still a few who oppose this legislation. They recite a parade of horrors in which they imagine that countless worthy cases would never see their day in court.

This kind of rank speculation misleadingly ignore the fact that the SPEAK FREE Act expressly provides that all claims with minimal merit will see their day in court. Only those lawsuits that are clearly nothing more than improper attempts to attack the right of petition or free speech will be dismissed under the Act.

The critics also point to cases that, in their view, have improperly applied the First Amendment to limit civil rights claims. This is also a misleading criticism because the SPEAK FREE Act does not (and could not) alter the substantive constitutional law regarding how and when the First Amendment applies to bar a claim.

Some critics also baldly assert that existing state anti-SLAPP laws are systematically abused. The actual data demonstrates precisely the opposite: anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets. In California, between fiscal years 2010 and 2014, the 2,051 anti-SLAPP motions filed constituted only about 0.041% of the 5,006,580 total civil filings.

A final criticism is that somehow Congress does not have the constitutional power to enact it. Wrong. The authority of federal courts under Article III to hear cases involving federal questions includes cases raising First Amendment speech and petition questions.

As an attorney who has represented both sides in anti-SLAPP cases, I have seen time and time again how an anti-SLAPP law can provide a critical safeguard that protects the right of ordinary citizens to petition their government and to speak their minds without fear of being dragged into lengthy and expensive litigation by the more powerful and wealthier interests that they seek to challenge.

This is why I have expressed my support for the SPEAK FREE Act. Without it, millions of Americans who live in states without such protection will continue to face the Hobson's choice of remaining silent or risking financial ruin from SLAPP litigation.

Rosen is a partner at Horvitz & Levy LLP, the largest appellate law firm in California, who has litigated more than 50 appeals under California's anti-SLAPP statute, on behalf of both plaintiffs and defendants. He is also Vice-President of the Public Participation Project, a national non-profit dedicated to protecting the free speech and petition rights of all Americans.

TAGS: Washington D.C., United States, NAACP, U.S. Supreme Court. U.S. Congress, SLAPP, SPEAK FREE Act

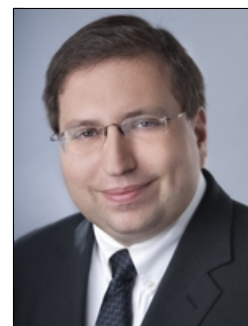
EXHIBIT “C”



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California's Anti-SLAPP Law Is Not Systematically Abused

Law360, New York (June 30, 2016, 4:07 PM ET) -- In 1992, California's Legislature "enacted the anti-SLAPP law in order to address the 'disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (People ex rel. Fire Insurance Exchange v. Anapol (2012) 211 Cal.App.4th 809, 821). The statute seeks to "provid[e] a fast and inexpensive unmasking and dismissal" of such lawsuits. (Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1415). It has succeeded: thousands of defendants have invoked the anti-SLAPP law to dismiss meritless lawsuits targeting their exercise of First Amendment rights.



Felix Shafir

California's law began a trend, with many other states following California's lead to enact their own anti-SLAPP statutes. (Prather, The Texas Citizens Participation Act — 5 Years Later (June 16, 2016) Law360). As one commentator recently explained, "this is not a red or blue state issue. It is a speech issue that transcends both [political] parties" and goes to "the heart of [American] patriotism." (Ibid.)



Jeremy B. Rosen

Despite the important role it plays in safeguarding constitutional rights, the anti-SLAPP statute encountered resistance from California's judiciary from its inception. In response to the bill that became the anti-SLAPP law, the California Judges Association expressed concern "that the bill's provisions were 'too broad'" and a provision was therefore added to "specify[] 'the First Amendment conduct protected by the bill.'" (Braun, Increasing SLAPP Protection: Unburdening the Right of Petition in California (1999) 32 U.C. Davis L.Rev. 965, 1002 (hereafter Braun)). Even after the law was enacted, some Courts of Appeal tried to narrow the anti-SLAPP statute, but, time and again, such efforts were rebuffed by the Legislature, the California Supreme Court, or both. (See e.g., Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 1114, 1120-1121, 1123, fn. 10; Equilon Enterprises LLC v. Consumer Cause Inc. (2002) 29 Cal.4th 53, 58-59, 68, fn. 5).

