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# Clones, Thugs, 'N (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe From Copyright Bullies

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**CLONES, THUGS, ‘N (EVENTUAL?) HARMONY:  
USING THE FEDERAL RULES OF CIVIL  
PROCEDURE TO SIMULATE A STATUTORY  
DEFAMATION DEFENSE AND MAKE THE  
WORLD SAFE FROM COPYRIGHT BULLIES**

*Robert T. Sherwin\**

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## I. INTRODUCTION

*[T]he Internet has unleashed an extraordinary possibility for many to participate in the process of building and cultivating a culture that reaches far beyond local boundaries. . . . Yet the law's response to the Internet, when tied to changes in the technology of the Internet itself, has massively increased the effective regulation of creativity in America. To build upon or critique the culture around us one must ask, Oliver Twist-like, for permission first.<sup>1</sup>*

In May 2014, a group of eight theatre students at The Evergreen State College<sup>2</sup> in Olympia, Washington ran into an unexpected roadblock erected by the college's administration.<sup>3</sup> Despite spending the entire spring quarter writing and rehearsing an original musical under faculty supervision, the administration pulled its support and barred the student theatrical troupe from performing the work on campus.<sup>4</sup> *The Quisney Project Presents: O.U.T.: Once Upon a Time* purported to be a parodic "work of critical inquiry and political commentary" that borrowed lyrics and music from popular Disney songs to criticize the media conglomerate for its perpetuation of gender norms through songs and movies.<sup>5</sup>

The students involved in the production received course credit for their work, consulted with and obtained the approval of an academic dean, and gained a legal thumbs-up from a nonprofit group of lawyers.<sup>6</sup> All appeared to be on track for a series of June 2014 performances when, two weeks prior to "curtains up," the college's provost pressured the same dean who had approved the show to demand any incorporation of the Walt Disney Company materials be stricken.<sup>7</sup> The reason? A concern voiced by the state attorney general's office that the production could trigger copyright liability.<sup>8</sup>

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1. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 9–10 (2004).

2. A progressive public liberal arts and sciences college, Evergreen boasted an undergraduate student enrollment of more than 4,000 for Fall 2014. *Evergreen Fact Page*, EVERGREEN ST. C., <http://www.evergreen.edu/institutionalresearch/factpage.htm> (last visited Feb. 1, 2015).

3. Jacob H. Rooksby, *Frozen: Free Speech at Evergreen State College*, HIGHER EDUC. L. (June 5, 2014, 5:22 PM), <http://www.highereducationlaw.org/url/2014/6/5/frozen-free-speech-at-evergreen-state-college-1.html>.

4. Letter from the Faculty, Evergreen State College, to the Administration, Evergreen State College (last updated May 28, 2014) [hereinafter *Evergreen Faculty Letter*], reprinted at Brian Rowe, *Copyright v. Academic Freedom @ Evergreen State College*, WASH. LAW. FOR THE ARTS BLOG (June 5, 2014), <http://thewla.org/copyright-v-academic-freedom-evergreen-state-college/>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Of course, anyone with so much as a remedial understanding of copyright law knows that wasn't a realistic possibility.<sup>9</sup> Even the college's faculty—which, presumably, consists mostly of nonlawyers—recognized, as it expressed in a resolution supporting the students, that the show was transformative and thus protected by the Copyright Act's fair use provisions.<sup>10</sup> No doubt, the state's attorney knew as much.<sup>11</sup>

So it's extraordinarily doubtful that the college really believed that the show could trigger copyright liability.<sup>12</sup> Rather, its likely fear—and one that's not necessarily unreasonable—was that a lawsuit, regardless of its merits or the college's ultimate chances of success, could drown the university in years of costly litigation.<sup>13</sup> In short, the college, and in turn, its students, became the victims of bullying<sup>14</sup>—bullying by a much larger, much richer, and much more sophisticated entity that has a track record of using the courts and the threat of litigation to get its way.<sup>15</sup>

Copyright *thugs*—those who threaten or actually initiate litigation against anyone making use of their work, regardless of the reason—are not an isolated problem.<sup>16</sup> They surface frequently, using their government-granted monopolies to “shakedown” those who have the temerity to transform existing works into new and creative art.<sup>17</sup> Given the ever-increasing propensity of everyday people to avail themselves of routine technology and digital distribution methods such as YouTube and Facebook, conflict between copyright holders and those seeking to make fair use of existing works will only grow.<sup>18</sup>

This Article explores one potential way to combat such bullying. By drawing on the theories and mechanisms many state legislatures have implemented to address a similar type of intimidation exacted through defamation and tortious interference lawsuits,<sup>19</sup> judges should

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9. Tim Cushing, *College Pulls Support for Students' Parodic Musical Because It \*Imagines\* Disney Might Sue It*, TECHDIRT (June 17, 2014, 10:02 AM), <https://www.techdirt.com/articles/20140613/12130627573/College-Pulls-Support-Students-Parodic-Musical-because-it-Imagines-Disney-Might-Sue-it.shtml>.

