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Copyright and Trademark Law and Public Interest Lawyering

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Copyright and Trademark Law and Public Interest Lawyering

R. Anthony Reese*

Introduction	911
I. The Public Interest Purposes of Trademark and Copyright Law	912
II. Representation of Clients Unable to Afford Legal Counsel.....	915
A. Representing Clients Accused of Trademark or Copyright Infringement	915
B. Representing Clients Asserting Trademark and Copyright Infringement Claims	918
C. Representing Nonprofit Organizations.....	920
III. Economic Empowerment	922
A. Copyright and Economic Empowerment	922
B. Trademark and Economic Empowerment.....	923
IV. Freedom of Expression.....	924
Conclusion.....	929

INTRODUCTION

A significant question lurks in the background of this symposium: What *is* public interest lawyering? It is far beyond the purview of this essay to attempt a comprehensive definition of what constitutes public interest legal practice. Instead, like any good common law lawyer, I plan to reason by analogy. Specifically, I will highlight a few ways in which the work that copyright and trademark lawyers do is often analogous to the kind of work done by lawyers who are engaged in practices that are fairly uncontroversially accepted as public interest lawyering.

I begin in Part I by examining how copyright and trademark law are each animated by fundamental goals of furthering the public interest and noting that, to the extent that one views current law as falling short of achieving those goals, that provides an opportunity for public interest lawyering in the form of advocating for

* © 2012 R. Anthony Reese, Chancellor's Professor of Law, University of California, Irvine. My thanks to Christopher Leslie for organizing the symposium and inviting me to participate, and to my fellow participants for helpful discussions on the topic.

legal reform. Part II then considers the opportunities that practicing copyright and trademark lawyers have for engaging in the paradigmatic form of public interest lawyering: representing clients who cannot afford legal representation. I offer examples of such public interest copyright and trademark lawyering in representing both clients who need to defend themselves against claims of copyright and trademark infringement and clients who have their own copyright or trademark claims that they need to assert. Part III turns to the potential role for copyright and trademark law in public interest lawyering directed at economic empowerment for disadvantaged individuals and communities. Finally, Part IV explains how copyright and trademark law, perhaps more than many other areas of business law, are often intertwined with freedom of expression concerns, and thus in some instances representing a client in a copyright or trademark case may help achieve the same goals as familiar public interest lawyering, which often seeks to defend freedom of speech.

I. THE PUBLIC INTEREST PURPOSES OF TRADEMARK AND COPYRIGHT LAW

In some ways, it seems strange to ask whether copyright law and trademark law are relevant to public interest lawyering, given that each body of law has a core purpose to advance the public interest in a particular way.

Some may think of trademark law as merely regulating relationships among the producers of goods and services and protecting certain rights of one producer against infringement by competitors. Indeed, trademark law certainly offers producers who use marks in connection with their products a valuable tool against some uses by competitors of identical or similar marks. But the core goal of traditional trademark law has long been to prevent ordinary consumers from being confused or deceived.¹ In a sense, trademark law is a very venerable branch of consumer protection law. While trademark infringement suits are brought by one trademark user against another, the basic object of traditional trademark infringement litigation is really vindicating consumer sovereignty. For example, if a consumer chooses to purchase a particular company's product, then trademark law seeks to ensure that she receives that product, and not one from some other producer that she has been led to mistakenly believe is actually the product she wants to buy. In other words, if the consumer wants to buy BEN & JERRY'S ice cream, then she should not inadvertently end up with BEN & JERKY'S products instead. Trademark law's consumer protection rationale seeks to ensure that the consumer can relatively easily make her purchasing choices in the marketplace.²

1. *See, e.g.,* *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003) ("Infringement law protects consumers from being misled by the use of infringing marks and also protects producers from unfair practices by an 'imitating competitor.'").

2. *See, e.g.,* *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163–64 (1995) ("In principle, trademark law, by preventing others from copying a source-identifying mark, reduce[s] the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a

And trademark infringement law can help facilitate other consumer protection goals as well. For example, if trademark law ensures that the consumer actually gets the brand of product that she thinks she is getting when she makes her purchase, then the consumer also will be able to pursue the right party—the actual producer of her chosen brand—if, for example, the product turns out not to be satisfactory. She might pursue her dissatisfaction by complaining to the producer, demanding a refund, posting a negative review online, or deciding to shift her future purchases to other producers, but in each instance trademark law can help ensure that her actions are directed at the party who actually supplied the disappointing product.

Like trademark law, copyright law also has at its core a goal to serve the public interest. Many may perceive copyright law as concerned primarily with the enrichment of copyright owners, which in many cases may be (or may be perceived as) well-off corporations, such as movie studios and record companies. But the fundamental purpose of copyright law, as expressed in the constitutional provision that empowers Congress to enact copyright statutes, is to promote the progress of “Science”—that is, of learning or knowledge.³ Copyright law aims to do this by providing incentives for people to create works of authorship and then to disseminate those works to the public. This public-regarding purpose can be seen in the title of the very first U.S. copyright statute, passed by the first Congress in 1790, which begins with the words “An Act for the Encouragement of Learning.”⁴

The Supreme Court has repeatedly made clear the public interest purpose of the private rights that the law grants to copyright owners. In 1932, the Court wrote that the “primary object in conferring the [copyright] lie[s] in the general benefits derived *by the public* from the labors of authors.”⁵ Sixteen years later, the Court wrote that “[t]he copyright law . . . makes reward to the owner a secondary consideration . . . [R]eward to the author or artist serves to induce release *to the public* of the products of his creative genius.”⁶ And again in 1975, the Court spoke of copyright law’s goal as one of benefitting the public:

[Copyright law] reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . [T]he ultimate aim

potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”) (citation and internal quotation marks omitted).

