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Curbing Copyblight

John Tehranian

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Curbing Copyblight

*John Tehranian**

ABSTRACT

This Article identifies and analyzes the growing problem of “copyblight”—the use of overreaching claims by putative copyright holders to ownership of public domain works, and, more broadly, to exclusive rights which they do not hold in copyrighted works. Despite the fact that copyblight circumscribes political and social discourse, stifles creativity, and constricts the dissemination of information, present law provides few, if any, disincentives against the practice. Building on the groundbreaking work of Paul Heald and Jason Mazzone, this Article advances three proposals to temper the problems of overreach in order to restore a needed balance in our copyright system: (1) strengthening section 512(f) of the Digital Millennium Copyright Act to provide a more viable claim against those who make false representations to force the removal of allegedly infringing content online; (2) forcing the adoption of an evenhanded approach to the assessment of fees in copyright cases—something that many trial courts have failed to do despite the explicit exhortations of the Supreme Court and the significant policy interest at stake; and (3) resurrecting a qui tam civil cause of action for false “markings” under the Copyright Act in order to disincentivize the presently ubiquitous use of fraudulent legal language that erodes and chills protected user activities. As a society, we rightfully offer meaningful remedies for the infringement of legitimate owner rights. It only makes sense to offer meaningful remedies for the infringement of legitimate user rights.

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The minacious language appears at the beginning of almost any commercially distributed creative work. Book publishers admonish that “[a]ll rights [are] reserved,” and that “[n]o part of this publication may be reproduced or transmitted in any form . . . without permission in writing from the publisher.”¹ The Federal Bureau of Investigation (FBI) cautions that “[t]he unauthorized reproduction or distribution” of CDs, DVDs and video games “is illegal.”² Indeed, the average person confronts stern warnings about the dire consequences of copyright infringement multiple times per day. While assertions of legal rights can serve a useful purpose, and are not unusual in any field of human endeavor, there is something distinctly troubling about certain copyright warnings. As it turns out, many of them are not

1. Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028, 1040 n.67 (2006) (quoting TERRY L. JORDAN, *THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT* 2 (7th ed. 1999)) (internal quotation marks omitted).

2. *Anti-Piracy Warning Seal*, FBI, <http://www.fbi.gov/about-us/investigate/cyber/ipr/anti-piracy> (last visited Mar. 26, 2012). Since August 2006, use of the FBI's seal with its stern warning was limited to big content holders' products—namely, members of the Recording Industry Association of America, Business Software Alliance, Entertainment Software Association, Software & Information Industry Association and the Motion Picture Association of America. *Id.* Since late 2011, however, the FBI has allowed anyone to make use of Anti-Piracy Warning Seal on copyrighted content. David Kravets, *Now We Can All Use the FBI Anti-Piracy Warning!*, WIRED (Sept. 9, 2011, 4:05 PM), <http://www.wired.com/threatlevel/2011/09/fbi-antipiracy-logo>.

simply aggressive; they frequently contain outright misrepresentations about the nature and scope of copyright law.³ Even more significantly, these exhortations to avoid any use of a copyrighted work without the express written permission of the putative copyright holder are not mere inconveniences. Rather, by choking off economic competition, increasing the costs of goods and services, restricting legitimate fair use rights, and silencing free speech, these warnings have serious societal consequences.⁴ In short, the negative externalities of overbroad copyright claims impact all aspects of modern life. All the while, however, present law does little to disincentivize such illegitimate assertions of rights.

This Article explores the growing problem of “copybight”—the use of overreaching claims by putative copyright holders to ownership of public domain works,⁵ and, more broadly, to exclusive rights that they do not hold in copyrighted works.⁶ Building on a growing body of literature on the subject, especially the groundbreaking work of Paul Heald and Jason Mazzone,⁷ this Article identifies some key areas in which copybight threatens the public weal by circumscribing political and social discourse, stifling creativity, and constricting the dissemination of information. In the process, this Article examines both the causes of and potential solutions to the problem of copybight.

Though the analysis here is by no means exhaustive, this Article specifically assesses three plausible reforms that, taken together, might temper the harms caused by overreaching claims to ownership of and exclusive rights in creative works. First, given the increasing importance of the Internet as a vehicle for the distribution of user-generated content, Congress could provide more bite to the Digital Millennium Copyright Act’s (DMCA) section 512(f)—the provision that penalizes putative rights holders from making false representations to effect the takedown of allegedly infringing content online.⁸ Second, in light of the massive cost of litigation and the critical public policy interests at stake, courts should take a more evenhanded approach to the assessment of attorneys’ fees in copyright

3. See *infra* Part II.

4. See *infra* Part II.

5. Jason Mazzone has famously dubbed this practice of “claiming falsely a copyright in a public domain work” as “copyfraud.” Mazzone, *supra* note 1, at 1028.

6. This Article uses the term “copybight” with a sense of remorse for adding yet another neologism to the annals of law review literature. That said, copybight is broader than Jason Mazzone’s term “copyfraud” and encompasses any manner of overreaching claims to copyright protection. Moreover, the term “bight” also emphasizes the corrosive, viral nature of the practice.

7. See generally Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259 (1994); Mazzone, *supra* note 1.

8. 17 U.S.C. § 512(f) (2006).

cases—something that many trial courts have failed to do despite the explicit exhortations of the U.S. Supreme Court.⁹ Third, Congress should recognize the significant harm that copybight inflicts on the legitimate access and use rights of consumers to creative works. Congress can do this by reviving an expurgated and long-forgotten provision of nineteenth-century federal law, a *qui tam* cause of action for false markings under the Copyright Act.

Taken together, these three reforms could go a long way toward combating copybight. Reform of section 512 would help avoid the overexertion of rights that work to achieve the improper takedown of legitimate online content. Actual adoption of a more evenhanded approach to fees awards would deter *in terrorem* litigation by overaggressive rights holders bent on stifling permissible access to and use of copyrighted works. Also, the resurrection of a false “marking” claim under the Copyright Act would help prevent baseless ownership assertions over public domain works and disincentivize the pernicious, widespread use of fraudulent legal language to erode and chill legitimate user activities.

All told, this Article’s proposals provide a more balanced legal playing field that would ultimately serve the copyright regime’s goal of progress in the arts. After all, while copyright users expose themselves to staggering penalties, both civil and criminal, for infringing activities,¹⁰ putative rights holders face few consequences for illegitimate assertions of rights. However, the reforms suggested here are not meant to privilege copyright consumers over valid copyright holders. Instead, by addressing one of the more troubling aspects of our copyright regime, these proposals would bolster respect for actual copyright law and, in turn, provide greater legitimacy to responsible copyright holders who seek to enforce their valid rights.

I. FROM COPYRIGHT TO COPYBLIGHT

A. *Owner’s Rights, User’s Rights, and Copybight*

Users pay a high price under the law if they run afoul of a copyright holder’s exclusive rights secured under 17 U.S.C. § 106. For timely-registered works, infringers face statutory damages in the

9. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (holding that “[p]revailing plaintiffs and prevailing defendants are to be treated alike” under section 505, the Copyright Act’s attorney’s fees recovery provision).

10. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543-48.

amount of up to \$150,000 per willful act.¹¹ In the digital age, these numbers can add up quickly. Doctoral candidate Joel Tenenbaum was famously on the receiving end of a bankrupting judgment in the amount of \$645,000 in statutory damages for “sharing” thirty songs on a peer-to-peer network.¹² Jammie Thomas-Rasset, a single mother of four who earned her living working as a natural-resources coordinator for a Native American tribe in Minnesota, suffered a \$1.92 million judgment after being found liable for “sharing” twenty-four songs on a peer-to-peer network.¹³

Although such judgments seem staggering, Tenenbaum and Thomas-Rasset enjoyed lenient treatment compared to some other infringers. Jack Yates, a twenty-eight year old who worked for a duplication company charged with making promotional copies of the Michael Myers movie *The Love Guru*, made the mistake of burning an unauthorized copy of the movie.¹⁴ This copy, marked with a digital fingerprint that traced back to Yates, eventually made its way onto the Internet, where it was allegedly downloaded more than 85,000 times.¹⁵ For his actions, the government charged Yates with criminal copyright infringement and sentenced him to six months in a federal prison.¹⁶ Kevin Cogill, a blogger who posted nine tracks from Guns N’ Roses’s long-awaited album, *Chinese Democracy*, on his website shortly before the songs’ release in 2008, saw police raid his home and arrest him—at gunpoint—for violating federal copyright law.¹⁷ In the face of a potential five-year prison term and a \$250,000 fine, he pled guilty to the charges and prosecutors sought a six-month sentence.¹⁸ In short, those who infringe the exclusive rights of copyright holders

11. 17 U.S.C. § 504(c)(2) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”).

12. Sony BMG Music Entm’t v. Tenenbaum, 660 F.3d 487, 490-91 (1st Cir. 2011).

13. See Chris Williams, *Big Fine Could Be Big Trouble in Downloading Case*, PHYSORG.COM (June 19, 2009), <http://www.physorg.com/news164653697.html> (noting that Tom Sydnor, the director of the Progress & Freedom Foundation’s Center for the Study of Digital Property, defended the verdict by arguing that “[l]egally acquiring a license to give copies of a song to potentially millions of Kazaa users might well have cost \$80,000 per song” (internal quotation marks omitted)).

14. See Richard Lawson, *How The Love Guru Could Cost You Half a Year of Your Life*, GAWKER (June 19, 2009, 12:09 PM), <http://gawker.com/5296843/how-the-love-guru-could-cost-you-half-a-year-of-your-life>.

15. See *Love Guru’ Costs Dumbass 6 Months of Freedom*, TMZ (June 19, 2009, 9:15 AM), <http://www.tMZ.com/2009/06/19/love-guru-costs-dumbass-6-months-of-freedom>.

16. *Id.*

17. See David Kravets, *Feds Demand Prison for Guns N’ Roses Uploader*, WIRED (Mar. 13, 2009, 4:37 PM), <http://blog.wired.com/27bstroke6/2009/03/feds-demand-6-m.html>.

18. *Id.*

face severe civil liability and, even worse, time in a federal penitentiary.

By sharp contrast, those who engage in copybight and infringe the rights of users in creative works face few consequences. So long as the drafter of a takedown notification under the DMCA¹⁹ does not manifest subjective bad faith intent, she will face no liability for causing the removal of (perfectly legitimate) material, even if the takedown notice makes wildly outlandish claims to copyright protection.²⁰ No federal civil cause of action exists for false copyright markings, fraudulent misrepresentations regarding copyright ownership, or outright untruths about the scope of one's alleged rights to a copyrighted work. Finally, despite some limited success,²¹ attempts to fight copybight with other federal laws, such as unfair competition statutes, have faced numerous difficulties.²² Courts have frequently held that false copyright notices by themselves do not constitute false designations of origin under section 43(a)(1)(A) of the Lanham Act.²³ Meanwhile, attempts to impose liability for false copyright claims through the Lanham Act's false advertising provisions have faced similar challenges.²⁴ Some circuits hold that false advertising claims under section 43(a)(1)(B) of the Lanham Act²⁵ require competitor standing,²⁶ thereby precluding impacted consumers from seeking relief for false statements regarding the nature of a copyright. Even when competitors bring suit, courts have found that

19. 17 U.S.C. § 512 (2006).