10. Evergreen Faculty Letter, *supra* note 4; *see also infra* Part II.

11. *See* Cushing, *supra* note 9.

12. *See* Rooksby, *supra* note 3.

13. *See, e.g.*, *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012).

14. Cushing, *supra* note 9.

15. Rooksby, *supra* note 3; *see also* LESSIG, *supra* note 1, at 145–46 (detailing a \$100 million suit filed by Disney against a company that made “trailer” advertisements that actually promoted Disney films).

16. *See generally* LESSIG, *supra* note 1, at 183–99.

17. *See generally id.*

18. *See id.* at 10.

19. *See infra* Part V.

follow the lead of the Court of Appeals for the Seventh Circuit, which utilized the already-existing federal motion practice scheme in 2012 to dismiss a clearly baseless case before costly discovery commenced.<sup>20</sup> If other courts did the same, it would impose strong disincentives for those who bring copyright suits for no other purpose than to snuff out fair use of their works.

Part II of this Article addresses in greater detail the problem of “copyright thugs” through several real-world examples. Part III discusses the defense of fair use and explores in more detail why many uses of copyrighted work do not amount to infringement. Part IV explores some potential answers to the problem of copyright bullying and explains why such solutions do not go far enough. Part V examines how many state legislatures have managed to combat an extremely similar problem, seen often in defamation law, by enacting what are popularly known as “anti-SLAPP” statutes. Finally, Part VI explores how federal courts can simulate the effect of anti-SLAPP statutes by utilizing already-existing civil procedure rules.

## II. OF BULLIES AND LUNCH MONEY

*This is the world of the mafia—filled with “your money or your life” offers, governed in the end not by courts but by the threats that the law empowers copyright holders to exercise.*<sup>21</sup>

### A. *Thuggin’ and Muggin’: Tales of Shakedown*

The story of the “Evergreen Eight” detailed in this Article’s introduction is hardly novel or new. Bullying at the hands of copyright thugs is a tale as old as intellectual property law itself.<sup>22</sup> But the advance of technology has delivered the problem to the mainstream.<sup>23</sup> As Harvard Law School Professor Lawrence Lessig has observed,

We live in a “cut and paste” culture enabled by technology. Anyone building a presentation knows the extraordinary freedom that the cut and paste architecture of the Internet created—in a second you can find just about any image you want; in another second, you can have it planted in your presentation.<sup>24</sup>

That cut-and-paste freedom has made artistic creators out of all of us, and as we create, we invariably build on existing works.<sup>25</sup> The explosion in use has been met with what almost seems to be a primal reac-

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20. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012).

21. LESSIG, *supra* note 1, at 191.

22. *See id.* at 130–39.

23. *See id.* at 145–46.

24. *Id.* at 105.

25. *See id.* at 105–06.

tion by copyright holders to defend their “property” at all costs.<sup>26</sup> As Lessig goes on to note, “[W]e can all understand the wrong in commercial piracy. But the law now purports to regulate *any* transformation you make of creative work using a machine.”<sup>27</sup>

In one recent stunning example of irony,<sup>28</sup> Lessig, perhaps the most visible and high-profile critic of overly restrictive copyright polices, found himself the unwitting victim of a copyright bullying attempt.<sup>29</sup> In 2010, he posted a lecture—which, again, ironically, was about sharing existing technology and creative works to encourage new, transformative material—on the video-sharing site YouTube.<sup>30</sup> In the lecture, Lessig used another YouTube video that had been posted in 2009, combining the French pop/rock band Phoenix’s song *Lisztomania* with video clips of characters dancing from 1980s movies like *The Breakfast Club*, *Pretty in Pink*, *Footloose*, and *Mannequin*.<sup>31</sup> In similar fashion to the Harvard University baseball team’s 2012 lip-synced backseat-van dance to Carly Rae Jepsen’s *Call Me Maybe*<sup>32</sup> and the 2013 *Harlem Shake*<sup>33</sup> video meme, the *Lisztomania* “brat pack mashup” video spawned its own series of countless imitations by copycats around the world.<sup>34</sup> Among the many points Lessig was trying to

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26. *Id.* at 18.

27. LESSIG, *supra* note 1, at 144.

28. And by irony, I mean real irony (defined by Merriam-Webster as “a situation that is strange or funny because things happen in a way that seems to be the opposite of what you expected”), and not “irony” as apparently understood by pop singer Alanis Morissette in her 1995 song *Ironic*. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1194 (3d ed. 1993); ALANIS MORISSETTE, *Ironic*, on *JAGGED LITTLE PILL* (Maverick Records 1995). In that tune, Morissette identifies a number of situations as “ironic” (such as dying the day after winning the lottery, finding a fly in a glass of wine, meeting a man’s wife after discovering an attraction to the man himself, and encountering a glut of spoons while looking for a knife) when, in actuality, they are simply a series of either unfortunate, frustrating, or tragic events. MORISSETTE, *supra*.