3. U.S. CONST., art. I, § 8, cl. 8; *see also* 1 NIMMER ON COPYRIGHT § 1.03 n.11.2 (2012).

4. 1 Stat. 124, 1st Cong. (1790). The first British copyright statute, the Statute of Anne, had a nearly identical title. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

5. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (emphasis added).

6. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (emphasis added).

[of copyright law] is . . . to stimulate artistic creativity for the general public good.⁷

Thus, while copyright law operates by granting potentially valuable rights to private parties (such as authors and publishers), the foundational understanding of copyright law is that Congress grants those rights because it has concluded that, on balance, those grants will lead to greater production and dissemination of knowledge and culture, for the benefit of the public at large, than would result if it did not grant such rights.

For both copyright and trademark law, we can, of course, question to what extent the current legal regime effectively implements these core public interest purposes and to what extent the law on the books and on the ground has strayed from them. For example, the cause of action for trademark dilution, recognized in the federal statute only in 1996,⁸ allows an owner of a famous trademark to stop another person from using a similar mark even in the absence of any likelihood that the use will confuse or deceive any consumers,⁹ and this body of trademark law seems harder to justify on the consumer protection grounds that undergird traditional trademark infringement law.¹⁰ And many people believe that the scope and duration of rights granted to copyright owners by current copyright law go beyond what is needed to provide authors and distributors with sufficient incentives to create and disseminate works of authorship.¹¹

Of course, in many areas of law that are understood to promote the public interest, one can question how well the existing law on the books, or on the ground, actually achieves those public interest goals. And any gap between the law's public interest goals and its actual effects provides the opportunity for copyright and trademark lawyers to engage in activity that seems generally understood to constitute public interest lawyering: advocacy for legal reform. To the extent that the current legal regime does not serve the expressed public interest goals of copyright law or trademark law, that means that public interest lawyers have work to do advocating to reform existing law so that it better achieves the goals of protecting consumers and promoting the diffusion of

7. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

8. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996). Approximately twenty-five states had adopted some form of dilution protection between 1947 (when Massachusetts adopted the first state antidilution statute) and 1995. H.R. Rep. No. 104-374, at 3 (1995).

9. 15 U.S.C. § 1125(e) (2006). *See, e.g.*, 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:69 (4th ed. 2012).

10. *See Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003) (“Unlike traditional infringement law, the prohibitions against trademark dilution are not the product of common-law development, and are not motivated by an interest in protecting consumers.”); 4 MCCARTHY, *supra* note 9, § 24:72 (“Antidilution law has a strong resemblance, not to the law of consumer protection, but to the law of trespass on property.”).

11. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

knowledge. To the extent that any proposed revision to the current regime would not serve the law's expressed public interest goals, public interest lawyers still have work to do objecting to—and seeking to revise and improve—such proposals. Such advocacy for legal reform is well recognized as a type of public interest lawyering in other areas, and recent years have seen an increase in public interest groups doing such work in the fields of copyright and trademark law, including the Electronic Frontier Foundation, Public Knowledge, the Center for Democracy and Technology, and others. Whether or not one agrees with their positions in any particular instance, these organizations are practicing public interest lawyering in their advocacy for or against proposals to amend the copyright and trademark statutes.

II. REPRESENTATION OF CLIENTS UNABLE TO AFFORD LEGAL COUNSEL

Perhaps the archetypal form of public interest lawyering is providing legal representation to clients who would otherwise be unable to afford effective legal counsel. Trademark and copyright law offer many opportunities for public interest lawyers to represent such clients. In this Part, I look at representing both indigent clients accused of infringing someone's copyright or trademark and clients who have copyright or trademark infringement claims of their own but cannot afford an attorney to assert them. I also note that representing under-resourced nonprofit organizations, as some public interest lawyers do, may sometimes involve assisting those organizations with trademark matters.

A. Representing Clients Accused of Trademark or Copyright Infringement

Indigent clients may find themselves sued for alleged trademark or copyright infringement. Such defendants may well have winning arguments as to why their conduct does not violate a plaintiff's trademark or copyright rights and meritorious defenses against such infringement claims.

Authors and artists are themselves sometimes subjected to overreaching copyright claims by another copyright owner. For example, James Joyce's grandson told Carol Shloss, a respected literary scholar who was writing a critical biography of Joyce's daughter Lucia, that Shloss could not quote Joyce's or Lucia's writings in her work, and could not quote information from Lucia's medical records or letters written to her by third parties.¹² In fact, Shloss's quotations from the copyrighted writings of James and Lucia Joyce may well have constituted fair use (and the copyright statute expressly provides that fair use does not infringe copyright),¹³ the facts contained in medical records are not subject to copyright

12. See Amended Complaint for Declaratory Judgment and Injunctive Relief, *Shloss v. Weeney*, 515 F. Supp. 2d 1083 (N.D. Cal. 2007) (No. 06-3718), 2006 WL 3619866.