Undeterred, a vocal minority of California courts have occasionally issued appellate opinions suggesting that litigants are systematically abusing the anti-SLAPP statute, and urging legislative reform to fix the supposed harm the statute is causing the judicial system. (E.g., Hewlett-Packard Co. v. Oracle Corp. (2015) 239 Cal.App.4th 1174, 1196 (Hewlett-Packard); Grewal v. Jammu (2011) 191 Cal.App.4th 977, 994-1003 (Grewal)).

Below, we examine the anti-SLAPP statute's actual impact on the judicial system. The available data demonstrates that the anti-SLAPP law has not been systematically abused,

but instead operates in the manner intended by the Legislature. We also analyze the real problem with this law — contradictory Court of Appeal opinions construing critical portions of the statute. To the extent some litigants occasionally file unnecessary motions and appeals, that can generally be traced to the lack of clear guidance in the face of these splits of authority.

Data Shows that the Anti-SLAPP Statute has not been Systematically Abused in the Trial Courts

Critics of the anti-SLAPP statute assert that many anti-SLAPP motions are filed each year, and suggest that the anti-SLAPP law is somehow being abused because “no let up” in the pace of this litigation “seems in sight.” (Grewal, *supra*, 191 Cal.App.4th at pp. 998-999.) But objective data suggests a different view.

The Judicial Council maintains data on anti-SLAPP court filings, which is available upon request. This data demonstrates that anti-SLAPP motions are little more than a tiny fraction of trial courts’ civil dockets.

For example, between fiscal years 2010 and 2014, parties filed a total of 2,051 anti-SLAPP motions in trial courts, or roughly 410 anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings over that same period, these 2,051 motions constitute only about 0.041 percent of total civil filings. (See Judicial Council of California, Administrative Office of Courts, Report on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70 (hereafter 2015 Court Statistics Report)). Such data shows that no systematic abuse of the anti-SLAPP statute is occurring.

A comparison of anti-SLAPP motions to summary judgment motions is telling because an anti-SLAPP motion operates “like a motion for summary judgment in reverse.” (Comstock v. Aber (2012) 212 Cal.App.4th 931, 947, internal quotation marks omitted). “[C]ourts routinely render thousands of summary judgment motions annually,” (Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little* (2012) 43 Loy. U. Chi. L.J. 561, 566) — which far exceeds the few hundred anti-SLAPP motions filed on average every year. That fewer anti-SLAPP motions are filed annually than their summary judgment counterparts corroborates the absence of systematic abuse.

Data Also Shows that Parties have not Systematically Abused the Anti-SLAPP Statute on Appeal

Critics also emphasize the supposedly high number of anti-SLAPP appeals that have been decided over the years and maintain that the right to an immediate appeal from anti-SLAPP orders “produces unintended and perverse results.” (Hewlett-Packard, *supra*, 239 Cal.App.4th at p. 1196; Grewal, *supra*, 191 Cal.App.4th at pp. 998, 1000-1003). But objective data shows that the anti-SLAPP statute’s appellate provision is operating in the fashion intended by the Legislature.

To understand the right of appeal afforded by the anti-SLAPP law, it is important to appreciate the history and purpose of this provision.

Prior to 1999, orders denying anti-SLAPP motions could “only be reviewed by a writ until the proceedings in the trial court” were complete. (Braun, *supra*, 32 U.C. Davis L.Rev. at p. 1008.) In 1998, SLAPP scholars George Pring and Penelope Canan prepared a report that recommended amending the statute to include an immediate right of appeal from orders denying anti-SLAPP motions. (Braun, *California’s Anti-SLAPP Remedy After Eleven Years* (2003) 34 McGeorge L.Rev. 731, 778-779 & fn. 280.) In response, the Legislature enacted Assembly Bill (AB) 1675, which provided that “[a]n order granting or denying a special motion to strike shall be appealable.” (Stats. 1999, ch. 960, § 1.) The Legislature viewed the right to an interlocutory appeal as essential to protecting defendants from

SLAPP suits. (See *Varian Medical Systems Inc. v. Delfino* (2005) 35 Cal.4th 180, 193 (Varian); *Doe v. Luster* (2006) 145 Cal.App.4th 139, 144-145 (Doe)).