29. Laura Sydell, *Record Label Picks Copyright Fight—with the Wrong Guy*, NPR (Sept. 27, 2013, 4:01 PM), <http://www.npr.org/blogs/alltechconsidered/2013/09/27/226834651/Record-Label-Picks-a-Fight-over-Copyright-with-the-Wrong-Guy>.

30. Chris DeVille, *Phoenix Side with Lawrence Lessig on “Lisztomania” Fair Use Lawsuit*, STEREOGUM (Feb. 28, 2014, 11:03 AM), <http://www.stereogum.com/1667378/Phoenix-Side-with-Lawrence-Lessig-on-Lisztomania-Fair-Use-Lawsuit/news/>.

31. Jaimedelaguilayrei, *Phoenix Lisztomania Brat Pack Mashup*, YOUTUBE (July 26, 2008), <https://www.youtube.com/watch?v=XtE-xnPKj28>.

32. Brian Anthony Hernandez, *This Is Crazy: Harvard Athletes Perform “Call Me Maybe” [VIDEO]*, MASHABLE (May 8, 2012), <http://mashable.com/2012/05/08/This-is-Crazy-Harvard-Athletes-Perform-Call-Me-Maybe-video/>.

33. Kristy Muir, *Copycat Shakers Tap into Worldwide Video Hit by Coast Teens*, SUNSHINE COAST DAILY (Feb. 15, 2013, 9:28 AM), <http://www.sunshinecoastdaily.com.au/news/caloundra-teens-shake-up-net-to-become-video-stars/1756874/>.

34. *Lisztomania Brat Pack Mashups*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/lisztomania-brat-pack-mashups> (last visited July 5, 2014).

make in his lecture, foremost among them was the celebration of multiple “artists” building on the creations of others.<sup>35</sup>

Liberation Music, the label that released Phoenix’s album in Australia, issued a so-called “takedown” notice to YouTube after Liberation’s automated “bot” flagged Lessig’s lecture as containing copyrighted material.<sup>36</sup> YouTube, as is its practice in availing itself of the Digital Millennium Copyright Act’s (DMCA) “safe harbor” provision,<sup>37</sup> complied with the takedown demand and removed the video.<sup>38</sup>

Lessig then took the offensive, suing Liberation for violating the same statute under which it demanded removal of the lecture.<sup>39</sup> Because the DMCA creates a cause of action against “[a]ny person who knowingly materially misrepresents . . . that material or activity is infringing,”<sup>40</sup> Lessig claimed that Liberation had violated the good faith requirements of the statute because it either knew or should have known that the use of the song in the lecture was fair and protected by the Copyright Act.<sup>41</sup>

Of course, Lessig was absolutely correct, and in February of 2014, Liberation paid him “an undisclosed sum” of money to settle the suit.<sup>42</sup> Along with the settlement funds, which Lessig pledged to donate to the Electronic Frontier Foundation, Liberation agreed to change its practices regarding takedown notices and legal threats.<sup>43</sup>

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35. Lawrence Lessig, Closing Keynote Address at the CC Asia Pacific Conference 2010 (June 4, 2010), available at Lawrence Lessig, *Open*, YOUTUBE (June 8, 2014), <https://www.youtube.com/watch?v=KBTWoCaNKn4>.

36. *Id.*

37. Title II of the Digital Millennium Copyright Act of 1998 grants online service providers safe haven from secondary copyright infringement liability providing they implement a *notice-and-takedown* system. 17 U.S.C. § 512 (2012). The statute requires that on receipt of a *takedown notice* issued by a copyright holder, the service provider must “respond[ ] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” *Id.* § 512(c)(1)(C); see also *id.* § 512 (3)(A). The person or entity who posted the alleged infringing material may then submit a “counternotice” contesting the allegation of infringement, which triggers a ten-to-fourteen-day period in which the copyright holder may file suit against the poster for infringement. *Id.* § 512(g)(2). If no suit is filed, the online service provider may restore access to the material with no risk of copyright liability. *Id.* § 512(g)(4).

38. First Amended Complaint at 8, *Lessig v. Liberation Music Pty Ltd*, No. 1:13-CV-12028-NMG (D. Mass. filed Sept. 19, 2013), 2013 WL 5500407.

39. Sydell, *supra* note 29.

40. 17 U.S.C. § 512(f).