20. See *infra* Part III.A.

21. See, e.g., *Montgomery v. Noga*, 168 F.3d 1282, 1298-1300 (11th Cir. 1999) (holding that a false copyright notice coupled with a false claim of ownership to a computer program can give rise to a violation of section 43(a) of the Lanham Act, which proscribes false designations of origin).

22. See, e.g., *Lipton v. Nature Co.*, 71 F.3d 464, 473 (2d Cir. 1995) (finding that, "as a matter of law, a false copyright notice alone cannot constitute a false designation of origin within the meaning of § 43(a) of the Lanham Act").

23. See, e.g., *id.* But see *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 37 (2d Cir. 1982) (finding section 43(a) liability where the infringing product contained both a false copyright notice and the additional representation that the product was "original," thereby "mislead[ing] consumers into believing that the clothing they purchased is a unique novelty instead of a common copy" (internal quotation marks omitted)). In addition, the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* calls into question future attempts to fight copybight through the Lanham Act's claim for false designation of origin. See 539 U.S. 23, 31-33 (2003). As *Dastar* held, the Lanham Act's use of the term "origin" is limited to the source of the tangible good sold, not the source of the ideas that the tangible good might embody. *Id.*

24. See *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005) (finding that plaintiff lacked competitive standing under the false advertising prong of § 43(a) of the Lanham Act).

25. 15 U.S.C. § 1125(a)(1)(B) (2006).

26. See *Jack Russell Terrier Network*, 407 F.3d at 1037.

false copyright notices alone “[are] not very likely to influence consumer purchasing decisions.”²⁷ Despite earlier hopes that state deceptive practices acts may hold “promise” as a means to “jolt” industries into compliance with the law and away from “spurious claims of copyright,”²⁸ the use of state and common law causes of action to combat copyblight remains relatively “untested” and the benefits of such claims could be limited.²⁹ As a result, it should come as little surprise that improper claims of copyright ownership and rights are ubiquitous.³⁰ In fact, since there is little to deter such activities and the cost is minimal, one could even argue that for-profit corporations would be remiss in their duties to their shareholders if they did not attempt to expand the scope of their copyrights through such claims. After all, intellectual property rights have grown increasingly valuable in the post-manufacturing economy and companies will naturally attempt to extract as much surplus from the exploitation of those rights as possible—especially if there are few, if any, adverse consequences to attempts at overreach.

As this state of affairs continues unmitigated, public welfare suffers. Widespread access to the global network—the lattice of personal computers and smartphones at the fingertips of all members of modern societies—has dramatically expanded the ability of individuals to make uses of creative works in ways that may potentially implicate the Copyright Act.³¹ Many of these uses constitute infringement; yet many others—including the exploitation of works whose copyright term has run, the fair use of works still under copyright protection, and the utilization of materials that lie outside of the subject matter of copyright—do not. Copyblight chills these latter uses and disrupts the delicate balance between owner and user rights in our copyright regime.

B. The Growing Problem of Copyblight

The adverse consequences of overreaching copyright claims are widespread, stymieing expressive rights and squelching legitimate social, political, and economic discourse in myriad ways. Consider, for instance, the impact of litigation threats, grounded in tenuous claims

27. See *EFS Mktg., Inc. v. Russ Berrie & Co.*, 76 F.3d 487, 492 (2d Cir. 1996) (rejecting a false advertising claim based on the fixation of a false copyright symbol on a troll doll and cautioning against allowing plaintiffs to “convert all improper copyright claims into Lanham Act violations”).

28. Heald, *supra* note 7, at 282.

29. Mazzone, *supra* note 1, at 1094-96.

30. See *id.* at 1026.

31. See Tehranian, *supra* note 10, at 537, 548-49.

of intellectual property rights, on the dissemination of consumer information and suppressing speech.³² Though it is an axiomatic principal of copyright law that facts do not enjoy protection,³³ recent headlines are replete with examples of companies claiming exclusive rights to elementary consumer information.³⁴ For example, to prevent pricing information from spilling onto the Internet and to deter web surfers from taking full advantage of the transparency and dissemination possible on a global network, some corporations have begun to claim a copyright interest in their basic retail data.³⁵ In 2002, Wal-Mart ended up in a dispute with FatWallet, which is an online forum for consumers to share discounts and pricing information.³⁶ A FatWallet user had posted details of the products and prices scheduled to appear in advertisements for Wal-Mart's annual Black Friday sale on the day after Thanksgiving.³⁷ Wal-Mart issued a takedown notification to FatWallet, demanding it remove the post on the grounds it violated Wal-Mart's copyrights.³⁸ Although Wal-Mart eventually backed down on its attempt to subpoena FatWallet for the identity of the poster, it did manage to get the information removed from the website.³⁹ Apparently, Wal-Mart has continued its takedown notifications undeterred ever since.⁴⁰ Other retailers, such as OfficeMax, Best Buy, and Staples, have used the DMCA for similar purposes.⁴¹ Even if the law does not consider the content to be facts (which are wholly uncopyrightable),⁴² but rather a compilation of facts (entitled to thin protection given sufficient

32. See, e.g., Cory Tadlock, Comment, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies are Overreaching Their Copyright Protections*, 7 J. MARSHALL REV. INTELL. PROP. L. 621, 634-35 (2008) (noting that content creators and distributors often overstate their rights, thereby "hinder[ing] the public's ability to make any meaningful use of the material, contrary to the purposes of copyright law").

33. 17 U.S.C. § 102(b) (2006); see also *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981) (noting that facts cannot be copyrighted).

34. See, e.g., Declan McCullagh, *Wal-Mart Backs Away from DMCA Claim*, CNET, Dec. 5, 2002, <http://news.cnet.com/2100-1023-976296.html>.

35. See, e.g., *id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Mike Masnick, *Wal-Mart Now Going After Search Engines for Linking to Sites with Black Friday Ads*, TECHDIRT (Nov. 14, 2008, 10:31 AM), <http://www.techdirt.com/articles/20081113/1511542826.shtml>.

41. See McCullagh, *supra* note 34.

42. See, e.g., *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) ("This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are.")

originality),⁴³ its unauthorized use is nevertheless subject to a strong fair use defense.⁴⁴ In this way, the tactics of Wal-Mart and other retailers to limit the availability of their pricing information online likely do not have support under the law, but they have nonetheless succeeded because of the threat of litigation.

Interestingly, for-profit corporations have not been alone in advancing these aggressive, if not wholly misguided, interpretations of copyright law. Institutions such as Harvard University have also taken such positions, despite educational missions that would seemingly support free-market price competition and the sharing of information and facts (the truth, or *veritas*, as Harvard's motto would have it).⁴⁵ In 2007, the venerable Harvard Coop, the University's official bookstore, started calling the police whenever they noticed a student jotting down the names and prices of books assigned for various courses.⁴⁶ Concerned about online price competition, the Coop claimed copyright protection over its book lists, including titles and prices, and informed law enforcement officials that these individuals were infringing the store's intellectual property.⁴⁷ Noting the irony, the *Harvard Crimson* reported "taking notes in class may be encouraged, but apparently it can get you kicked out of the Coop."⁴⁸

Harvard University is not alone in its regressive stance on copyright—a position that increases the cost of higher education.⁴⁹ Leading university presses, along with other academic publishers, have asserted overreaching copyright claims that directly lead to increases in the costs of books and other educational materials for students in two ways.⁵⁰ First, they have repeatedly taken the position

43. See, e.g., *Kregos v. Associated Press*, 3 F.3d 656, 663 (2d Cir. 1993) (noting that compilations of facts get only limited copyright protection because copyright law protects only the "expression of an idea," not the idea itself).

44. See *Dow Jones & Co. v. Bd. of Trade Chi.*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) (noting that, in a fair use analysis, authors of factual compilations are "held to grant broader licenses for subsequent use than persons whose work is truly creative").

45. See *Harvard at a Glance*, HARV. U., <http://www.harvard.edu/harvard-glance> (last visited Mar. 26, 2012).

46. See Gabriel J. Daly, *Coop Discourages Notetaking in Bookstore*, HARV. CRIMSON, Sept. 19, 2007, <http://www.thecrimson.com/article/2007/9/19/coop-discourages-notetaking-in-bookstore-taking>.

47. Angela Kang, John G. Palfrey, Jr. & Wendy M. Seltzer, *Has Sense Flown the Coop?*, HARV. CRIMSON, Sept. 26, 2007, <http://www.thecrimson.com/article/2007/9/26/has-sense-flown-the-coop-last>.

48. Daly, *supra* note 46.

49. See *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1393-94 (6th Cir. 1996) (Martin, J., dissenting) ("By charging permission fees on this kind of job, publishers will pass on expenses to colleges and universities that will, of course, pass such fees on to students. Students may also be harmed if added expenses and delays cause professors to opt against creating such specialized anthologies for their courses.")

50. See *id.*

that any unauthorized use of their copyrighted works, no matter how small, constitutes an act of infringement.⁵¹ Under this position, even a one-paragraph reproduction of a one-thousand-page book could incur liability. To cite a small smattering of examples, books published by Princeton University Press contain a copyright warning dictating “[n]o part of this book may be reproduced in any form . . . without permission in writing from the publisher.”⁵² Another publisher, Cengage Learning, asserts any republication, reproduction, or redistribution of any content from its works “is prohibited without the prior written consent of Cengage Learning.”⁵³ Also, Pearson Education categorically proclaims dissemination of any “parts” of any of its works “is not permitted,” and that materials from its works “should never be made available to students except by instructors using the accompanying text in their classes.”⁵⁴ All of these statements are untrue as a matter of law and, among other things, ignore the existence of the fair use doctrine, as embodied in section 107 of the Copyright Act.⁵⁵

Second, university presses and other academic publishers regularly engage in a practice Jason Mazzone has dubbed “copyfraud”—the act of “claiming falsely a copyright in a public domain work.”⁵⁶ In his groundbreaking work on the subject, Mazzone gives a quintessential yet particularly stunning example of the practice: a pocket version of the U.S. Constitution that sternly warns against reproducing the work without written permission from the publisher.⁵⁷ As Mazzone quips, “[w]hatever the Constitution’s framers and ratifiers had in mind when they authorized Congress to create copyright law, they surely did not expect that somebody would one day claim a copyright in the Constitution itself.”⁵⁸ It seems that, if it were up to some publishers, even those attempting to use works in the public domain (such as the Constitution) would face liability for copyright infringement.

Moreover, the problem is not limited to the Constitution. As Mazzone points out, copyfraud is omnipresent:

51. See Mazzone, *supra* note 1, at 1049 (“Books published nowadays carry copyright notices that suggest de minimis copying and fair use are nonexistent.”).

52. See, e.g., JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1973) (quoting the notice on the copyright page).

53. *Copyright Notices*, CENGAGE LEARNING, <http://www.cengage.com/copyright> (last visited Mar. 9, 2012).

54. *Terms of Use*, PEARSON: INT’L RIGHTS MGMT. GRP., <http://rights.pearsoned.com/index.cfm?a=cat&cid=7605> (last visited Mar. 9, 2012).