The enrolled bill report for AB 1675: (1) concluded that under then-existing law, appellate courts reviewed approximately 30 SLAPP motions each year; and (2) noted that "[t]he Judicial Council estimate[d] that the SLAPP appeals authorized in AB 1675 would result in an increase of approximately 90 additional cases per year." (California Department of Finance, Enrolled Bill Report on Assembly Bill No. 1675 (1999-2000 Reg. Sess.) Sept. 16, 1999, p. 1). In other words, the Legislature anticipated that appellate courts would consider a mere 120 or so anti-SLAPP appeals per year.

This prediction proved accurate. From fiscal years 2010 to 2014, appellate courts decided between 105 and 123 appeals per year from orders granting or denying anti-SLAPP motions. (This number consists of both published and unpublished opinions that affirmed or reversed such an order in whole or in part.) These statistics confirm that appellate courts decide roughly the 120 anti-SLAPP appeals per year that the Legislature expected would result from inclusion of an immediate right of appeal in the anti-SLAPP statute.

Moreover, the data bears out that the Legislature correctly predicted these anti-SLAPP appeals would have a negligible impact on appellate courts. California's appellate courts issued written opinions in 585 anti-SLAPP appeals between fiscal years 2010 and 2014 out of a total of 48,403 appeals disposed of by written opinion in that same time period. (2015 Court Statistics Report, *supra*, Courts of Appeal Data for Figures 22-27, p. 67; Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2012) Courts of Appeal Data for Figures 22-27, p. 70 (hereafter 2012 Court Statistics Report)). Thus, anti-SLAPP opinions by the appellate courts during that time period constituted roughly 1.209 percent of the total appellate opinions issued by those courts. Hardly a crisis.

Critics suggest that the anti-SLAPP statute is especially flawed because it permits appeals from orders denying anti-SLAPP motions. (See *Hewlett-Packard*, *supra*, 239 Cal.App.4th at p. 1196; *Grewal*, *supra*, 191 Cal.App.4th at pp. 1000-1003). They maintain that the Legislature should consider eliminating this appellate right because "[i]n those relatively rare circumstances where a trial court has clearly erred in denying a meritorious anti-SLAPP motion, relief might be obtained by a writ, as it has been in similar circumstances where an appeal does not lie." (*Grewal*, at p. 1002).

This proposal flies in the face of legislative intent and would place defendants in the same untenable position they were in before an immediate right of appeal was added to the anti-SLAPP statute. Much like critics today, the Judicial Council back then recommended against an immediate right of appeal, insisting no such right was necessary because review by writ petition was "sufficient." (*Braun*, *supra*, 32 U.C. Davis L.Rev. at p. 1011 & fn. 182). The Legislature disagreed because writ review was "discretionary and rarely granted" and the Legislature therefore deemed the theoretical availability of writ review to be insufficient to protect the constitutional rights at stake in an anti-SLAPP motion. (*Doe*, *supra*, 145 Cal.App.4th at p. 145). "Since the right of petition and free speech expressly granted by the U.S. Constitution are at issue when these motions are filed," the Legislature determined that "the defendant should have the same right to appeal as plaintiffs already have under current law and have the matter reviewed by a higher court." (*Ibid.*)

Furthermore, Westlaw data confirms that the anti-SLAPP statute does not systematically enable meritless appeals from orders denying anti-SLAPP motions. Of the 585 anti-SLAPP appeals decided between fiscal years 2010 and 2014, only 269 were from orders that denied anti-SLAPP motions in their entirety. These 269 appeals were a mere .55 percent — less than one percent — of the 48,403 appeals disposed of by written opinion during that time period. Appellate courts completely reversed the orders in 71 of these 269 appeals, for a 26 percent reversal rate. The rate is often higher in certain years. For example, in fiscal year 2012, appellate courts decided 64 appeals from orders denying anti-SLAPP

motions in their entirety, and they completely reversed 21 of those orders — a reversal rate of roughly 33 percent. These reversal rates are markedly higher than the general reversal rate of 9 to 10 percent during this same period, and also higher than the general reversal rate of 17 to 19 percent in all civil cases. (See 2015 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 26; 2012 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 27). Thus, the data shows that defendants often need the right of immediate appeal to vindicate their right to early termination of meritless SLAPP suits because trial courts too often erroneously deny anti-SLAPP motions.