41. First Amended Complaint, *supra* note 38, at 11.

42. Mike Masnick, *Label Threatening Larry Lessig with Insane Infringement Claim over Fair Use Video Caves In, Pays Up*, TECHDIRT (Feb. 28, 2014, 2:07 PM), <https://www.techdirt.com/articles/20140227/15302526383/Label-Threatening-Larry-Lessig-with-Insane-Infringement-Claim-over-Fair-Use-Video-Caves-Pays-Up.shtml>.

43. *Id.*

But in the end, the case is really just an instance of a bully picking on the wrong guy; while Lessig clearly won one for the good guys, the average person has neither Lessig's legal acumen nor his access to resources that would enable a fair fight.

Take, for example, the story of documentary filmmaker John Else. In 1990, Else was making a movie about German composer Richard Wagner's *Ring Cycle* operas.<sup>44</sup> In a scene that focuses on backstage workers at the San Francisco Opera, the stagehands were playing checkers.<sup>45</sup> While they played, a television in one corner of the room aired an episode of *The Simpsons*.<sup>46</sup> Else's film captured the cartoon in the background—a four-and-a-half-second image on a small TV in the corner of the room—and he believed the “touch of cartoon helped capture the flavor of what was special about the scene.”<sup>47</sup>

Of course, there's no question that *The Simpsons* is copyrighted.<sup>48</sup> And in order to use copyrighted material—even if it's only playing in the scene's background—Else had to make a choice: Either obtain the permission of the copyright holder (typically by paying for a license), or rely on the fair use defense in the event that he's sued for infringement.<sup>49</sup> The first choice costs money but provides economic certainty; the second is potentially free but leaves open the possibility of an infringement suit down the road.<sup>50</sup> In attempting to “clear the rights” to use the scene, Else first called Matt Groening, the creator of *The Simpsons*.<sup>51</sup> Groening gave his blessing, but told Else to contact Gracie Films, the show's producer.<sup>52</sup> Gracie cleared it as well, but like Groening, directed Else up the chain to Fox Broadcasting Co., its parent company.<sup>53</sup> Fox, shockingly, demanded \$10,000 in exchange for a license to use the four-and-one-half-second background shot.<sup>54</sup>

Flabbergasted, Else sought out a Fox executive, who not only confirmed the \$10,000 demand, but threatened to “turn [Else] over to our attorneys” in the event he told anyone of the price.<sup>55</sup> Else was later told by the executive's assistant that “[t]hey don't give a shit. They

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44. LESSIG, *supra* note 1, at 95.

45. *Id.*

46. *Id.*

47. *Id.* at 95–96.

48. *Id.* at 96.

49. *Id.*

50. See LESSIG, *supra* note 1, at 107.

51. *Id.* at 96.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 96–97.



just want the money.”<sup>56</sup> Else did not have \$10,000 to spend, so he digitally replaced the shot with a clip from another movie.<sup>57</sup>

When asked why he did not simply elect for the second option—rely on fair use if sued—Else responded there were several reasons. First, his errors and omissions insurance policy application required a detailed “visual cue sheet” identifying the source and licensing status of each scene.<sup>58</sup> Listing fair use instead of a license for any particular scene would “grind the application process to a halt.”<sup>59</sup> Second, because the clip was only four seconds, he thought he would be granted a “free or cheap license,” and “the last thing [he] wanted was to risk legal trouble, even nuisance legal trouble, . . . to defend a principle.”<sup>60</sup> Third, he was told by a colleague at Stanford Law School that “Fox would ‘depose and litigate [him] to within an inch of [his] life,’ regardless of the merits of [his] claim. [The colleague] made clear that it would boil down to who had the bigger legal department and the deeper pockets.”<sup>61</sup>

Other examples abound. In 2003, college student Jesse Jordan was sued by the Recording Industry Association of America (RIAA) for building a search engine to be used on his school’s intranet.<sup>62</sup> Among other things, the search engine’s index included music files, which drew the attention of the RIAA.<sup>63</sup> As Lessig puts it:

When the RIAA brought suit against Jesse Jordan, it knew that in Jordan it had found a scapegoat, not a defendant. The threat of having to pay either all the money in the world in damages (\$15,000,000) or almost all the money in the world to defend against paying all the money in the world in damages (\$250,000 in legal fees) led Jordan to choose to pay all the money he had in the world (\$12,000) to make the suit go away.<sup>64</sup>

Lessig notes that the same strategy led the RIAA, in 2003, to sue 261 individuals, including “a twelve-year-old girl living in public housing and a seventy-year-old man who had no idea what file sharing was.”<sup>65</sup> And then there was the time the Marx Brothers planned to make a parody of the film *Casablanca*, and Warner Brothers Entertainment, Inc. threatened them with “serious legal consequences” if

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56. LESSIG, *supra* note 1, at 97.

57. *Id.*

58. *Id.* at 98.