13. 17 U.S.C. § 107 (2006).

protection,¹⁴ and James Joyce's estate owned no copyright in letters written by other people to Lucia Joyce.¹⁵

As another example, consider photographer Thomas Forsythe, who took a series of seventy-eight photographs called "Food Chain Barbie,"¹⁶ which the court described as follows:

Forsythe generally depicts one or more nude Barbie dolls juxtaposed with vintage kitchen appliances. For example, "Malted Barbie" features a nude Barbie placed on a vintage Hamilton Beach malt machine. "Fondue a la Barbie" depicts Barbie heads in a fondue pot. "Barbie Enchiladas" depicts four Barbie dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven.¹⁷

While Mattel claimed (among other things) that Forsythe's photographs infringed on the company's copyright in the Barbie doll, Forsythe believed that his work was "obviously 'fair use'—political and social criticism presented with humor and parody,"¹⁸ and would therefore not infringe Mattel's copyrights.

Somewhat similar situations can arise involving trademarks, when an existing mark holder sues (or threatens suit) alleging that a smaller business, or sometimes a new market entrant, is infringing its mark. Consider Bo Muller-Moore, who runs a small t-shirt printing business in Montpelier, Vermont. For several years, one of his most popular t-shirts has featured the hand-stenciled slogan "Eat More Kale," as depicted here:



14. Copyright offers no protection to facts (though it can protect an original expression of facts). See 17 U.S.C. § 102(a) (2006); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991); Nash v. CBS, Inc., 899 F.2d 1537, 1542 (7th Cir.1990).

15. See 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1.3 (3d ed. 2012). Lucia Joyce (or her estate) would only own the copyright in a letter written and sent to her by another person if the letter's author expressly transferred the copyright to her.

16. Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003).

17. *Id.*

18. Tom Forsythe, *Food Chain Barbie and the Fight for Free Speech*, ARTSURDIST, <http://www.tomforsythe.com/the-fight-for-free-speech.html> (last visited Nov. 14, 2012).

This design, however, has earned him repeated trademark trouble with the fast-food chain Chick-fil-A, which has several trademark registrations for the slogan “EAT MOR CHIKIN,”¹⁹ which it uses as part of its advertising campaign featuring semi-literate Holstein cows trying to save their hides by persuading customers to eat chicken instead of beef. In 2006, Chick-fil-A sent Muller-Moore a letter alleging trademark infringement and demanding that he stop selling his EAT MORE KALE t-shirts, though when the company took no further action, he continued to sell the shirts. When Muller-Moore applied in 2011 to register his own trademark in the “EAT MORE KALE” slogan for t-shirts and related goods,²⁰ Chick-fil-A protested and demanded that he cease using the slogan and turn over his domain name, eatmorekale.com. The dispute is ongoing, leaving the parties’ factual and legal disagreements unresolved. However, it is not clear that Muller-Moore’s use of EAT MORE KALE is likely to cause any consumer confusion. If it is not, then his use of the slogan is not infringing, and he would not be barred from registering his mark on the grounds that it is confusingly similar to Chick-fil-A’s.²¹

As these examples illustrate, artists and small entrepreneurs may face overreaching claims by copyright or trademark owners of violating the owners’ intellectual property rights. The artist or entrepreneur in these instances may well have winning arguments for why her conduct is not infringing. Many aspects of copyright and trademark law are fact-intensive and case specific, including whether a defendant’s trademark is likely to cause confusion with a plaintiff’s trademark, whether a defendant’s work of authorship is sufficiently similar to a plaintiff’s copyrighted work to infringe,²² and whether a defendant’s copying of a plaintiff’s copyrighted work constitutes noninfringing fair use.²³

But the costs of defending against such suits can be substantial, often running to hundreds of thousands of dollars.²⁴ Given the expense of litigating

19. See EAT MOR CHIKIN, Registration No. 2,010,233; EAT MOR CHIKIN, Registration No. 2,062,809; EAT MOR CHIKIN, Registration No. 2,240,326; EAT MOR CHIKIN, Registration No. 2,197,973; EAT MOR CHIKIN, Registration No. 2,538,050; EAT MOR CHIKIN, Registration No. 2,538,070.

20. U.S. Trademark Application Serial No. 85,412,053 (filed Aug. 31, 2011).

21. Even if Muller-Moore’s mark is not confusingly similar to Chick-fil-A’s, he still might not be able to register the mark if Chick-fil-A’s mark is famous (and thus entitled to trademark law’s anti-dilution protections) and his mark would dilute Chick-fil-A’s mark. 15 U.S.C. §§ 1125(c), 1063(a) (2006).

22. 2 GOLDSTEIN, *supra* note 15, § 9.3.1 (“[T]he [copyright infringement] plaintiff must show that audiences will perceive substantial similarities between the defendant’s work and the plaintiff’s protected expression.”).

23. 17 U.S.C. § 107 (2006).

24. A survey of members of the American Intellectual Property Law Association indicated that in 2011, the all-inclusive median cost for litigating a trademark or copyright infringement suit with less than \$1 million at risk was \$350,000. AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, REPORT OF THE ECONOMIC SURVEY 2011, at 35 (2011).

these cases, typically in federal court,²⁵ an artist or entrepreneur who is sued for copyright or trademark infringement may not have the resources to assert potentially successful defenses against the plaintiff's claims, particularly if she faces an opponent with substantially greater resources, such as the James Joyce estate, Mattel, or Chick-fil-A. For this reason, the defendant may have little choice but to accede to the plaintiff's demands and stop using parts of the plaintiff's work or stop using the entrepreneur's allegedly confusing trademark. As a result, free or low-cost legal representation may be key to enabling an artist or entrepreneur who is sued to vindicate the legality of her activities and continue them. Public interest lawyers who will represent poorly resourced defendants in copyright and trademark disputes can thus enable an artist or author to create her works, or allow a small business to continue to operate under the name its customers know. Indeed, the examples given in this section come from cases in which public interest groups, law firms acting pro bono, or a combination of the two represented the alleged infringers, demonstrating the importance of public interest lawyering in determining whether copyright or trademark claims asserted against under-resourced defendants are valid.²⁶ While Muller-Moore's trademark dispute with Chick-fil-A is currently ongoing, courts in the copyright examples above ultimately determined that Shloss and Forsythe were not infringing copyrights in James Joyce's works or Mattel's Barbie, and those authors were able to continue disseminating their works.