55. 17 U.S.C. § 107 (2006).

56. Mazzone, *supra* note 1, at 1028.

57. See *id.*

58. *Id.*

False copyright notices appear on modern reprints of Shakespeare's plays, Beethoven's piano scores, greeting card versions of Monet's *Water Lilies*, and even the U.S. Constitution. Archives claim blanket copyright in everything in their collections. Vendors of microfilmed versions of historical newspapers assert copyright ownership. These false copyright claims, which are often accompanied by threatened litigation for reproducing a work without the 'owner's' permission, result in users seeking licenses and paying fees to reproduce works that are free for everyone to use.⁵⁹

Exacerbating the problem, the Copyright Clearance Center (CCC), a private not-for-profit organization charged by major publishers with the collection of reproduction and other usage fees, provides a stunning example of copyfraud in action. Through the CCC, many publishers demand licensing fees for the photocopying of materials that are indisputably in the public domain.⁶⁰ Often, the CCC collects these fees from educational institutions and, ultimately, students who are making educational use of these works.⁶¹ In the process, the publishers misrepresent that any use of such works requires permission from and payment to them, when, as a matter of law, it does not require such permission and payment. For example, various publishers demand payment via the CCC for the reproduction of any portion of *The Complete Works of William Shakespeare*, Henry David Thoreau's *Walden* (1854), Charles Darwin's *The Expression of the Emotions of Man and Animals* (1872), or Jane Austen's *Sense and Sensibility* (1811).⁶²

As it turns out, the publishers' ability to demand such payments is highly suspect. William Shakespeare (1564–1616) lived before the passage of the Statute of Anne (1710), the world's first modern copyright act.⁶³ Copyright law therefore did not even exist when Shakespeare authored his plays and poems and, as a result, his works never enjoyed copyright protection and have always belonged to the public domain.⁶⁴ Similarly, Austen's *Sense and Sensibility* and Darwin's *The Expression and Emotions of Man and Animals* never enjoyed protection in the United States.⁶⁵ They were first published in

59. *Id.* at 1026.

60. *See* Heald, *supra* note 7, at 259-60.

61. *See* Mazzone, *supra* note 1, at 1060, 1063 (noting that students ultimately absorb CCC fees since they are instructed by professors to purchase course packets).

62. *See* *Copyright Licensing Requests for Specific Works of Authorship*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com> (last visited Mar. 19, 2012) (enter name of desired work in "Get Permission" search bar; then choose desired work from results page; then follow "Permissions Options" hyperlink to purchase copyright license).

63. *See* *William Shakespeare Biography*, COMPLETE WORKS WILLIAM SHAKESPEARE, http://www.shakespeare-literature.com/l_biography.html (last visited Mar. 10, 2012).

64. *See* Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, CORNELL U. COPYRIGHT INFO. CENTER (Jan. 3, 2012), <http://copyright.cornell.edu/resources/publicdomain.cfm>.

65. *Id.*; *see also* Mazzone, *supra* note 1, at 1040.

the United Kingdom, and British authors did not receive copyright protection in the United States until 1891.⁶⁶ Finally, works like Thoreau's, which were published before 1923, no longer possess copyright protection in the United States because their terms have expired.⁶⁷ These are but a few examples of the rampant practice of demanding licensing fees for the use of public domain materials.⁶⁸ All told, it is unknown how many millions of dollars the major publishing companies wrest from college students each year for the photocopying of works that are, in fact, not copyrighted. These improper claims undoubtedly contribute to the increasing cost of higher education.

Meanwhile, claims of copyright ownership in emails and other correspondence have also grown, with dizzying effect. Indeed, tenuous copyright assertions have even extended to the very notifications through which suit is threatened. An overly aggressive cease-and-desist letter to a sympathetic defendant can generate a firestorm of bad publicity for the attorney's client, especially in the Internet age.⁶⁹ As a result, in an apparent fit of sudden publicity shyness, lawyers have begun to claim copyrights in their letters to prevent the unauthorized dissemination of these missives by their recipients.⁷⁰ For example, in 2007 a furniture outlet named DirectBuy learned several websites contained comments about the company and its services (calling it a "scam" and a "nightmare") that it considered defamatory.⁷¹ In fact, the websites were consumer-oriented pages that allowed users of infomercial products to provide reviews, commentary, and criticism regarding the products and their producers' sales tactics.⁷² DirectBuy's attorneys, Dozier Internet Law, P.C., promptly fired off a cease-and-desist letter to the websites' owners.⁷³ The letter was rather mundane, except for its conclusion, which warned: "Please

66. Chace Act, ch. 565, 26 Stat. 1106, 1110 (1891). It was not until the passage of the International Copyright Act of 1891, also known as the Chace Act, that foreign authors finally enjoyed copyright protection in the United States. *Id.*

67. See Hirtle, *supra* note 64.

68. See STEPHEN FISHMAN, *THE PUBLIC DOMAIN: HOW TO FIND & USE COPYRIGHT-FREE WRITINGS, MUSIC, ART & MORE* 24-25 (Richard Stim ed., 5th ed. 2010) (noting the widespread use of tactics "to intimidate the public into paying permission fees or royalties for works that should be free for all to use").

69. See David Bell, *Tips for Addressing Brand Misuse While Mitigating PR Backlash*, SOC. MEDIA MARKETING MAG. (Dec. 7, 2011), <http://www.smmmagazine.com/blog/2011/12/07/tips-for-addressing-brand-misuse-while-mitigating-pr-backlash> ("One overly aggressive notice could land a full-page blog post, thousands of re-tweets, and negative publicity.").

70. Sam Bayard, *Copyright Misuse and Cease-and-Desist Letters*, CITIZEN MEDIA LAW PROJECT (Oct. 11, 2007), <http://www.citmedialaw.org/copyright-misuse-and-cease-and-desist-letters>.

71. *Id.*

72. *Id.*

73. *Id.*

be aware that this letter is copyrighted by our law firm, and you are not authorized to republish this in [sic] any manner. Use of this letter in a posting, in full or in part, will subject you to further legal causes of action.”⁷⁴ Of course, such a tactic was nothing more than a thinly veiled attempt to preclude the negative publicity that DirectBuy’s cease-and-desist letter might yield and to stifle the websites’ free speech rights. Ostensibly, the strategy paid dividends. According to DirectBuy’s attorneys, no one had ever dared publish their cease-and-desist letters before.⁷⁵ In the end, however, the owner of the websites refused to let DirectBuy intimidate him. His attorneys, the Public Citizen Litigation Group (PCLG), placed the cease-and-desist letter prominently on its website, daring Dozier to litigate the issue.⁷⁶ Dozier never sued.

C. Professional Sports and Copyblight: A Case Study

Indeed, the creative work distributed by major content providers is replete with overreaching claims that ultimately chill legally protected activities. For example, sports fans are all too familiar with the requisite copyright warnings that accompany every televised professional athletic event. For years, at least once during each Major League Baseball (MLB) game, an announcer has dutifully informed viewers:

[t]his copyrighted telecast is presented by authority of the Office of the Commissioner of Baseball [and/or INSERT YOUR FAVORITE TEAM NAME]. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated, without the express written consent [of INSERT YOUR FAVORITE TEAM NAME].”⁷⁷

74. *Id.* (internal quotation marks omitted).

75. *Id.*

76. *Id.*

77. Thomas Claburn, *Tech Group Fights Copyright Absolutism at the FTC*, INFORMATIONWEEK (Aug. 1, 2007, 6:40 PM), <http://www.informationweek.com/news/201202497>; see, e.g., *Terms of Use Agreement*, MLB.COM (Feb. 3, 2012), http://mlb.mlb.com/mlb/official_info/about_mlb_com/terms_of_use.jsp; see also *MLB Productions: Frequently Asked Questions*, MLB.COM, http://mlb.mlb.com/mlb/video/mlb_productions/feature.jsp?content=faq (last visited Sept. 29, 2009). The agreement states:

Except for Submitted Content (defined below), the MLBAM Properties are either owned by or licensed to MLBAM. The applicable owners and licensors retain all rights to the MLBAM Properties, including, but not limited to all copyright, trademark and other proprietary rights, however denominated. Except for downloading one copy of the MLBAM Properties on any single computer for your personal, non-commercial home use, you must not reproduce, prepare derivative works based upon, distribute, perform or display the MLBAM Properties without first obtaining the written permission of MLBAM or otherwise as expressly set forth in the terms and conditions of the MLBAM Properties. The MLBAM Properties must not be used in any unauthorized manner.

Terms of Use Agreement, supra.

Other professional sports leagues broadcast similarly stern admonishments. The National Football League (NFL), for example, warns that “[t]his copyrighted telecast is property of the NFL. Any rebroadcast, retransmission or any other use of this telecast without the express written permission of the NFL is strictly prohibited.”⁷⁸

Of course, there is nothing particularly unusual about a corporation trumpeting its rights. However, the gross inaccuracy of these warnings’ legal conclusions is particularly troubling. With their uncompromising air of certitude and authority, these bold declarations misrepresent the law and the rights the leagues enjoy.

Consider MLB’s famed legalese. First, its copyright warning entirely neglects the existence of the fair use doctrine, which allows the unauthorized use of broadcasts to occur without liability under certain conditions.⁷⁹ Besides being firmly embedded in the federal Copyright Act, fair use is arguably a constitutionally mandated First Amendment check on the copyright monopoly. As such, it allows exploitation of creative works for such purposes as commentary or criticism without the permission of the copyright holder.⁸⁰ For example, unauthorized use of MLB footage to demonstrate the changing physique of the average slugger through the years for a presentation on performance-enhancing drugs (PEDs) might well constitute fair use.⁸¹ In such circumstances, a user would possess a complete defense to charges of copyright infringement, even in the face of explicit demands by MLB to refrain from using its footage. The copyright warnings of MLB and the NFL conveniently omit any mention of the fair use rights that all members of the public enjoy. This stance resembles similarly glib efforts by other segments of the content-creation industry to downplay or entirely gloss over fair use rights.⁸² After all, many content creators and distributors routinely insist that any exploitation of a work, no matter how small, requires a license.⁸³

Second, while MLB’s copyright warning prohibits any unauthorized retransmissions, the law says otherwise. For example,

78. Gary Rayno, *NFL Tells Movie Theater Chain Not to Show Game*, N.H. UNION LEADER, Feb. 2, 2008, <http://www.townunderground.com/forum/index.php?topic=1399.0:wap2>; see *Website Terms and Conditions*, NFL.COM, <http://www.nfl.com/help/terms> (last updated Nov. 16, 2011).

79. See 17 U.S.C. § 107 (2006).

80. See *id.*

81. See, e.g., *BIGGER STRONGER FASTER** (Magnolia Pictures 2008) (showing images of, among others, Barry Bonds and Mark McGwire in a discussion about steroids).

82. See, e.g., *Permissions*, RANDOM HOUSE, INC., <http://www.randomhouse.com/about/permissions.html> (last visited March 24, 2012) (“Written permission is required from the publisher if you wish to reproduce any of our material.”); see also Mazzone, *supra* note 1.