59. *Id.*

60. *Id.*

61. *Id.*

62. LESSIG, *supra* note 1, at 48–50.

63. *Id.* at 49–50.

64. *Id.* at 200.

65. *Id.*

they followed through.<sup>66</sup> And don't forget about when the American Society of Composers, Authors and Publishers (ASCAP) sued the Girl Scouts of the United States of America for failing to license the songs they sang around campfires.<sup>67</sup> I could go on and on . . . .

The effect of these shakedown attempts is not limited to the economic woes of would-be copyright defendants. Rather, it is us, the larger populace, who suffer. As Lessig argues, "The property right that is copyright has become unbalanced, tilted toward an extreme. The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer."<sup>68</sup> Indeed, perhaps the *The Quisney Project Presents: O.U.T.: Once Upon a Time* was a dreadful, unwatchable piece of drivel that would have been forgotten moments after the final curtain fell. Maybe it was a genius work of art, destined for Broadway or poised to influence the next great American playwright. Or maybe it was a little of both. Alas, we will never know, and that is why the public at large is the true victim.

### B. In Search of a Definition

I use the foregoing examples not to imply or argue that in every case the copyright holder is without a legal basis to demand payment.<sup>69</sup> Although, to be sure, there are some instances—the Else documentary, for example<sup>70</sup>—where liability clearly does not exist. Rather, I provide them as a mere sampling of disturbing behavior I would characterize as bullying.

Certainly, it is not my contention that the law can (either as currently equipped, or even in an ideal world) put an end to copyright thugs. But it is my belief that litigants and courts already have the tools to curb one specific type of bullying—the type seen in the Evergreen State College and John Else cases—where a clear case of copyright fair use turns into a "your money or your life" shakedown.

Other commentators have written on the issue of "copyright trolls," which clearly qualify as a type of thug.<sup>71</sup> But the scope of this Article is a bit different. Trolling refers to a specific type of behavior—one that involves either acquiring a copyright in the aftermarket or

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66. *Id.* at 147–48.

67. *Id.* at 18.

68. LESSIG, *supra* note 1, at 173.

69. *Id.* at 97.

70. See *supra* notes 44–61 and accompanying text.

71. See generally Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 57–59 (2014).

authoring a work for the primary purpose of suing others to extract quick settlements.<sup>72</sup> Undoubtedly, I don't put Disney or Fox in that category, as they do not create work with the primary intent of using it to extort litigation settlement money.<sup>73</sup>

But I do think Disney and Fox can be considered a bullies—those who have shown a propensity to demand large sums of money for conduct that either constitutes fair use or, even if infringing, does no harm to (and in many cases benefits) the value of their copyrights.<sup>74</sup> It's what Professor Rochelle Dreyfuss refers to as the “if value, then right” theory of intellectual property: If value exists, then someone must have a right to that value, and that value will be extracted no matter what.<sup>75</sup>

Again, some bullies are in the right (at least legally), and this Article makes no attempt to rein them in. Instead, I focus on those who threaten or initiate litigation against creators who clearly make fair use of copyrighted work. It is in that context I use the term copyright “thug” or “bully” going forward.

### III. THE DEFENSE OF FAIR USE

*In theory, fair use means you need no permission. The theory therefore supports free culture and insulates against a permission culture. But in practice, fair use functions very differently. The fuzzy lines of the law, tied to the extraordinary liability if the lines are crossed, means that the effective fair use for many types of creators is slight. The law has the right aim; practice has defeated the aim.*<sup>76</sup>

#### A. Copyright as Property

To understand the copyright defense of fair use and its application to copyright bullies, it's necessary to understand the purpose of copyright law in the first place. And that purpose—at least as it exists in the United States—may differ from what some might argue or believe the purpose of copyright law *should be*.<sup>77</sup>

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72. *Id.* at 59.

73. *Id.*

74. See, e.g., LESSIG, *supra* note 1, at 96–97; Rooksby, *supra* note 3. But see Andrew Leonard, *How Disney Learned To Stop Worrying and Love Copyright Infringement*, SALON (May 23, 2014, 4:43 PM), [http://www.salon.com/2014/05/23/How\\_Disney\\_Learned\\_to\\_Stop\\_Worrying\\_and\\_Love\\_Copyright\\_Infringement/](http://www.salon.com/2014/05/23/How_Disney_Learned_to_Stop_Worrying_and_Love_Copyright_Infringement/) (discussing how, despite Disney being “notoriously heavy-handed in defense of its intellectual property,” some believe Disney has shifted its strategy to embrace online fan videos that cover copyrighted songs or appropriate its characters).

75. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405 (1990).