B. Representing Clients Asserting Trademark and Copyright Infringement Claims

Another opportunity for public interest lawyering in copyright and trademark law comes not from defending clients against claims of infringement, but from representing them in asserting their own infringement claims. As noted above, copyright and trademark claims can be very expensive to litigate. Even if a low-income plaintiff has a strong infringement claim, the available monetary damages might not justify pursuing the claim, given the litigation costs. For example, a freelance photographer who finds one of her photographs used without permission in a national magazine might have relatively small actual damages—the license fee that she would have charged the magazine for permission to use the photo,²⁷ which might have cost, for example, only \$500, \$1000, or \$2000. If the photographer must litigate a copyright infringement claim in federal court in order to recover those damages, the cost of the litigation is

25. Copyright claims can only be heard in federal court, and many trademark claims are brought there although they can also be brought in state court. 28 U.S.C. § 1338(a) (2006).

26. Shloss was represented by the Stanford Law School Cyberlaw Clinic and attorneys from Kecker & Van Nest and from Howard Rice. *Shloss v. Sweeney*, 515 F. Supp. 2d 1083, 1083 (N.D. Cal. 2007). Forsythe was represented by attorneys from Howard Rice, acting on behalf of the ACLU of Southern California. See Forsythe, *supra* note 18. Muller-Moore is being represented pro bono. Jess Bidgood, *Chicken Chain Says Stop, but T-Shirt Maker Balks*, N.Y. TIMES, Dec. 5, 2011, at A12.

27. *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).

likely to dwarf the recovery. (Indeed, even the cost of the lawyer's time needed to send a demand letter and settle the claim without litigation, if the magazine were willing to do so, might exceed the likely amount of recovery.) As a result, those authors and business operators who cannot easily afford legal representation may be unlikely to pursue their potentially valid claims against infringers. In such cases, those authors and business operators do not receive any compensation for the harm they have suffered. To make matters worse, if the low-income rightsholder cannot afford to pursue litigation, she will also not receive injunctive relief against any harm she continues to suffer. This is likely to be a particular problem in cases of trademark infringement, since it may mean that consumers will continue to be subjected to ongoing confusion; indeed, injunctive relief was traditionally the preferred remedy in trademark infringement cases precisely in order to prevent such ongoing confusion.²⁸

Copyright and trademark law already attempt to address these difficulties for poorly resourced rightsholders, but they do so only imperfectly.²⁹ Copyright law provides statutory damages as an alternative to actual damages, so that a copyright owner may recover in the ordinary case between \$750 and \$30,000 per work infringed.³⁰ But statutory damages are only available if the infringed work was registered with the Copyright Office before the infringement began.³¹ Of course, a low-income copyright owner may well be unable to afford to systematically register her works as they are produced, and she will thus be unlikely to be able to recover statutory damages. Even if statutory damages are available, the amount of the damage award within the statutory range is to be set "as the court considers just," leaving a potential plaintiff (and her potential counsel) uncertain as to how large an award she might be able to receive if she wins.

The Copyright Act and the Lanham Act, the federal trademark statute, also contain provisions allowing a court to award a prevailing party her attorney's fees,³² which could offer some encouragement for a struggling artist or business

28. See, e.g., *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 131 (1947) (noting that an accounting of an infringer's profits will be "denied where an injunction will satisfy the equities of the case"); *Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc.*, 41 F.3d 1242, 1247 (8th Cir. 1994) (describing injunction as "the preferred Lanham Act remedy"); 5 MCCARTHY, *supra* note 9, § 30:31.

29. The Copyright Office is currently conducting a study "to assess whether and, if so, how the current legal system hinders or prevents copyright owners from pursuing copyright infringement claims that have a relatively small economic value ('small copyright claims'); and recommend potential changes in administrative, regulatory, and statutory authority to improve the adjudication of these small copyright claims." *Remedies for Small Copyright Claims*, 76 Fed. Reg. 66,758 (Oct. 27, 2011); see also 77 Fed. Reg. 51,068 (Aug. 23, 2012).

30. 17 U.S.C. § 504(c)(1)–(2) (2006). The statute also provides that if the infringement was willful, the maximum amount of statutory damages rises from \$30,000 to \$150,000, while if the infringement was innocent, the minimum amount falls to \$200.

31. 17 U.S.C. § 412 (2006) (the only caveat to this rule applies in cases where "registration is made within three months after the first publication of the work," even if such registration occurs after an infringement action has commenced").

32. 17 U.S.C. § 505 (2006); 15 U.S.C. § 1117(a) (2006).

owner to bring an infringement claim in the hope that, if the claim succeeds, the plaintiff will recover not only her damages but also the cost of hiring counsel to bring the suit. Such recovery, though, is by no means assured. The Copyright Act gives courts the discretion to award an attorney's fee but does not require them to do so,³³ and in any event conditions an award of attorney's fees on registration prior to infringement (as it does for statutory damages).³⁴ The Lanham Act allows an attorney's fee award only "in exceptional cases."³⁵ As a result, a plaintiff who expends the resources to bring an infringement suit in the hope of not only winning and recovering her actual damages (or a higher amount in statutory damages), but also having the infringer ordered to pay her attorney's fees, is taking a substantial risk. Contingent fee arrangements might help address this problem, but these do not seem to be common in copyright and trademark litigation.