83. See, e.g., *Permissions*, *supra* note 82; see also Mazzone, *supra* note 1.

the Copyright Act allows both cable and satellite operators to retransmit broadcasts without the authorization of copyright holders, so long as the operators pay a statutory licensing fee.⁸⁴ In some cases, such as the retransmission of broadcasts of local television stations by cable and satellite operators, the license is virtually royalty-free.⁸⁵

Third, MLB's apparent recognition of only express written permissions stands on shaky legal ground. Admittedly, federal copyright law requires that any *exclusive* license be in writing.⁸⁶ However, as courts have repeatedly recognized, an individual can obtain a nonexclusive license to exploit a copyrighted work either orally or by conduct, even in the absence of any express written consent.⁸⁷

Fourth, MLB's attempt to monopolize all "accounts" of a game under the aegis of federal copyright law is deeply problematic. MLB undoubtedly owns a copyright to particular descriptions of its game by its broadcasters. However, the phrasing of MLB's copyright statement suggests a claim of ownership to something more.⁸⁸ MLB's recent litigation posture confirms this suspicion. Over the past few years, MLB has asserted property rights in player names and statistics and has demanded fantasy baseball operators obtain a license for the right to market their services to the public.⁸⁹ In short, MLB has used an expansive view of its own property rights to profit more directly from the rapidly increasing popularity of fantasy baseball, a sizeable fraction of the \$1.5 billion fantasy sports industry.⁹⁰

Significantly, the merits of MLB's legal claims on this front have left actual courts less than impressed. Although MLB had

84. See 17 U.S.C. § 111 (allowing cable operators to retransmit both local and distant over-the-air television and radio broadcasts); *id.* § 119 (allowing satellite carriers to retransmit distant over-the-air television broadcasts for private viewing); *id.* § 122 (allowing satellite carriers to retransmit local over-the-air television broadcasts for private and commercial viewing).

85. *Id.* §§ 111, 122 (subjecting the operators to a minimum basic royalty).

86. *Id.* § 101 (defining a "transfer of copyright ownership" as including "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright"); *id.* § 204(a) (dictating a "transfer of copyright ownership" is not valid unless it is in writing).

87. See, e.g., *Johnson v. Jones*, 149 F.3d 494, 500 (6th Cir. 1998); *Lulirama Ltd. v. Access Broad. Servs.*, 128 F.3d 872, 879 (5th Cir. 1997).

88. See Mike Masnick, *MLB Refuses to Give Permission to Guy to Describe Game to a Friend*, TECHDIRT (Sept. 4, 2009, 7:30 PM), <http://www.techdirt.com/articles/20090904/0304256103.shtml> (challenging MLB's copyright notice prohibiting any "account of this game" as an encroachment on fair use and an example of copyright overreach).

89. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

90. See Abbey Klaassen, *Fantasy Sports Generate Booming New Online Ad Market*, AD AGE DIGITAL (Aug. 8, 2006), <http://adage.com/article/digital/fantasy-sports-generate-booming-online-ad-market/110891>.

previously been able to wrest licenses from most operators, negotiations between MLB and a Missouri fantasy baseball company, CBC Distribution, broke down in 2005.⁹¹ CBC Distribution sued MLB in federal court, seeking declaratory relief for its right to use player names and statistics without a license.⁹² Ultimately, CBC Distribution prevailed, as the trial court rejected both MLB's copyright and right of publicity claims.⁹³ The U.S. Court of Appeals for the Eighth Circuit agreed, finding that the names and statistics of baseball players were information "in the public domain."⁹⁴ In June 2008, the Supreme Court denied MLB's petition for certiorari, effectively ending the dispute, at least within the Eighth Circuit (for copyright law) and in Missouri (for right of publicity law).⁹⁵ Thus, according to the only reported decision on the matter, MLB does not have an intellectual property right to its players' names and statistics. Undeterred, however, MLB implicitly continues to claim this right through its unchanged copyright warning.⁹⁶

The copyright reach of the professional sports leagues has grown so expansive that, like DirectBuy, they have even fought unauthorized reproduction of their own legal warnings. Attorney and academic Wendy Seltzer discovered this firsthand when she posted a brief snippet from Super Bowl XLI on YouTube so students in her class could hear the NFL's copyright warning for themselves.⁹⁷ Seltzer was using the video as an educational tool and an example to demonstrate the ways in which entities overreach in claims about their intellectual property rights.⁹⁸ The demonstration went far better than Seltzer could have ever imagined. Within days, YouTube had received a takedown demand from the NFL, which claimed Seltzer's posting of the clip infringed its copyright.⁹⁹ YouTube acceded to preserve its Internet Service Provider (ISP) safe harbor from liability

91. See *C.B.C. Distrib.*, 443 F. Supp. 2d at 1107.

92. See *id.*

93. *Id.* at 1086, 1107 (finding "facts themselves are not copyrightable because '[t]he *sine qua non* of copyright is originality'" and holding "undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC's fantasy games and that CBC has not violated the players' claimed right of publicity").

94. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (concluding that "it would be strange law that a person would not have a First Amendment right to use information that is available to everyone").

95. *Major League Baseball Advanced Media v. C.B.C. Distrib. & Mktg., Inc.* 553 U.S. 1090 (2008).

96. *Terms of Use Agreement*, *supra* note 77.

97. See Jacqui Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, ARS TECHNICA (Mar. 20, 2007, 12:35 PM), <http://arstechnica.com/business/news/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions.ars>.

98. *Id.*

99. *Id.*

under the DMCA.¹⁰⁰ Refusing to be intimidated, Seltzer struck back with a counternotification under section 512(g)(3) (which enabled YouTube to restore the clip to its server for public performance)¹⁰¹ by which she effectively challenged the NFL to take her to court.¹⁰² The NFL attempted another takedown notification, but it ultimately backed down, unwilling to test its infringement theory in court.¹⁰³

However, few potential copyright defendants are as well versed in their legal rights as Wendy Seltzer, and even fewer are willing to risk defending their legal rights against a multibillion-dollar corporation.¹⁰⁴ Despite Seltzer's bold stand, individuals in her position possess only limited means to combat overreaching claims. Even though making such fraudulent claims effectively chills a wide swath of protected activity, the law makes little relief available against the deception.¹⁰⁵ The Copyright Act effectively incentivizes the propagation of such false information. As a result, such overreaching statements serve as a powerful vehicle to extend the breadth of the copyright monopoly with few adverse consequences for their disseminators.

II. CURBING COPYBLIGHT

“Everybody talks about the weather,” Mark Twain once reportedly mused, “but nobody does anything about it.”¹⁰⁶ While the problem of copyblight is challenging, it is—thankfully—less intractable than the weather. With Twain's admonition in mind, the dangerous consequences of copyright overreach demand consideration of how best to curb copyblight. To that end, this Article advances three proposals: (1) strengthening the DMCA's section 512(f) to provide a more viable claim against individuals or entities that make false representations, including overreaching claims of copyright

100. 17 U.S.C. § 512 (2006).

101. *Id.* § 512(g)(3) (requiring that service providers seeking the DMCA safe harbor, “replace[] the removed material and cease[] disabling access to it not less than 10, nor more than 14, business days” following receipt of a counter-notification, unless suit is filed in federal court before that time).

102. Letter from Wendy Seltzer to DMCA Complaints, YouTube, Inc. (Feb. 14, 2007), available at <http://wendy.seltzer.org/media/DMCA-counter-notification.pdf>.

103. Cheng, *supra* note 97.

104. Surprisingly, the NFL did not ultimately pursue action against Seltzer for subsequently reproducing its DMCA takedown demand to YouTube on her website. See E-mail from National Football League to YouTube, Inc. (Feb. 13, 2007), available at http://wendy.seltzer.org/media/NFLAntipiracyo3_takedown_2007.02.13.txt. It was, after all, the unauthorized reproduction of a creative work under the NFL's legal theory. See *id.*

105. See *supra* Part II.A.

106. Mark Twain Quotes, NOTABLE QUOTES, http://www.notable-quotes.com/t/twain_mark.html (last visited Apr. 2, 2012).

protection, to force the removal of allegedly infringing content online; (2) making grants of attorneys' fees mandatory under section 505, thereby forcing the long-elusive evenhanded treatment of prevailing plaintiffs and defendants in copyright suits; and (3) resurrecting a *qui tam* civil cause of action for false "markings" under the Copyright Act to disincentivize the (presently ubiquitous) use of fraudulent legal language that erodes and chills protected activities.

A. Modifying Section 512(f)'s Good Faith Requirement

We begin by considering the impact of the DMCA's takedown provisions on legitimate uses of creative works. The DMCA, of course, provides a mechanism for genuine rights holders to force Internet service providers to remove infringing content placed online at the direction of users.¹⁰⁷ Upon cursory examination, it also appears to safeguard against abuses of the takedown procedure. First, the complaining party must attest to aspects of its takedown notification under penalty of perjury.¹⁰⁸ But, it turns out, that attestation is arguably limited to the complaining party's statement that it is "authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."¹⁰⁹ Secondly, the DMCA appears to provide meaningful relief against complaining parties, such as the NFL in the Seltzer controversy described above,¹¹⁰ who overreach in their demands to Internet service providers for the takedown of allegedly infringing materials online. Specifically, the DMCA creates a civil cause of action against those who "knowingly materially misrepresent[] . . . that material or activity is infringing"¹¹¹ in an online takedown notification. Typically, a person challenging a takedown notification will argue that the copyright owner knowingly and materially misrepresented having "a good faith belief that use of the material in the manner complained of is not authorized," as required under section 512(c)(3)(A)(v).¹¹²

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 under the DMCA improbable. For example, the leading case on the mens rea requirement in section 512(f), *Rossi v. MPAA*, held that the "good faith belief" requirement

107. See 17 U.S.C. § 512(c) (2006) (providing for takedown notice procedure for infringing "information residing on systems or networks at direction of users").

108. *Id.* § 512(c)(3)(A)(iv).

109. *Id.*

110. See discussion *supra* Part I.C.

111. 17 U.S.C. § 512(f)(1).

112. *Id.* § 512(c)(3)(A)(v).

was entirely subjective, not objective.¹¹³ “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.”¹¹⁴ Instead, the court required “a demonstration of some actual knowledge of misrepresentation” before imposing liability on a party serving a DMCA takedown.¹¹⁵

Though such a reading may be consonant with Congress’s intent, it makes for troubling policy. Specifically, 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.¹¹⁶ This standard is problematic given that some factions in the content-creation industries believe that virtually all uses of copyrighted works require licenses.¹¹⁷ As a result of these inaccurate beliefs, a veritable Kool-Aid defense arises: if a copyright holder “drinks the Kool-Aid” of these factions (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. The infamous *Lenz v. Universal* case is illustrative of the problem.¹¹⁸ The dispute that led to the suit began when a young mother named Stephanie Lenz uploaded a twenty-nine-second home video that featured her toddler son bouncing around to the sounds of Prince’s 1984 hit *Let’s Go Crazy*, which was playing in the background.¹¹⁹ Lenz was using YouTube as a convenient way to share the footage with family and friends.¹²⁰ However, Universal Studios also quickly took an interest in the video.¹²¹ As the owner of sound recording copyright for *Let’s Go Crazy*, Universal promptly sent YouTube a takedown notification under section 512(c)(3)(A), claiming that the video infringed the company’s copyright in the sound recording.¹²² Universal’s uncompromising

113. *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

114. *Id.* at 1005.