In sum, there is no evidence that the anti-SLAPP law has generated an explosion of abusive motions or appeals. The anti-SLAPP statute, like any other procedural device, can be abused and may thus result in frivolous motions and appeals. (See Varian, *supra*, 35 Cal.4th at p. 195.) But courts already possess the procedural tools to correct these occasional instances of abuse. (See *id.* at p. 196.)

The Intermediate Appellate Courts Foster Uncertainty in the Law, which Multiplies Anti-SLAPP Appeals

The anti-SLAPP law “is a complex statute” and its “complexities” have “spawned a ‘plethora of appellate litigation.’” (Burke, *Anti-SLAPP Litigation (The Rutter Group 2015)* § 2.1, p. 2-5). Accordingly, what some have depicted as abuses of the anti-SLAPP statute are often little more than defendants turning to the law in areas where intermediate appellate courts disagree over whether, or the manner in which, the anti-SLAPP statute applies.

Defining a Matter of Public Interest. The anti-SLAPP statute safeguards speech and conduct undertaken “in connection with” an “issue of public interest.” (Code Civ. Proc., § 425.16, subds. (e)(3)-(4)). The California Supreme Court has acknowledged that there could be “confusion and disagreement about what issues truly possess public significance” but has so far been of the view “that no standards are necessary” to assess which issues are of public interest because “judges and attorneys ... will, or should, know a public concern when they see it.” (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1122 & fn. 9, internal quotation marks omitted).

This “no standards” methodology has proved to be ineffectual. More than 60 published Court of Appeal opinions have struggled with the question of what constitutes an issue of “public interest.” (See Notes of Decision, West’s Ann. Code Civ. Proc., foll. § 425.16 [heading “Public interest or significance.”]). “Where the margins are drawn as to what constitutes an ‘issue of public interest’ ... has been one of many subjects of anti-SLAPP jurisprudence which has garnered substantial judicial attention in the last several years.” (Thomas v. Quintero (2005) 126 Cal.App.4th 635, 658).

Some Courts of Appeal interpret “public interest” under a “restrictive test.” (Hilton v. Hallmark Cards (9th Cir. 2010) 599 F.3d 894, 906). Others adopt a broader standard, concluding that an issue of public interest “is any issue in which the public is interested.” (Id. at p. 907, fn. 10). The Ninth Circuit has decried the deeply-rooted divisions among these various tests as it has grappled with the meaning of “public interest” under the anti-SLAPP statute. (Id. at pp. 906, 907, fn. 10).

Affirmative Defenses. Where the anti-SLAPP law applies, “the plaintiff [must] establish that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16, subd. (b)(1)). In doing so, plaintiffs often confront affirmative defenses, like the litigation privilege. (See Flatley v. Mauro (2006) 39 Cal.4th 299, 323). But Courts of Appeal have split over whether plaintiffs opposing anti-SLAPP motions have the burden to overcome affirmative defenses or whether defendants instead bear the burden of proof on these defenses. (See No Doubt v. Activision Publishing Inc. (2011) 192 Cal.App.4th 1018, 1029, fn. 4).

Lawsuits Against Lawyers. Courts of Appeal disagree as to whether the anti-SLAPP law applies to actions against lawyers for malpractice and other litigation activity (see Sprengel v. Zbylut (2015) 241 Cal.App.4th 140, 158-163 (dis. opn. of Perluss, J))., with some courts adopting rules precluding application of the anti-SLAPP statute for certain claims in contravention of the anti-SLAPP statute's plain text (see Mindy's Cosmetics Inc. v. Dakar (9th Cir. 2010) 611 F.3d 590, 597-598).

The cure for these divisions among the Courts of Appeal is not to blame the anti-SLAPP law for promoting abusive litigation, nor to demand that the law be repealed wholesale or that the vital right of immediate appeal be eviscerated. Rather, as with any other splits of authority, the California Supreme Court should step in to provide guidance and thereby reduce the number of motions and appeals these conflicts generate. At any rate, given the serious damage caused by lawsuits that target the rights of petition and free speech, we should bend over backwards to ensure that these constitutional rights are fully protected.

—By Felix Shafir, Jeremy B. Rosen and David Moreshead, Horvitz & Levy LLP

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