All of this means that a financially struggling author who finds her copyright infringed may well go uncompensated for the monetary damages that the infringement caused her if she cannot get free or reduced-cost legal representation. Likewise, a struggling small business owner who finds her trademark being infringed but cannot afford a lawyer may end up not being compensated for any damages she has suffered and may not be able to enjoin a third party's continuing infringing use of her trademark and the continued harm that use causes to her business by confusing consumers. Representing authors and business owners who have valid infringement claims but who cannot afford paid counsel thus presents another opportunity for a classic type of public interest lawyering in the copyright and trademark fields.

C. Representing Nonprofit Organizations

One particular type of client that often can ill afford to pay for counsel is the nonprofit organization. An entity's nonprofit status does not in itself indicate that the organization cannot afford to pay for legal representation—extremely well-off foundations and private universities may be nonprofit organizations but can certainly pay lawyers to represent them. Many other nonprofit organizations, though, struggle with very limited resources to achieve their organizational goals and may well be unable to afford legal representation at market rates. Pro bono lawyering has long involved handling issues—including corporate formation and tax exemption—for such entities.

Trademark law also offers opportunities to practice public interest lawyering by representing under-resourced nonprofit organizations, as such organizations may find themselves on one side or another of a trademark dispute.³⁶ Consider,

33. 17 U.S.C. § 505.

34. 17 U.S.C. § 412.

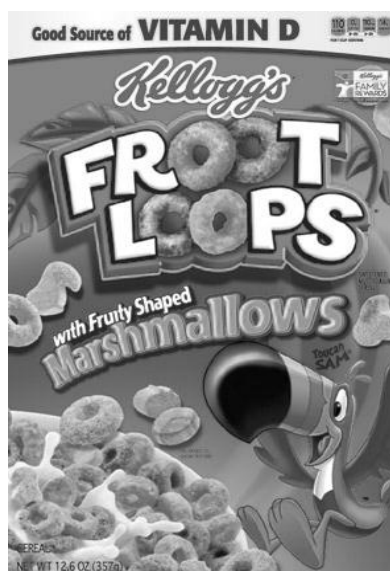
35. 15 U.S.C. § 1117(a).

36. Nonprofit organizations may face copyright issues as well, but trademark claims seem more likely to arise across a wider variety of fields of activity than nonprofit organizations may

for example, the Maya Archaeology Initiative (MAI), a nonprofit organization that aims to “provide the means to protect and improve northern Guatemala through a range of diverse programs,”³⁷ and that uses the following logo:



In 2011, cereal maker Kellogg’s asserted that MAI was infringing on the “Toucan Sam” character the company uses to promote its Froot Loops cereal, as seen on a recent box:³⁸



engage in. See *Trademark Registration for NPOs*, NONPROFIT CENTRAL, <http://www.startnonprofitorganization.com/trademark-registration-for-npos> (last visited Nov. 14, 2012) (“Patents and copyrights may not be relevant for most of the nonprofit organizations. Many nonprofit organizations instead go for trademark or service mark registration.”).

37. *Our Mission*, MAYA ARCHAEOLOGY INITIATIVE, http://mayaarchaeology.org/index.php?option=com_content&view=article&id=83&Itemid=203. (last visited Oct. 20, 2012).

38. *Kellogg in Fight over Toucan Sam Logo*, DETROIT NEWS, Aug. 23, 2011, at A11.

The company threatened to sue MAI if the group did not alter its logo and agree to conditions on its future use.³⁹ The parties eventually settled the dispute on terms favorable to MAI without litigation,⁴⁰ but the episode offers an example of the kind of trademark claim that a nonprofit organization might have to defend against.

Nonprofit organizations may also need representation to assert trademark claims of their own. For example, The Committee for Idaho's High Desert (CIHD), a nonprofit environmental advocacy organization founded in the late 1970s, unknowingly let its state corporate charter lapse in the mid-1980s.⁴¹ In the early 1990s, individuals with views antithetical to those of CIHD discovered the lapse, formed a new corporation with the same name, and engaged in advocacy of positions opposed by CIHD. CIHD successfully sued the individuals and the new corporation for trademark infringement, and eventually won an injunction against the defendant's continued use of the name "Committee for Idaho's High Desert." These examples show that public interest lawyering can involve representing nonprofit organizations that cannot afford counsel to assert or defend trademark claims—indeed, CIHD was represented in its litigation by a public interest group.⁴²

III. ECONOMIC EMPOWERMENT

Providing legal assistance that helps economically disadvantaged individuals and communities improve their economic situation is another example of legal work that is commonly regarded as public interest lawyering. Indeed, UC Irvine's own Community Economic Development Clinic is an example of this type of public interest lawyering.⁴³

A. Copyright and Economic Empowerment

It can be easy to see copyright as a body of law that benefits economic superstars—bestselling authors, recording artists who produce megahits, film artists who create blockbusters that break previous box office records, etc. Many observers fail to see that copyright law is also very important to many other less prominent creators, who are usually much less economically successful than the

39. *Id.*

40. John Gallagher, *Kellogg Toucan Trademark Dispute Resolved*, DETROIT FREE PRESS, Nov. 16, 2011, available at 2011 WLNR 23485907.

41. *Comm. for Idaho's High Desert v. Yost*, 92 F.3d 815, 817 (9th Cir. 1996).