115. *Id.*

116. 17 U.S.C. § 512(e)(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.*

117. 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 requires permission and payment to a putative rights holder).

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

119. *Id.* at 1151-52.

120. *Id.* at 1152.

121. *See id.*

122. *Id.*

desire to force the removal of a seemingly sweet¹²³ recording of a son taken by his mother gained widespread media attention.¹²⁴ After several rounds of procedural machinations, Lenz ultimately filed suit against Universal claiming, *inter alia*, that Universal had made a knowing material misrepresentation to YouTube that her video infringed Universal's copyright.¹²⁵

Initially, the court dismissed Lenz's complaint for failing to allege "a knowing misrepresentation,"¹²⁶ but Lenz proceeded to amend her complaint.¹²⁷ Then, in an issue of first impression,¹²⁸ the court found that, to possess the necessary good faith belief required for a proper takedown notification under the DMCA, a complaining party "must evaluate whether the material makes fair use of the copyright."¹²⁹ Even so, the court nevertheless admitted that instances of liability under section 512(f) are rare, given the subjective bad faith standard:

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).¹³⁰

As such, the odds of Lenz prevailing on her section 512(f) action remain exceedingly low. Indeed, it appears that one can avoid section 512(f) liability by simply "drinking the Kool-Aid" unabashedly—so long as the copyright holder truly believes the voices of the maximalists, who have asserted that virtually all uses of copyrighted works require licenses, the takedown notification will qualify as one made in good faith for the purposes of section 512(f).

Courts have further enervated the vigor of section 512(f) by limiting the relief allowed in its remedies provisions. Section 512(f)(2) entitles victims of takedown notifications brought in bad faith to recover damages and attorneys' fees incurred because of the

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

124. 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>.

125. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008).

126. *Lenz v. Universal Music Corp.*, No. C 07-03783 JF, 2008 WL 962102, at *3 (N.D. Cal. Apr. 8, 2008) (granting defendants' motion to dismiss with leave to amend as to claims 1 and 2 and without leave to amend as to claim 3).

127. *Lenz*, 572 F. Supp. 2d at 1153.

128. *Id.* at 1154 ("Whether fair use qualifies as a use 'authorized by law' in connection with a takedown notice pursuant to the DMCA appears to be an issue of first impression. Though it has been discussed in several other actions, no published case actually has adjudicated the merits of the issue.")

129. *Id.* (citing 17 U.S.C. § 512(c)(3)(A)(v) (2006)).

130. *Id.* at 1155 (citing *Rossi v. Motion Picture Ass'n of Am.*, 391 F.3d 1000, 1004 (9th Cir. 2004)).

takedown.¹³¹ But, courts have read the scope of recoverable damages and fees narrowly, finding that damages must be “proximately caused by the misrepresentation to the service provider and the service provider’s reliance on the misrepresentation,”¹³² as opposed to “all damages that occur as a “but for’ result of the misrepresentation.”¹³³ Moreover, plaintiffs can only recover fees related to pre-litigation activity (“*i.e.*, in drafting and issuing the counter notice”)—not all fees for litigating a section 512(f) claim itself.¹³⁴

The state of the law on section 512(f) is emblematic of a dramatically unbalanced aspect of the present copyright regime. No state of mind, even if innocent, can protect a defendant from liability for the direct infringement of a copyright holder’s exclusive rights.¹³⁵ By sharp contrast, courts require a showing of subjective bad faith before they will impose liability on a putative rights holder who misrepresents its rights and stifles the legitimate activities of a user through the DMCA takedown procedure. To remedy this inequity and advance greater respect for all rights secured under the Copyright Act—both those of owners and users—Congress should modify section 512(f)’s bad faith standard to reflect an objective, rather than subjective, standard for liability. The Appendix to this Article contains one example of how a revised section 512(f) might look.¹³⁶

B. Equalizing Grants of Attorneys’ Fees under Section 505

Beyond adjusting the law applying to Internet takedowns, broader reforms related to actual infringement litigation could help equalize the playing field between users and creators, and curb the problem of copybight. In particular, the imbalance between plaintiffs and defendants in copyright suits is particularly notable when courts render fees awards. The adoption of effective fee-shifting provisions could provide a powerful disincentive against copyright overreach. Unfortunately, however, the way in which many courts have implemented the extant attorneys’ fees provisions of the Copyright Act

131. 17 U.S.C. § 512(f)(2).

132. *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466, at *10 (N.D. Cal. Feb. 25, 2010).

133. *Id.*

134. *Id.* (emphasis added).

135. For direct copyright infringement, *mens rea* is irrelevant to *the fact of liability*. See, e.g., *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) (holding that “[i]ntention to infringe is not essential” for copyright liability). However, state of mind can impact *the amount of liability*, but only if a plaintiff elects to receive statutory damages. See 17 U.S.C. § 504(c)(2) (allowing courts, in their discretion, to reduce statutory damages to as low as \$200 per act of innocent infringement).

136. See *infra* Appendix.

has played a key role in failing to stem the tide of overreaching copyright claims.¹³⁷

1. *Fogerty* and Competing Fees Standards

Under section 505 of the Copyright Act, prevailing parties can, at the court's discretion, recover attorneys' fees.¹³⁸ On the surface, such a provision would appear to dissuade plaintiffs from pursuing meritless claims of infringement, lest the defendants receive their fees as a prevailing party. However, despite the absence of any statutory language distinguishing between prevailing plaintiffs and defendants, many courts historically applied a bifurcated standard on the fees question, depending on which side prevailed: defendants generally faced greater difficulty in recovering fees, even in relatively one-sided cases.¹³⁹ Since the cost of litigation is one of the most salient factors preventing individuals from fighting overreaching copyright claims,¹⁴⁰ reform of the recovery of attorneys' fees is a necessary step to equalizing the playing field between content owners and users.

Prior to 1994, many courts, including the copyright-rich U.S. Courts of Appeals for the Second and Ninth Circuits, explicitly adopted an unbalanced approach to the award of fees under section 505.¹⁴¹ These courts would routinely grant fees to prevailing plaintiffs,¹⁴² but deny them to prevailing defendants absent a finding of frivolousness or bad faith—an exacting standard.¹⁴³ As the U.S.

137. See *infra* note 135.

138. 17 U.S.C. § 505.

139. See *infra* note 135.

140. See generally AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY: 2011 35 (2011). According to the Report of the Economic Survey conducted by the American Intellectual Property Law Association, to litigate even a small (less than \$1 million at risk) copyright infringement trial in 2010 costs a whopping \$350,000 in attorneys' fees, on average. See *id.*

141. See *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 323 (9th Cir. 1987) ("Because section 505 is intended in part to encourage the assertion of colorable copyright claims, to deter infringement, and to make the plaintiff whole, fees are generally awarded to a prevailing plaintiff." (citations omitted)); *Diamond v. Am-Law Publ'g Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) ("Fees to a prevailing defendant should not be awarded when the plaintiff's claim is colorable since such awards would diminish the intended incentive to bring such claims."). It is unclear just how this unevenhanded approach came to life, and as the Supreme Court ultimately would hold, there is nothing in the text of the Copyright Act's attorneys' fees provision that warrants the use of an unbalanced approach. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 n.11 (1994).

142. *Frank Music Corp. v. MGM, Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989) ("Plaintiffs in copyright actions may be awarded attorney's fees simply by virtue of prevailing in the action: no other precondition need be met, although the fee awarded must be reasonable.").

143. See, e.g., *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127 (2d Cir. 1989) (stating that there exists a "heavier burden imposed upon defendants who seek fees"); *Olson v. NBC, Inc.*, 855 F.2d 1446, 1454 (9th Cir. 1988) (declining to adopt an evenhanded

Court of Appeals for the D.C. Circuit stated in 1987, “[C]ourts generally have agreed that defendants are entitled to fees . . . only when the claims are frivolous or are brought in bad faith.”¹⁴⁴

Things appeared to change in 1994, when *Fogerty v. Fantasy, Inc.* reached the Supreme Court.¹⁴⁵ In that case, Creedence Clearwater Revival’s old record label, Fantasy, sued the band’s lead singer, John Fogerty, for copyright infringement.¹⁴⁶ The case garnered immediate headlines because of one unusual fact—Fantasy had accused Fogerty of effectively infringing himself.¹⁴⁷ Specifically, Fantasy charged that Fogerty’s solo work *The Old Man Down the Road* infringed his classic *Run Through the Jungle*, to which Fantasy owned the copyright.¹⁴⁸ Due to the acrimony between the two sides,¹⁴⁹ the case went all the way to trial, where a jury ultimately ruled in favor of Fogerty.¹⁵⁰ As a prevailing defendant, Fogerty then sought recovery of his attorneys’ fees and then appealed after the district court denied his motion.¹⁵¹ This appeal ended up before the Supreme Court over the proper standard that courts should apply in analyzing recovery of fees under section 505.¹⁵² In the case, the Supreme Court overruled the predominant practice of the time and rejected outright the dual standard for fees, ordering hereafter that “[p]revailing plaintiffs and prevailing defendants are to be treated alike” under section 505.¹⁵³ The Court reasoned:

Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate

approach to awarding fees). *But see* *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (adopting an evenhanded approach to the grant of attorneys’ fees under the Copyright Act in the Third Circuit).

144. *Reader’s Digest Ass’n v. Conservative Digest, Inc.*, 821 F.2d 800, 809 (D.C. Cir. 1987).

145. *Fogerty*, 510 U.S. at 517.

146. *Id.* at 519-20.

147. *See id.*; *see also* James Sullivan, *John Fogerty Sued for Plagiarizing . . . Himself: Twisted Tales*, SPINNER (May 14, 2010, 5:00 PM), <http://www.spinner.com/2010/05/14/john-fogerty-creedence-clearwater-revival>.

148. *See Fogerty*, 510 U.S. at 519-20.

149. Fogerty and Fantasy’s owner, Saul Zaentz, had a famous falling out and the suit was one among several disputes between them. Matthew Bolin, *When Good Albums Happen to Bad People: John Fogerty, “Centerfield”*, POPDOSE (Mar. 8, 2010), <http://popdose.com/when-good-albums-happen-to-bad-people-john-fogerty-centerfield>.

150. *Fogerty*, 510 U.S. at 520.

151. *Id.*

152. *Id.* at 534.

153. *Id.*

them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.¹⁵⁴

Although the Court eschewed any particular test of the provision of fees, preferring an imprecise reliance on "equitable discretion,"¹⁵⁵ it did reference a non-exclusive list of factors that the lower courts might consider, including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence."¹⁵⁶ Regardless of what standard lower courts used, the Supreme Court insisted that the judiciary treat prevailing plaintiffs and defendants evenhandedly.