76. LESSIG, *supra* note 1, at 99.

77. See generally 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:1 (2014).

One common misconception is that copyright serves the same purpose as other forms of property ownership. The “natural right” theory, as it goes, asserts that the fruits of one’s labor and intellect are property, and accordingly, deserve the same type of *perpetual* and exclusive protection.<sup>78</sup> To be sure, such a view is hardly outrageous, and in fact, saw support even in the infant days of the United States.<sup>79</sup> In an 1826 letter by Noah Webster to his then-congressman cousin Daniel, Webster argued:

I sincerely desire that, while you are a member of the House of Representatives in Congress, your talents may be exercised in placing this species of property on the same footing as all other property as to exclusive right and permanence of possession.

Among all modes of acquiring property or exclusive ownership, the act or operation of *creating* or *making* seems to have the first claim. If anything can justly give a man an exclusive right to the occupancy and enjoyment of a thing, it must be the fact that he has *made* it. The right of a farmer and mechanic to the exclusive enjoyment and right of disposal of what they *make* or *produce* is never questioned.

. . . .

I sincerely wish our legislature would come at once to the line of right and justice on this subject, and pass a new act, the preamble to which shall admit the principle that an author has, by common law or natural justice, the sole and *permanent* right to make profit by his own labor, and that his heirs and assigns shall enjoy the right, unclogged with conditions. . . .<sup>80</sup>

In response, Daniel Webster acknowledged that “[y]our opinion, in the abstract, is certainly right and incontrovertible. Authorship is, in its nature, ground of property.”<sup>81</sup> But he went on to “confess frankly, that I see, or think I see, objections to make it perpetual.”<sup>82</sup>

Perhaps those objections were rooted in the Constitution itself, as Article I, Section 8 grants Congress the power to “*promote the progress of Science and useful Arts*, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>83</sup> As the Supreme Court has recognized, the purpose of the Constitution’s so-called Copyright Clause “is the conviction that encouragement of individual effort by personal gain is the

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78. *Id.*

79. *See id.*

80. DAVID MICKLETHWAIT, NOAH WEBSTER AND THE AMERICAN DICTIONARY 211–12 (2000).

81. *Id.* at 213.

82. *Id.*

83. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

best way to advance public welfare through the talents of authors and inventors.”<sup>84</sup>

In any event, Daniel Webster’s “objections” ultimately proved to be *the law* when the Supreme Court, just eight years after Webster’s reply to his cousin, handed down its first copyright decision in *Wheaton v. Peters*.<sup>85</sup> The Court held: “The argument, that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product *in the sale of his works, when first published*.”<sup>86</sup>

The Supreme Court’s view of copyright as something much more limited than natural property rights should not have been surprising to Webster or anyone else.<sup>87</sup> Even setting aside the Constitution’s Copyright Clause, Webster’s arguments mirrored earlier English debates on the same issue,<sup>88</sup> which were ultimately settled in favor of copyright being positive—as opposed to natural—law.<sup>89</sup>

That the Supreme Court has been consistent in this view can hardly be questioned; in 1918, Justice Holmes observed:

Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it.<sup>90</sup>

And so, despite the general conception that copyright is “intellectual property,” and despite the desire of some that it be treated the same as other forms of property, “[c]opyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, *created by positive law for utilitarian purposes: to promote the progress of science*.”<sup>91</sup> That utilitarian purpose is key to understanding fair use. Without accepting that copyright’s primary purpose is to

84. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

85. 33 U.S. (8 Pet.) 591 (1834).

86. *Id.* at 591 (emphasis added).

87. See 1 PATRY, *supra* note 77, § 1.1.

88. *Id.*

89. See *Wheaton*, 33 U.S. at 591 (noting that since the statute of 8 Anne, the literary property of an author in her works can only be asserted under the statute, and not the common law).

90. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

91. 1 PATRY, *supra* note 77, § 1.1 (emphasis added). To be sure, rewarding authors is not an entirely unrecognized purpose behind copyright. *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992). Certainly, “copyright law *celebrates* the profit motive.” *Id.* But it does so only because “the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.” *Id.* (citation omitted). Ultimately, the goals of public good and rewarding authors “are not mutually exclusive; copyright law serves public ends

serve the public interest,<sup>92</sup> the concept of fair use does not make much sense.

### B. Fair Use and Transformation

Although codified in § 107 of the Copyright Act of 1976, fair use was originally a common-law doctrine, created by courts to protect the public from “copyright owners bent on shutting down all unauthorized uses or extracting license fees for conduct that should be uncompensated.”<sup>93</sup> To assume that all creation of intellectual products occurs in a vacuum would be shortsighted; certainly, “[t]he world goes ahead because each of us builds on the work of our predecessors. ‘A dwarf standing on the shoulders of a giant can see farther than the giant himself.’ Progress would be stifled if the author had a complete monopoly of everything in his book.”<sup>94</sup> Consequently, fair use exists to maintain the delicate balance between encouraging original authors to create and encouraging secondary authors to benefit the public by building on that work.<sup>95</sup> In that light, “fair abridgment,” as it was originally known, should “not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”<sup>96</sup>

Congress recognized as much, not only by codifying fair use in the 1976 Act, but also through clear statutory language in § 107’s preamble: “[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>97</sup>

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by providing individuals with an incentive to pursue private ones.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

92. See Brigham Young Univ., *Module 1 Copyright Basics & Requesting Information: Purpose of Copyright Law*, COPYRIGHT 101, <http://copyright101.byu.edu/module1/page3.htm> (last visited July 28, 2014).