42. The Committee for Idaho's High Desert was represented in the suit by the Land and Water Fund of the Rockies. *Id.* at 816. That group has now changed its name to Western Resource Advocates and describes itself as a "nonprofit environmental law and policy organization." *About Us*, W. RESOURCE ADVOCATES, <http://www.westernresourceadvocates.org/about> (last visited Nov. 14, 2012).

43. See, e.g., Iris Yokoi, *Legal Clinic Champions Local Small Businesses*, UCI LAW (May 11, 2012), http://www.law.uci.edu/communications/ced_feature_051112.html.

superstars. These include, for example, the photographer who works as a freelancer hoping to sell an image to a news outlet or who produces notecards and other merchandise bearing her images; the technical writer who uses her skills on a contract basis to produce copy for clients; the quilter who produces new designs for quilts to sell to customers; the painter who paints canvases during evenings and weekends and sells them online; and many others.

In other words, many authors and artists who are not copyright's superstars often struggle to make a living through their creative work. Copyright law offers an essential part of the infrastructure that might allow them to do so. If the author finds an audience for her work, then copyright law is designed to help ensure that the rewards from that audience's demand go to the author, and not to other parties who simply make copies of the author's work and sell them for less than the author.⁴⁴

As a result, a public interest lawyer who helps an under-resourced author exploit her copyrights can assist the author in being able to earn a living from her work. This might involve, as discussed in the previous Part, litigating against a third party who is infringing on the client's copyright. But it might also involve advising a client regarding potential copyright transactions in order to help the client make good economic and business decisions regarding her work and livelihood. It is not uncommon to hear complaints by artists who feel that they have entered into bad bargains with a distributor (publisher, record company, film studio, retailer, etc.) and signed away their rights for a mess of pottage. Legal representation for a struggling artist will not necessarily change any underlying imbalance in bargaining power between an author and a distributor, but it may nonetheless help the author to strike a deal that she finds more satisfactory by providing her a better understanding of the legal consequences of the proposed bargain. And even if an author decides to accept a monetary pittance from a distributor in return for signing over her copyrights because she believes that other benefits (such as public exposure) make the overall deal worthwhile, at least she will have a better chance of striking that deal with her eyes open to the costs and benefits involved.

B. Trademark and Economic Empowerment

Trademark law, too, can help support economic development since trademark rights can be an important tool for entrepreneurs engaged in such development. For example, an entrepreneur working in an economically disadvantaged community may start a small business that contributes to the

44. Copiers can typically charge lower prices than original authors because they have not borne any of the costs of creating a work and therefore do not need to charge a price that attempts to recover that investment in creating the work. See generally R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 TEX. L. REV. 585, 653–54 (2007).

economic development of that community. The business may become successful and acquire goodwill among customers in the community and beyond, and the entrepreneur may be able to expand, potentially further enhancing the economic opportunities in the community. Trademark law can allow the entrepreneur to prevent others from free riding on the goodwill of her small business and from undermining the success of the enterprise (and the amount it contributes to the community's economy), but many entrepreneurs may be unable to afford the legal representation necessary to secure their trademark rights and prevent others from infringing on them.

Again, as in the copyright context, public interest legal work here can take the form of litigation against third parties who infringe on a client's trademark rights, but it can also involve nonlitigation matters as well. Indeed, a substantial amount of trademark representation for under-resourced entrepreneurs might involve prosecuting an application to the U.S. Patent and Trademark Office to obtain a registration of the client's trademark.⁴⁵ While trademark rights can arise merely from the entrepreneur's use of the mark in the course of her business operations, federal registration can offer substantial advantages to the owner of the mark's registration, and many entrepreneurs might not be likely to enjoy those advantages without legal representation to help them navigate the registration process.⁴⁶ Such representation seems quite similar to legal work that is generally regarded as public interest lawyering: the lawyer assists the client in engaging in an administrative proceeding before a government agency in order to convince the agency to provide some government benefit to the client. Traditionally, this kind of public interest representation might involve, for example, obtaining Social Security benefits for the client; in this context, it would involve securing a trademark registration.

Thus, in addition to providing legal assistance to clients who would otherwise be unable to afford counsel to represent them in litigating copyright and trademark matters, public interest lawyering on copyright and trademark matters can take the form of legal representation that attempts to assist with the economic empowerment of individuals and communities.

IV. FREEDOM OF EXPRESSION

Representing clients to vindicate their freedom of speech has traditionally been regarded as a type of public interest lawyering, carried out by organizations such as the ACLU. Copyright and trademark law are intertwined with free

45. See 15 U.S.C. §§ 1051–1072 (2006) (governing registration of marks on the Principal Register).

46. Such benefits include a nationwide right of priority to use the mark as of the date of the application to register the mark. 15 U.S.C. § 1057(c). Another benefit is a registration certificate, which constitutes *prima facie* evidence of the validity of the registrant's mark and her exclusive right to use the mark. *Id.* § 1057(b).

expression issues more substantially than most types of business law.⁴⁷ A copyright or trademark owner can go into federal court and get a court order (under the provisions of a statute enacted by Congress) that bars a defendant from engaging in certain expressive acts. This brief description alone highlights the tension between copyright and trademark protection and the First Amendment's provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press."⁴⁸

A defendant accused of copyright or trademark infringement may be engaged in using the plaintiff's copyrighted work or trademark in the defendant's own speech. So a judgment that the defendant has infringed, and an injunction against the defendant's continued use of the plaintiff's work or mark, may mean that the defendant will have to stop engaging in her expression, or will have to express herself in a different way. The same consequence will follow, even in the absence of any court judgment that the defendant's conduct is infringing, if the defendant capitulates to the plaintiff rightsholder's demands because litigation to establish whether the defendant's expressive activity is or is not infringing would be too expensive.