2. The Dual Standard's Continued Survival Post-*Fogerty*

Nevertheless, since 1994, a dual standard continues to prevail. An empirical study conducted in 2000 analyzed 260 reported fees decisions both before and after the *Fogerty* case.¹⁵⁷ Although it found that the rate at which defendants received their fees in copyright infringement cases increased substantially after the *Fogerty* decision, there was still a marked disparity between the grant of fees to plaintiffs and defendants. First, the rate at which plaintiffs received their fees (89 percent) was exactly the same both before and after *Fogerty*.¹⁵⁸ In other words, despite the Supreme Court's admonition otherwise,¹⁵⁹ lower courts continue to grant fees routinely to prevailing plaintiffs. Second, the data suggest that it is still significantly more difficult for prevailing defendants to recover fees than it is for prevailing plaintiffs.¹⁶⁰ As the author of the study

154. *Id.* at 527.

155. *Id.* at 534 (noting that "there is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983))).

156. *Id.* at 535 n.19 (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)).

157. See Jeffrey Edward Barnes, Comment, *Attorney's Fee Awards in Federal Copyright Litigation After Fogerty v. Fantasy: Defendants Are Winning Fees More Often, But the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L. REV. 1381, 1382 (2000).

158. *Id.* at 1389-90.

159. *Fogerty*, 510 U.S. at 533-34. The court stated:

Congress has modified the American Rule to allow an award of attorney's fees in the court's discretion, we find it impossible to believe that Congress, without more, intended to adopt the British Rule [granting fees as a matter of right]. Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment.

Id.

160. Barnes, *supra* note 157, at 1390. Of course, there could be other explanations for the continued disparity, including sample bias from the types of cases that reach a full adjudication on the merits.

bluntly concluded, “*Fogerty* has not changed a prevailing defendant’s need to show that [the opposing party’s] conduct during the course of litigation is culpable in order to win a fee award.”¹⁶¹ Thus, in many cases, courts seem to mandate that defendants show frivolousness or bad faith conduct by the plaintiff in order to receive fees, which is something they do not require prevailing plaintiffs to demonstrate.

An anecdotal examination of the case law appears to confirm the empirical survey’s findings. The Ninth Circuit—home of Hollywood and the entertainment industry—has continued to award fees to plaintiffs as a general matter of right. For example, in the notable *Krypton* opinion from 1997,¹⁶² the Ninth Circuit held that “a plaintiff in a copyright action is generally awarded fees by virtue of prevailing in the action”¹⁶³ though *Fogerty* says no such thing and, instead, mandates a balancing of factors that courts should use to determine the award of fees to either a plaintiff or defendant under an evenhanded approach.¹⁶⁴ Although the court decided this case some three years *after* the *Fogerty* decision, the Ninth Circuit never cited *Fogerty* and inexplicably ignored its core holding against the adoption of a British-style rule where courts grant fees as a matter of right.¹⁶⁵ There is also no plausible basis to think that the Ninth Circuit accidentally overlooked *Fogerty*. Indeed, the *Krypton* opinion shows that the Ninth Circuit was quite familiar with *Fogerty*—on several occasions during the course of the ruling, the Ninth Circuit refers to its own (overruled) decision in *Fogerty* for non-fees-related propositions.¹⁶⁶

161. *Id.* at 1396.

162. *Columbia Pictures Television v. Krypton Bd. of Birmingham, Inc.*, 106 F.3d 284, 296 (9th Cir.), *rev’d on other grounds, sub nom. Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1997).

163. *Id.* The Ninth Circuit ultimately reversed the fees award of the lower court because the lower court had not provided any basis for the fees award. *Id.* at 297. However, in so doing, the court appeared far more concerned about its ability to ascertain the reasonableness of the award, not the fact of the award itself. *Id.* at 296. As the court wrote:

This Circuit has a “long-standing insistence upon a proper explanation of any fee award” by a district court. The district court, rather than providing a reasoned explanation of its fee award, simply included the entire amount requested in the final judgment. Thus, without expressing any opinion on whether or not the fees claimed were reasonable, we must vacate the district court’s fee award and remand the matter so that the district court may provide a reasoned explanation supporting the amount of fees awarded.

Id. (citation omitted) (quoting *Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614, 623 (9th Cir. 1993)).

164. *Fogerty*, 510 U.S. at 534. “Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” *Id.* The Court therefore rejected the adoption of a British rule granting fees generally to prevailing plaintiffs (or prevailing defendants). *Id.*

165. *Id.* at 533-34.

166. *Krypton*, 106 F.3d at 290.

Meanwhile, post-*Fogerty*, courts continue to deny defendants fees absent “bad faith motivation (such as to dominate the market in question), hard-ball tactics [such as discovery abuse] . . . or objective unreasonableness (such as pursuing a claim against a defendant after dismissal of the identical claim against a co-defendant).”¹⁶⁷ Thus, to receive fees, many courts still appear to require a demonstration of extraordinary gall and bad judgment by the plaintiff. In *Bond v. Blum*, for example, the plaintiff was an author who had written an autobiographical manuscript detailing his act of patricide when he was seventeen.¹⁶⁸ 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.¹⁶⁹ Plaintiff 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.¹⁷⁰ The 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.”¹⁷¹ As the 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.¹⁷²

Similarly, a court granted attorneys’ fees to the defendant in *Hofheinz v. AMC Productions* when bad faith motivations for the litigation came to light.¹⁷³ In the case, a widow retracted what appeared to be a grant of permission for the use of movie clips, posters and photographs in a documentary when she did not like the movie’s final cut.¹⁷⁴ She then sued for infringement.¹⁷⁵ The court awarded fees on the grounds that the case was brought for improper purposes.¹⁷⁶ Specifically, the timing of the objection strongly suggested an ulterior motive to ensure that the documentary showcased her husband in a more favorable light.¹⁷⁷ The court found

167. 4 NIMMER ON COPYRIGHT (MB) § 14.10(D)(3)(b) (2011) (footnotes omitted).

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

169. *Id.* at 391.

170. *Id.*

171. *Id.* at 398.

172. *Id.* at 397-98.

173. *Hofheinz v. AMC Prods.*, No. CV-00-5827 (CPS), 2003 U.S. Dist. LEXIS 16940, at *18-19 (E.D.N.Y. Apr. 21, 2003).

174. *Id.* at *4-5.

175. *Id.* at *5.

176. *Id.* at *18-19.

177. *Id.* at *18.

the claim objectively unreasonable and frivolous, thereby warranting an award of fees to the defendant.¹⁷⁸ However, absent such egregious behavior by a plaintiff, a defendant is far less likely to receive an award of fees.

3. Fees and Artistic Expression: The *Koons* Cases

Consider the predicament of notorious appropriation artist Jeff Koons, who has faced accusations of copyright infringement in two high-profile lawsuits.¹⁷⁹ His encounters with the court system in these cases epitomize the troubles facing a defendant raising a fair use defense. In 1989, Koons was famously sued successfully in an artistic appropriation case involving his unauthorized transformation of a photograph into a satirical sculptural work.¹⁸⁰ In that suit, the court rejected his fair use defense and found him liable for copyright infringement.¹⁸¹ Although the holding did not produce a reported decision on Koons's liability for the plaintiffs' attorneys' fees under section 505, the court strongly hinted at their likely recoverability, styling Koons's actions in an unfavorable light and noting that the plaintiff was a good candidate for additional relief beyond ordinary damages.¹⁸²

Several years later, Koons found himself in court again. In *Blanch v. Koons*, the plaintiff owned the copyright to a photograph entitled "Silk Sandals by Gucci"—a commercial work used in advertising.¹⁸³ Koons usurped the image, reproducing a portion of it for his painting "Niagara," which had been commissioned by Deutsche Bank.¹⁸⁴ This time, however, the court found that the fair use doctrine protected Koons's activities as a form of transformative appropriation.¹⁸⁵ Koons then petitioned the court for fees as a prevailing defendant, but the court denied his request, reasoning that attorney's fees were not appropriate since the suit was neither frivolous nor brought in bad faith.¹⁸⁶ Such a result is typical post-*Fogerty*.¹⁸⁷ As Melville Nimmer notes, "most courts deny fees to

178. *Id.* at *20-21.

179. *See, e.g.,* *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

180. *Id.* at 305-06.

181. *Id.* at 312.

182. *Id.* at 313. As the Second Circuit noted in remanding the case to the district court, "given Koons' wilful [sic] and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2)." *Id.*

183. *Blanch v. Koons*, 396 F. Supp. 2d 476, 478 (S.D.N.Y. 2005).

184. *Id.* at 479.

185. *Id.* at 480-82.

186. *Blanch v. Koons*, 485 F. Supp. 2d 516, 517-18 (S.D.N.Y. 2007).

187. *See Barnes, supra* note 157, at 1396.

prevailing defendants when the plaintiffs' claims were neither frivolous nor motivated by bad faith. . . . By the same token, there is typically no award of fees in cases involving issues of first impression or advancing claims that were neither frivolous nor objectively unreasonable."¹⁸⁸

Interestingly, the *Blanch* decision sent a warning to Koons and others like him. As an appropriationist artist, reasoned the court, Koons knowingly took the risk of copying others' works even though the Copyright Act had protected him.¹⁸⁹ Unconcerned with the chilling effect such a ruling might have on future fair use in the arts, the court unsympathetically commented that: "appropriation artists can expect that their work may attract lawsuits. They must accept the risks of defense, including the time, effort, and expenses involved."¹⁹⁰ However, such a result fails to make Koons whole. In winning the case and successfully fending off charges of copyright infringement, Koons still found himself out of pocket for over one million dollars in attorneys' fees and costs.¹⁹¹ This result precludes all but the most wealthy celebrity artists from defending a suit with a meritorious fair use defense.

Thus, in the *Rogers* and *Blanch* cases, two copyright infringement claims involving issues of fair use and the appropriationist works of Jeff Koons end in strikingly different results. In the first—where the plaintiff established liability—the plaintiff was likely to get fees. In the second—where the defendant prevailed under a fair use defense—the defendant was unable to recover fees. In effect, despite the admonitions of the Supreme Court to the contrary, a dual standard for grants of fees apparently continues to prevail.

4. Fees and Political Speech: The Savage Incident

This continuing asymmetry between plaintiffs and defendants does not merely impact artists making transformative uses of copyrighted content; rather, it can suppress core political speech rights as well. Recently for example, the 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. CAIR

188. NIMMER ON COPYRIGHT, *supra* note 167 (footnote omitted).

189. *Blanch*, 396 F. Supp. 2d at 481-82. All the while, however, the court found that none of the four fair use factors weighed in favor of the plaintiff (three favored the defendant and one was neutral) and, therefore, Koons had made fair use of the photograph as a matter of law. *Id.*

190. *Blanch*, 485 F. Supp. 2d at 518.

191. *Id.*

had excerpted approximately four minutes of Savage's two-hour broadcast from October 27, 2007 without authorization.¹⁹² During the broadcast, Savage had deemed the Koran to be "a book of hate" and referred to Muslims as "throwback[s]" who deserved deportation "without due process," declaring that "I don't want to hear one more word about Islam."¹⁹³ 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."¹⁹⁴ 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.¹⁹⁵ Entitled *National Radio Host Goes on Anti-Muslim Tirade*, the article critiqued Savage's Islamophobic 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."¹⁹⁶ 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's protection of core political speech.¹⁹⁷ Savage, however, felt that CAIR had illicitly impinged on his exclusive dominion over his intellectual property; he therefore sued the organization for copyright infringement in a California federal district court.¹⁹⁸

The court quickly dispensed with the suit, 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.¹⁹⁹ Nevertheless, the court denied CAIR's subsequent motion for attorneys' fees.²⁰⁰ Although the

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

193. *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) (denying plaintiff's motion for partial summary judgment); *National Radio Host Goes on Anti-Muslim Tirade*, CAIR (Nov. 11, 2007), <http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=23608>.