93. 4 PATRY, *supra* note 77, § 10:1.50.

94. *Id.* § 10:2 (quoting Zechariah Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945)).

95. See *id.*

96. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105, 1110 (1990).

97. Copyright Act of 1976, 17 U.S.C. § 107 (2012). Section 101 of the Act specifically defines the terms “including” and “such as” as “illustrative and not limitative.” *Id.* § 101; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560–61 (1985). Consequently, even uses not listed in the preamble may be fair use. See *Harper & Row*, 471 U.S. at 561.

To determine whether a particular use qualifies as “fair,” courts must examine the copyrighted work and the allegedly infringing work against the backdrop of four factors:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>98</sup>

The first factor—“the purpose and character of the use”—probes the allegedly infringing work and tests how closely related it is to the types of uses identified in § 107’s preamble.<sup>99</sup> Argued by some to be “the soul of fair use,”<sup>100</sup> and the “heart of the fair use inquiry,”<sup>101</sup> it can, particularly in the case of parody, overwhelm the remaining three factors and effectively determine the fair use question by itself.<sup>102</sup>

Perhaps the clearest example of this came in 1994, when the Supreme Court heard the case of *Campbell v. Acuff-Rose Music, Inc.*<sup>103</sup> There, the Court unanimously held that the popular rap group 2 Live Crew’s use of Roy Orbison’s song *Oh, Pretty Woman* to create a rap song of the same name<sup>104</sup> was fair use, even though the rap group profited and borrowed heavily from the original song.<sup>105</sup>

Central to the Court’s analysis in *Campbell* was its acceptance<sup>106</sup> of the defendant’s argument that his rap song *Pretty Woman* was a par-

98. 17 U.S.C. § 107.

99. 4 PATRY, *supra* note 77, § 10:5; *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1993) (holding that a purpose and character of use inquiry “may be guided by the examples given in the preamble . . . looking to whether the use is for criticism, or comment, or news reporting, and the like.” (citation omitted)).

100. *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 417 (E.D. Pa. 2009).

101. *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

102. *See Campbell*, 510 U.S. at 597–98 (Kennedy, J., concurring); *see also* Evan Brown, Comment, *Shaking Out the “Shakedown”: Pre-Discovery Dismissal of Copyright Infringement Cases After Comparison of the Works at Issue*, 9 WASH. J.L. TECH. & ARTS 69, 83 (2013) (observing that the fair use factors are “often melded when courts examine parodies, since a parody will only be found to have copied an impermissible amount of the copyrighted work if it is likely to be a ‘market substitute’”).

103. 510 U.S. 569.

104. Admittedly, 2 Live Crew’s version was simply called *Pretty Woman*. *Id.* at 572.

105. *Id.* at 594.

106. Justice Kennedy penned a concurring opinion in which he indicated his hesitance to agree that the rap version was indeed parody:

The Court decides it is “fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree.” While I am not so assured that 2 Live Crew’s song is a legitimate parody, the Court’s treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use.

ody of the original Orbison song—that through “comical lyrics,” his intent was to “satirize the original work.”<sup>107</sup> The district court had agreed, opining that the rap song “quickly degenerates into a play on words, substituting predictable lyrics with shocking ones” to show “how bland and banal the Orbison song seems.”<sup>108</sup> The district court also agreed with the defendant that aside from its lyrics, the rap version employed several musical devices—such as a “heavily distorted ‘scraper,’” off-key singing, and an “annoying” repeat of the original version’s bass riff—that “exaggerate the original and help to create a comic effect.”<sup>109</sup> Because the parody rap version was deemed to be “transformative,” it also satisfied the first fair use factor.<sup>110</sup>

The idea of “transformative use” can trace its origins back to English common law.<sup>111</sup> As early as 1740, in one of the first fair use cases, one court noted that “[infringement] must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because . . . the invention, learning, and judgment of the [secondary] author is shewn in them.”<sup>112</sup> This type of reasoning eventually grew into the concept of “productive use”—the idea that use of an author’s work by a second author or critic to create a new work would not constitute infringement.<sup>113</sup> Justice Blackmun discussed the term at length in his dissent in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>114</sup>: “[The enumerated examples in § 107’s preamble] . . . reflect[ ] a common theme: each is a *productive* use, resulting in some added benefit

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*Id.* at 599–600 (Kennedy, J., concurring) (citation omitted). Arguably, Justice Kennedy’s larger concern was that a defendant could easily defeat a copyright infringement claim merely by saying the magic words: it’s a parody. *Id.* at 599. He warned:

More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a “comment on the naiveté of the original,” because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre.