Some examples can help illustrate the connections between copyright or trademark law and free expression. A copyright example comes from the case of *Savage v. Council on American-Islamic Relations, Inc.*⁴⁹ In October 2007, Michael Savage, host of the right-wing daily radio program *The Savage Nation*, made statements about Islam and the Council on American-Islamic Relations (CAIR) during his two-hour program that CAIR considered inflammatory.⁵⁰ CAIR posted on its website a detailed commentary on Savage's remarks, including a four-minute-and-thirteen-second audio clip of excerpts from Savage's program.⁵¹ Savage sued CAIR alleging that the posting of the audio clip infringed on his copyright in the program, and CAIR defended against that claim by arguing that its posting constituted fair use. The district court ultimately concluded that CAIR's use did constitute fair use as a matter of law and granted CAIR judgment on the

47. On the relationship between copyright and free expression concerns, see, for example, *Golan v. Holder*, 132 S. Ct. 873 (2012), *Eldred v. Ashcroft*, 537 U.S. 186 (2003), *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), NEIL W. NETANEL, COPYRIGHT'S PARADOX (2008), Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970), and Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). On the relationship between trademark and free expression, see, for example, *Mattel, Inc. v. MCA Records*, 296 F.3d 894 (9th Cir. 2002), *Int'l Olympic Comm. v. S.F. Arts & Athletics*, 789 F.2d 1319, 1320–26 (9th Cir. 1986) (Kozinski, J., dissenting), and Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C.L. REV. 737 (2007).

48. U.S. CONST. amend. I.

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

50. *Id.* at 1732

51. *Id.* See *National Radio Host Goes on Anti-Muslim Tirade*, COUNCIL ON AM-ISLAMIC REL. (Nov. 1, 2007, 11:40 AM), <http://www.cair.com/ArticleDetails.aspx?ArticleID=23608>.

pleadings as to Savage's copyright infringement claim, so CAIR can continue to allow visitors to its website to listen to the recording of Savage's remarks in conjunction with its commentary on them.⁵² Although the court decided in CAIR's favor purely on copyright grounds, it noted in its discussion of Savage's other claim against CAIR (a civil RICO claim) that Savage's claimed injury "is entirely founded upon defendants' speech-related activities,"⁵³ and that the First Amendment would place significant hurdles in the way of Savage's claim.⁵⁴ Thus, CAIR was engaged in classic free speech activity, but faced the possibility that accusations of copyright infringement might force it to abandon or substantially curtail that speech.⁵⁵

Trademark claims can also implicate free expression concerns. One example involves claims by MasterCard against Ralph Nader, alleging that a television advertisement that Nader ran as part of his 2000 presidential campaign infringed on MasterCard's trademarks in what it called its "Priceless" advertisements, which the court described:

These advertisements feature the names and images of several goods and services purchased by individuals which, with voice overs and visual displays, convey to the viewer the price of each of these items. At the end of each of the Priceless Advertisements a phrase identifying some priceless intangible that cannot be purchased (such as "a day where all you have to do is breathe") is followed by the words or voice over: "Priceless. There are some things money can't buy, for everything else there's MasterCard."⁵⁶

MasterCard alleged that the Nader campaign infringed on its trademarks⁵⁷ by running a pro-Nader commercial that the court described as follows:

That political ad included a sequential display of a series of items showing the price of each ("grilled tenderloin for fund-raiser: \$1,000 a plate;" "campaign ads filled with half-truths: \$10 million;" "promises to special interest groups: over \$100 billion"). The advertisement ends with a phrase identifying a priceless intangible that cannot be purchased

52. *Savage*, 87 U.S.P.Q.2d, at 1738.

53. *Id.* at 1740.

54. *Id.* at 1739.

55. For another example, see *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203–05 (N.D. Cal. 2004) (concluding that an electronic voting machine company asserted an invalid copyright infringement claim in attempt to suppress publication of employee e-mails acknowledging problems associated with company's machines).

56. *MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc.*, 70 U.S.P.Q.2d 1046, 1047–48 (S.D.N.Y. Mar. 8, 2004).

57. MasterCard had registered as trademarks for credit and debit card services the word "PRICELESS" and the phrase "THERE ARE SOME THINGS MONEY CAN'T BUY. FOR EVERYTHING ELSE THERE'S MASTERCARD." *Id.* at 1048.

(“finding out the truth: priceless. There are some things that money can’t buy”).⁵⁸

MasterCard demanded that Nader cease running the advertisement and when Nader did not do so, MasterCard filed suit.⁵⁹ Although the court denied MasterCard a preliminary injunction during the 2000 campaign, it was not until nearly four years after MasterCard’s suit was filed that the court granted the Nader campaign summary judgment on all of MasterCard’s claims. A presidential candidate’s advertisement communicating to voters the way in which the candidate believes he is different from the other candidates in the race seems to be a quintessential instance of the type of free expression that implicates core First Amendment concerns. But claims of trademark infringement threatened to silence that speech, though they were not ultimately successful in doing so.⁶⁰