194. *Id.*; *Michael Savage*, CAIR (Nov. 1, 2007, 11:40 AM), http://www.cair.com/audio/savage_102907.asp.

195. *See Our Vision, Mission and Core Principles*, CAIR, <http://www.cair.com/AboutUs/VisionMissionCorePrinciples.aspx> (last visited Mar. 14, 2012).

196. *National Radio Host Goes on Anti-Muslim Tirade*, *supra* note 193.

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

198. *Savage v. Council on Am.-Islamic Rels., Inc.*, 87 U.S.P.Q.2d (BNA) 1730 (N.D. Cal. July 25, 2008).

199. *Id.* at 1738.

200. *Savage v. Council on Am.-Islamic Rels., Inc.*, No. C 07-06076 SI, 2009 U.S. Dist. LEXIS 4926, at *1 (N.D. Cal. Jan. 26, 2009).

court admitted that “[p]laintiff’s Copyright Act claim was ‘never strong and was litigated anemically,’”²⁰¹ the court simply denied defendant’s request for an award of fees.²⁰² The court affirmed this opinion upon a motion for reconsideration.²⁰³

By denying CAIR’s motion for fees, the court failed to disincentivize overreaching claims. So it is not surprising that, shortly thereafter, Savage attempted to silence other groups by using similarly tenuous claims over the same piece of intellectual property.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ The company filed a takedown notice with YouTube pursuant to the DMCA.²⁰⁷ 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.²⁰⁸ The blow to Brave New Films was significant; the takedown thoroughly neutered the power of its concentrated outreach campaign. Although Brave New Films ultimately sued so that it could have its use of the video restored, the damage had already been done; in the end, without a grant of fees to CAIR, Savage’s disingenuous and abusive use of copyright law went undeterred.²⁰⁹

201. *Id.* at *2-3.

202. *See id.*

203. *Id.*

204. 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>.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* Plaintiff Brave New Films’ Notice of Motion and Motion for Partial Summary Judgment, *Brave New Films 501(C)(4) v. Weiner*, No. CV 08-04703 SI (N.D. Cal. Feb. 27, 2009), 2009 WL 527974 at *1 (“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*.”).

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

5. Fees Reform

In one sense, however, CAIR was fortunate; the courts at least adjudicated its motion for fees on the merits. Not all defendants enjoy that benefit. This important, though underappreciated, fact emphasizes the need for further reform. Specifically, a significant number of infringement suits in which defendants prevail are *altogether exempted* from a grant of fees under section 505. In many circuits, if the court dismisses a case for lack of standing (for example, brought on a false claim of copyright ownership), it precludes a court from granting fees under section 505 on the theory that the court lacks continuing subject-matter jurisdiction over the case and the defendant has not prevailed on the merits.²¹⁰ Barring the unusual imposition of Rule 11 sanctions under the Federal Rules of Civil Procedure,²¹¹ such a result protects misguided plaintiffs from having to pay fees even if they bring weak claims of infringement over works for which they do not possess rights.

The purpose of section 505 is not just to make the infringed whole, but to vindicate the rights of non-infringers that overbearing plaintiffs haul to court.²¹² In this latter goal, however, the statute is failing. Part of the problem may stem from the continued reliance of the evenhanded approach on some notion of culpability.²¹³ As Peter Jaszi presciently noted even before the Court issued *Fogerty*, since an “inquiry into a nonprevailing plaintiff’s culpability focuses solely on behavior associated with the litigation, while inquiry into a

210. *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 164-65 (1st Cir. 2007) (finding that a defendant who obtains dismissal for lack of subject-matter jurisdiction cannot obtain fees under section 505 of the Copyright Act since that party has not prevailed on the merits); *McCormick v. Amir Constr., Inc.*, No. CV 05-7456 CAS, 2008 WL 4534266, at *1-2 (C.D. Cal. Oct. 6, 2008) (declining to award attorneys’ fees under section 505, despite invalid claim of copyright ownership by plaintiff, based on lack of subject-matter jurisdiction to do so, but ultimately granting fees under FED. R. APP. P. 38 for the appellate portion of the suit); *cf. W.G. v. Senatore*, 18 F.3d 60, 65 (2d Cir. 1994) (finding that a court lacks jurisdiction to award attorneys’ fees based on a claim if it lacks subject-matter jurisdiction over that claim); *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035-36 (9th Cir. 1985) (finding that a district court lacks the ability to opine on the merits of a claim after deciding that it lacks subject-matter jurisdiction over the claim).

211. Of course, if a court lacks jurisdiction to grant fees after dismissing a case for lack of subject-matter jurisdiction, one could similarly argue that a court also lacks the ability to impose Rule 11 sanctions on similar grounds. That said, courts have typically held that they retain authority to impose Rule 11 sanctions, even absent subject-matter jurisdiction over a dispute. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396-97 (1990). But, of course, the standard for a Rule 11 violation is quite high.

212. Peter Jaszi, *505 and All That—The Defendant’s Dilemma*, 55 LAW & CONTEMP. PROBS. 107, 121 (1992).

213. As the Supreme Court has noted, trial courts should use their equitable discretion in considering such factors as frivolousness, motivation, and objective unreasonableness. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994).

nonprevailing defendant's culpability includes the underlying infringing activities,"²¹⁴ an evenhanded approach that continues to rely on notions of culpability will systematically disadvantage prevailing defendants.²¹⁵ Making grants of fees mandatory, rather than discretionary, might present one way to curb this tendency.²¹⁶ After all, prevailing plaintiffs already appear to receive fees in nine out of every ten cases—close to a matter of right. Since infringement suits are tremendously costly both to prosecute and defend against, a mandatory grant of attorneys' fees to prevailing parties could play an influential role in leveling the playing field in copyright litigation. If courts consistently granted fees to prevailing defendants, defendants would enjoy a greater ability to fend off claims by putative copyright holders seeking to receive benefits not recognized by the law. This, in

214. See Barnes, *supra* note 157, at 1385.

215. Jaszi, *supra* note 212, at 122, 127.

216. Such a proposal is, of course, not without potential problems. For instance, many companies now transfer their copyrights to 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 (though the copyright itself would presumably have some value). In addition, a mandatory grant of fees might disincentivize defendants from fighting unreasonable damages demands by a plaintiff in instances where the question of liability is settled but the calculation of damages remain. In particular, defendants might reasonably fear that, by not settling early, they will only incur a larger ultimate bill since they face exposure for the plaintiff's final attorneys' fees total. The use of Rule 68 offers of judgment, which can shift fee liability, could address this problem. See FED. R. CIV. P. 68. Specifically, 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." *Id.* If the underlying statute giving rise to the cause 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," 17 U.S.C. § 505 (2006) (emphasis added), section 505 of the Copyright Act appears to qualify for *Marek* treatment and the shifting of fees under Rule 68. 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 (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, 1048-49 (9th Cir. 2011); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 645-647 (7th Cir. 2001) (holding that, for a claim of copyright infringement, "only prevailing parties can receive attorney's fees pursuant to Rule 68" (emphasis added)). To avoid any doubt and to bolster the power of Rule 68 to encourage settlement, Congress should explicitly amend the Copyright Act to adopt a compromise position between the split circuits. To wit, section 505 should state that no party is prevailing when a judgment ultimately obtained by the plaintiff is not more favorable than the unaccepted offer.

turn, would reduce the seductive lure of rights-overreach that has led to widespread copybight. The Appendix to this Article contains one example of how a revised section 505 might look.²¹⁷

C. Resurrecting a Federal Cause of Action for False Copyright Claims

While section 505 reform could play a critical role in combating copybight, it would need augmentation for at least three reasons. First, section 505 reform would do little to deter the widespread use of overreaching (though rarely litigated) copyright warnings. Internalized by many ordinary individuals as representing accurate statements of the law, this form of copybight represses countless legitimate uses of copyrighted materials. Second, since the vast majority of copyright disputes never reach the point of litigation, let alone an adjudication on the merits that can trigger a fees motion, section 505 reform would directly impact only a small subset of the universe of copyright disputes. Third, for a certain class of cases litigated to the point of a final resolution, section 505 is inapplicable.²¹⁸ While section 505 reform can disincentivize copybight litigation when suits are brought by plaintiffs with proper standing, it does little to curb copybight litigation driven by plaintiffs who are ultimately found to lack ownership rights to the allegedly infringed work. Specifically, when a federal court determines that a plaintiff lacks sufficient ownership rights to possess standing for an infringement claim, the court is said to lack subject-matter jurisdiction over the dispute.²¹⁹ This absence of subject-matter jurisdiction in turn renders the court unable to consider any additional motions in the case, including a request for attorneys' fees by defendants who have prevailed.²²⁰

These limitations to section 505 reform highlight the need for an additional revision to Title 17 of the United States Code: the creation of a federal cause of action for false copyright claims. In the past, Jason Mazzone has proposed that Congress amend the Copyright Act to create a cause of action against copyfraud.²²¹ This suggestion is not broad enough; the law should penalize all forms of copybight by providing relief against individuals and entities who make patently and indisputably false claims of copyright ownership *and* against objectively unreasonable statements about the extent of an owner's

217. See *infra* Appendix.

218. See *supra* note 210 and accompanying text.

219. See *supra* note 210 and accompanying text.

220. See *supra* note 210 and accompanying text.

221. Mazzone, *supra* note 1, at 1031.

rights. Congress could model such a reform after section 512(f), though it would have the added advantage of disincentivizing overreaching copyright claims that are not subject to section 512(f), which only applies in limited contexts for online takedown notifications.²²²

Indeed, present law punishes overreaching intellectual property claims in certain limited arenas that, although worth addressing, do less public harm than copyblight. For example, the Copyright Act currently interdicts a failure by publishers to disclaim copyright in portions of a work embodying government works.²²³ More pointedly, the Patent Act has provided a (recently neutered²²⁴) cause of action against the false marking of a product as patented.²²⁵ And yet, the problem of copyright overreach is far more pervasive and dangerous than that of false claims to government works or false patent marking. After all, the public legally enjoys the freedom to use many works, not just those of the government, without the authorization of rights holders.²²⁶ Moreover, unlike with patented products, use of copyrighted works implicates important expressive

222. See 17 U.S.C. § 512 (2006).

223. *Id.* § 403.