Here again, a defendant who is sued (or threatened with suit) for copyright or trademark infringement may not have the resources to defend herself against such a claim. But while the claims against such a defendant may be grounded in copyright or trademark law, the claims have implications for freedom of speech as well. If the defendant cannot afford to mount a defense, then she may simply accede to the plaintiff’s demands and cease her allegedly infringing speech, or alter it substantially in order to satisfy the plaintiff that it no longer infringes, even if she may have meritorious arguments for why her speech is not infringing. If she cannot afford to assert (or be prepared to assert) those claims in court and instead capitulates to the plaintiff’s demands and abandons her expression, abandoning her speech causes a loss to free expression values and to the people who might have received her expressive message. If the defendant has meritorious arguments for why her speech is not infringing, then that loss to free expression values does not come with any corresponding public gain of any benefit of promoting the progress of learning (in the case of speech alleged to infringe on a copyright) or of reducing consumer confusion or deception (in the case of speech alleged to infringe on a trademark), because the defendant’s use is not infringing and is not within the scope of the exclusive rights granted to the plaintiff in order to achieve the goals of copyright or trademark law. Instead, the law could allow the defendant to continue to speak in the same way that she had been speaking—thus vindicating our goal of protecting free expression—and could simultaneously fulfill the goals of the copyright and trademark laws.

58. *Id.*

59. The suit alleged federal and state trademark infringement, trademark dilution, and unfair competition claims, as well as copyright claims. *Id.* at 1047.

60. Not all political advertisements that use a third party’s copyrighted work or have similarities to a third-party’s trademark will constitute noninfringing use. For example, in *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1169 (C.D. Cal. 2010), the court concluded that online videos posted by Chuck DeVore’s U.S. Senate campaign that featured altered versions of Don Henley’s copyrighted songs “The Boys of Summer” and “All She Wants to Do Is Dance” did not qualify as noninfringing fair use, and therefore infringed on Henley’s copyrights.

Without counsel to represent defendants in such cases—either by actually taking the defendant’s arguments to court or by using them to resist demands made by a rightsholder in cease-and-desist letters that threaten litigation—society will simply lose the defendants’ speech and suffer a free-expression harm without any counterbalancing copyright or trademark gain. Representing defendants who could not otherwise afford to defend against infringement claims that might improperly interfere with the defendants’ free expression thus offers an important opportunity for public interest lawyering in the copyright and trademark fields.

Furthermore, because courts have generally resisted subjecting copyright and trademark claims to formal First Amendment scrutiny,⁶¹ public interest lawyers who work in this area will often need to argue these cases within the framework of copyright or trademark law. Courts are far more likely, for example, to resolve these cases in favor of a defendant on the ground that the defendant’s use qualifies under copyright law as fair use, and therefore does not infringe on the plaintiff’s copyright, than to determine that although the defendant’s use constitutes copyright infringement under the current Copyright Act as applied, that application of the Copyright Act is outside of Congress’s power because it violates the First Amendment.⁶² That is, after all, how the court resolved *Savage’s* copyright infringement claim against CAIR. Similarly, courts generally resolve trademark infringement claims based on the standard “likelihood of confusion” analysis, even when the defendant’s alleged use of the mark might seem to constitute speech at the core of First Amendment protection, as the court did with MasterCard’s claims against Nader.⁶³

In many of these situations, defendants who face charges of infringement will be unable to afford an attorney to represent them in expensive and potentially protracted litigation. Indeed, the defendants in the examples given in this part were represented by public interest organizations or private attorneys acting pro bono.⁶⁴ Here again, then, copyright and trademark cases present the opportunity

61. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 193–94 (2003); *Golan v. Holder*, 132 S. Ct. 873, 876 (2012); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 905 (9th Cir. 2002).

62. See, e.g., *Savage v. Council on Am.-Islamic Relations, Inc.*, 87 U.S.P.Q.2d (BNA) 1730, 1737 (N.D. Cal. 2008) (resolving a copyright claim for the defendant on fair use, not First Amendment, grounds); *MasterCard*, 70 U.S.P.Q.2d at 1050–51 (resolving a trademark claim for the defendant on grounds that the defendant’s use was not likely to confuse consumers, not on First Amendment grounds).

63. *MasterCard*, 70 U.S.P.Q.2d at 1050–51; see also *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 263 (2007) (adapting the standard likelihood of confusion analysis for the situation where the defendant’s use qualifies as parody). But see *Anheuser-Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 775 (8th Cir. 1994) (analyzing whether the defendant’s use should be allowed because of free speech interests after having concluded that use was likely to cause consumer confusion under the standard analysis).

64. In *Savage*, CAIR was represented by the nonprofit Electronic Frontier Foundation as well as an attorney from Davis Wright Tremaine LLP, 2008 WL 2951281. Fish & Richardson represented the Nader campaign pro bono. See Sheri Qualters, *Charitable Protections: More Local Law Firms Offer IP Expertise on a Pro Bono Basis*, BOSTON BUS. J., Sept. 24, 2004, at 44, 51.

for public interest lawyering quite similar to familiar public interest lawyering—representing clients seeking to vindicate their rights to freedom of expression.

CONCLUSION

Copyright and trademark are bodies of substantive law that provide opportunities for lawyers to practice law in ways that seem fairly commonly understood as public interest lawyering. While some may see copyright and trademark disputes as generally involving battles between well-to-do parties, such disputes not only can, but often do, involve at least one party that may not be able to afford legal representation. This means that public interest lawyers have opportunities to represent indigent clients who likely would not otherwise have their interests represented in the legal system. In addition, such representation can sometimes serve to help foster economic development. And, because copyright and trademark law are often closely intertwined with issues of freedom of speech, representing clients in these matters often protects values of free expression, allowing the client to continue to speak and the public to benefit from that speech. All of these types of copyright and trademark practice can fit well within conventional understandings of what constitutes public interest lawyering.