224. Until recently, section 292(a) of the Patent Act provided for fines of “not more than \$500” for every act of false marking. 35 U.S.C. § 292(a). For many years, this provision generally escaped criticism or rebuke. However, in 2009, the Federal Circuit took a rather broad interpretation of what constituted an “offense” under the statute and held that plaintiffs could multiply the section’s statutory damages award by the literal number of actual goods falsely marked by a defendant. See *Forest Grp., Inc. v. Bon Tool Co.*, 590 F.3d 1295 (2009) (holding that section 292’s plain language requires courts to impose a fine for each and every false marking on an unpatented article). Thus, post-*Forest Group*, a distributor selling one million widgets marked with an expired patent mark suddenly faced potential liability in the amount of \$500 million (one million offenses multiplied by \$500 in statutory damages per offense) under the statute. Needless to say, this state of affairs resulted in the threat of absurdly large judgments against technology companies. The American Invents Act, signed into law in 2011, quickly undid the Federal Circuit’s holding in *Forest Group*. See Andrew S. Dallmann, *Patent False Marking and the America Invents Act*, PAT. LAW. BLOG (Oct. 27, 2011), <http://patentlaw.jmbm.com/2011/10/patent-false-marking-and-the-a.html>.

225. See 35 U.S.C. § 292(a). The act states:

Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word “patent” or any word or number importing that the same is patented for the purpose of deceiving the public; or Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words “patent applied for,” “patent pending,” or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—Shall be fined not more than \$500 for every such offense.

Id.

226. See, e.g., 17 U.S.C. §107 (allowing the fair use of copyrighted works without the authorization of rights holders).

and personhood interests.²²⁷ While the impact of a false claim of patenting often falls on sophisticated competing businesses—many of which have access to patent counsel who can quickly dispel any inaccuracies in the marking—one cannot say the same about a false copyright claim. The digital age has increased public interaction with copyright law in ways unforeseeable just a generation ago,²²⁸ and individuals often lack access to copyright counsel who could undo the falsehoods spread by copyblight.

There are also long-forgotten historical analogues for combating false copyright claims, though they are scarcely mentioned in modern literature.²²⁹ Starting in 1802, with the first amendment to the Copyright Act, federal law began to provide a cause of action for “false entry of copyright.”²³⁰ According to the statute:

If any person or persons . . . shall print or publish any map, chart, book or books, print or prints, who have not legally acquired the copyright of such map, chart, book or books, print or prints, and shall, contrary to the true intent and meaning of this act, insert therein or impress thereon that the same has been entered according to act of Congress, or words purporting the same, or purporting that the copyright thereof has been acquired; every person so offending shall forfeit and pay the sum of one hundred dollars, one moiety thereof to the person who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States having cognizance thereof.²³¹

In effect, the provision served as a private attorney general provision that split recoveries for violations evenly between the plaintiff and the United States government.²³² It remained on the books throughout the nineteenth century, serving as a part of the federal copyright scheme.²³³ The provision was also harsh in its application, doling out strict liability against violators.²³⁴ As an article from an 1857 edition of *The New York Times* noted, although an error might be “caused by carelessness and inadvertence, . . . that none the less expose[d] the parties to the penalties.”²³⁵

227. See, e.g., John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1 (2011) (illustrating the potent impact of copyright regulations on personhood interests).

228. See *supra* note 31 and accompanying text.

229. See, e.g., Act of Apr. 29, 1802, ch. 36, § 4, 2 Stat. 171.

230. *Id.*

231. *Id.*

232. *Id.*

233. See Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075. The claim endured in robust form through 1909, when it suffered significant dilution. See *id.*

234. *Id.*

235. *Personal*, N.Y. TIMES, Dec. 23, 1857, <http://query.nytimes.com/mem/archive-free/pdf?res=9F0DEFD8173CEE34BC4B51DFB467838C649FDE>. Ironically, the reproduction of the column from the newspaper in 1857 provided by *The New York Times* on its website contains the following language: “Published: December 23, 1857[.] Copyright © The New York Times.” *Id.* If

At the dawn of the twentieth century, however, the power of the false-entry provision eroded significantly. The 1909 Copyright Act radically altered the law on this count: Congress added a requirement of “fraudulent intent” and eliminated the *qui tam* nature of the claim.²³⁶ The Act removed the private cause of action. Instead, enforcement was left entirely to government discretion and deterrence took the form of a misdemeanor punishable by a fine of between 100 and 1000 dollars.²³⁷ The substantially weakened and scarcely enforced provision quietly remains, like a vestigial tail, in the 1976 Copyright Act.²³⁸

Not surprisingly, recent decades have seen increasingly dubious copyright claims wreak havoc on the legitimate rights of the public to access factual information. Such claims also limit the ability of consumers to make use of creative works that have fallen into the public domain or to engage in fair use of copyrighted works that remain under legal protection. The reenactment of a *qui tam* federal cause of action for any objectively unreasonable and false claim to copyright ownership or exclusive rights over a work would balance the copyright regime’s treatment of user and owner rights.

Specifically, Congress could model a reenacted false claim statute based on the 1802 *qui tam* provision and the modern section 512(f), which proscribes misrepresentations of material or activities are infringing (while, of course, incorporating the alterations to section 512(f) this Article has already suggested). Since copybight—like copyfraud—“inflicts small injuries on many individuals” and simultaneously “causes a more general injury to the public as a whole,” a false claims statute against copybight—like Jason Mazzone’s proposal to remedy copyfraud—should “provide relief broader than any plaintiff’s individual injury.”²³⁹ Yet the diffuse impact of each act of copybight makes actual damages difficult to determine. A *qui tam* scheme that provides statutory damages large enough to disincentivize copybight, but not so onerous as to result in unreasonable liability on businesses—especially those acting in good faith—would ideally reflect the broad societal injury that copybight inflicts. It would also provide potential plaintiffs with the necessary instigation to make an attack on significant misrepresentations about the nature and scope of copyright worthwhile. The Appendix to this

section 11 of the 1831 Copyright Act were still in effect, *The New York Times* would have violated it with this notification. *Id.*

236. Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075.

237. *Id.* § 28.

238. See 17 U.S.C. § 506(c) (2006) (allowing the government to impose fines of up to \$2500 for appending fraudulent copyright notices to works).

239. Mazzone, *supra* note 1, at 1086.

Article contains one example of how a reenacted false claims statute might look.²⁴⁰

III. CONCLUSION

Copyblight's suppression of user rights is disturbingly widespread and multifaceted. The Copyright Clearance Center and major publishing houses earn millions of dollars in ill-gotten license payments from students and academic institutions by glibly tossing aside the "limited [t]imes"²⁴¹ requirement and claiming copyright protection over public domain works.²⁴² Talk show hosts, law firms, sports leagues, and major record labels overwhelm legitimate fair use rights²⁴³ when they suppress criticism of hate speech,²⁴⁴ stifle public commentary on legal positions and tactics,²⁴⁵ claim exclusive rights to any manner of use of their copyrighted content, no matter how transformative or de minimis,²⁴⁶ and, most infamously, tell a mother that she cannot place on a YouTube a short video of her baby dancing to unauthorized music.²⁴⁷ Finally, University bookstores, big box retailers, and MLB attempt to circumvent copyright's subject-matter limitations²⁴⁸ when they claim protection in book lists,²⁴⁹ product pricing,²⁵⁰ and factual statistical data for playing fantasy sports.²⁵¹ In all, countless organizations and entities flout numerous provisions of federal law that protect the public interest by circumscribing the scope of copyright protection.

Absent the imposition of significant legal consequences for its perpetuation, copyblight will continue to spread. As Paul Heald once warned, without the development of a sound public policy (including punitive sanctions) to "jolt" industry into compliance, "consumers will continue to be induced to part with their money by spurious claims of

240. See *infra* Appendix.

241. U.S. CONST. art. I, § 8, cl. 8.

242. See *supra* Part I.B (discussing the Copyright Clearance Center example).

243. 17 U.S.C. § 107.

244. See *supra* Part II.B (discussing the Michael Savage/CAIR example).

245. See *supra* Part I.B-C (discussing the Dozier Internet Law, P.C. and National Football League/Wendy Selzer examples).

246. See *supra* Part I.B-C (discussing the copyright warnings of major publishers and Major League Baseball).

247. See *supra* Part II.A (discussing *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008)).

248. 17 U.S.C. § 102(b).

249. See *supra* Part I.B (discussing the Harvard Coop example).

250. See *supra* Part I.B (discussing the Wal-Mart example).

251. See *supra* Part II.B (discussing the fantasy baseball example).

copyright.”²⁵² That admonition, made almost two decades ago, remains true today, and consumers do not suffer just in their pocketbooks. As a result, this Article seeks to curb copyblight by proposing real legal consequences for its purveyors. The reforms advocated here focus on three loci where copyblight has its biggest effect: (1) in the sphere of commerce and discourse, where public representations featuring sweepingly inaccurate statements about the nature and scope of rights chill legitimate uses of copyrighted works; (2) in the online environment, where improper takedown notifications under the DMCA threaten to remove legitimate user-generated content; and (3) in court, where the continued persistence of an uneven standard for fees awards undermines the balance between plaintiffs and defendants in infringement cases. Federal law (rightfully) offers meaningful remedies for the infringement of legitimate owner rights. It only makes sense to offer meaningful remedies for the infringement of legitimate user rights. Though far from perfect, the three proposals advanced in this Article represent a small step toward curbing the widespread problem of copyblight and recognizing that the rights of users deserve the same respect as the rights of copyright holders.

252. Heald, *supra* note 7, at 282.

APPENDIX

Section 505:

Current version

“In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”²⁵³

Potential new version

“In any civil action under this title, the court will award recovery of full costs to a prevailing party against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court will also award reasonable attorney’s fees to the prevailing party as part of the costs. For the purposes of this Section, when a defendant makes an offer of judgment under Federal Rule of Civil Procedure 68 and the plaintiff rejects said offer of judgment and ultimately receives a judgment not more favorable than the unaccepted offer of judgment, no party will be considered prevailing.”

Section 512(f):

Current version

“Any person who knowingly materially misrepresents under this section—

- (1) that material or activity is infringing, or
- (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be

253. 17 U.S.C. § 505.

infringing, or in replacing the removed material or ceasing to disable access to it.”²⁵⁴

Potential new version

“Any person who, without objective good faith or reasonable consideration of any defenses (either legal or equitable) to claims of infringement, misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorney’s fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation. Damages awards shall account for all ‘but for’ consequences of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it. Damages awards shall also include reasonable attorney’s fees incurred in prevailing in a claim brought under this subsection.”

Qui Tam Statute:

Old version (from Chapter 11 of the 1831 Copyright Act)

“[I]f any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut, or engraving, not having legally acquired the copyright thereof, and shall insert or impress that the same hath been entered according to act of Congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognisance thereof.”²⁵⁵

Potential new version

“Any person who, without objective good faith or reasonable consideration or mention of defenses (either legal or equitable) to claims of infringement, misrepresents, in connection with the distribution of goods or services, to the public that material or activity

254. *Id.* § 512(f).

255. Act of Feb. 3, 1831, ch. 16, § 11, 4 Stat. 436, 438.

is infringing shall be liable for statutory damages in the amount of no less than \$[TBD] and no more than \$[TBD] per act of misrepresentation, as determined at the discretion of the court. Any person may sue for said statutory damages with one moiety thereof going to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognisance thereof.”²⁵⁶

256. To recognize the historical roots of this statute in Chapter 11 of the Copyright Act of 1831, the proposed language for a false “marking” statute would retain the charming, antediluvian language referring to moieties. *See id.*