*Id.* (citation omitted).

107. *Id.* at 572 (majority opinion).

108. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991), *rev’d*, 972 F.2d 1429 (6th Cir. 1992), *rev’d*, 510 U.S. 569 (1994).

109. *Id.*

110. *Campbell*, 510 U.S. at 583, 594.

111. *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 11 (S.D.N.Y. 1992); *see also* 4 PATRY, *supra* note 77, § 10:21.

112. *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.) 490; 2 Atk. 141, 143.

113. *E.g.*, *Geophysical Union*, 802 F. Supp. at 11.

114. 464 U.S. 417 (1984).



to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works to be used for 'socially laudable purposes.'<sup>115</sup>

Labeling this type of use as "productive," however, was not without problems. According to Judge Pierre Leval,

[use of the term "productive"] risked the misconception that it encompassed any copying for a socially useful purpose. In fact, . . . what the early authorities had meant was a secondary use that was productive in that it produced a new purpose or result, different from the original—in other words, a secondary use that transformed, rather than superseded, the original.<sup>116</sup>

So, the term "transformative" was born out of Judge Leval's writings,<sup>117</sup> and ultimately employed by the Supreme Court in *Campbell*.<sup>118</sup> But regardless of what it is called—productive or transformative—the meaning is the same: If a work "adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."<sup>119</sup>

Certainly, transformative uses can take various forms, so long as they make use of the original work for a reason that differs from the original's purpose. Specifically, transformation can consist of (1) a nonwholesale alteration of the original work's content (for example, 2 Live Crew's covering of—and changes to—*Oh, Pretty Woman* to comment on the banality of the original);<sup>120</sup> (2) no alteration of the original work's content, but use for a different, societally beneficial purpose (for instance, copying a picture intended to be used in a modeling portfolio, and instead using it in a news story);<sup>121</sup> or (3) no alter-

115. *Id.* at 478–79 (Blackmun, J., dissenting) (footnote omitted).

116. *Geophysical Union*, 802 F. Supp. at 11.

117. Judge Leval first set forth his idea of "transformative" use in his 1990 Harvard Law Review article *Toward a Fair Use Standard*. Leval, *supra* note 96, at 1111.

118. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). At least one court has rejected the "transformative" label. In *Ty, Inc. v. Publications International Ltd.*, the Seventh Circuit Court of Appeals used the terms "complementary" and "substitutional copying" in place of "transformative" and "superseding," which it deemed to be "confusing." 292 F.3d 512, 518 (7th Cir. 2002). Patry has noted that "the 'complementary versus substitutional' formulation provides valuable insights in some situations (like book reviews), but not others." 4 PATRY, *supra* note 77, § 10.21. He identifies parody and satires, unauthorized derivative works, and criticisms of one's personal character (like the facts the Second Circuit encountered in *New Era Publications International, ApS, v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989)), as such cases where the Seventh Circuit's test may not be well suited. 4 PATRY, *supra* note 77, § 10.21.

119. Leval, *supra* note 96, at 1111.

120. *Campbell*, 510 U.S. at 594.

121. *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

ation of the original's content, but presentation of the original in a new context or with new insights (such as using a movie clip to criticize or complement a director's style or cinematic devices).<sup>122</sup> The common thread between all three admittedly similar, yet nevertheless different examples, is that none seek to serve as a market replacement for the original work, and all three serve some purpose that arguably inures to the public's benefit.<sup>123</sup> On the other hand, if an allegedly infringing work does little more than present the original in an unaltered state, without adding anything new and offering no purpose different from that of the original, then it cannot be transformative.<sup>124</sup>

Two final points need to be made regarding transformative use and the initial fair use factor: First, although the plain language of the Copyright Act specifically ties the "purpose and character of the use" to "whether such use is of a commercial nature or is for nonprofit educational purposes," the mere fact that use is made for commercial gain does not preclude a fair use determination.<sup>125</sup> As the Supreme Court observed in *Campbell*: "If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'"<sup>126</sup>

The second final point with respect to the first fair use factor is an expansion of something I briefly touched on earlier: that with respect to *parody* (and even some other transformative uses), once a use is affirmatively so categorized, the rest of the fair use analysis tends to be short-circuited.<sup>127</sup> As Justice Kennedy observed in his *Campbell* concurrence, "[W]e have gone most of the way towards satisfying the four-factor fair use test" simply by labeling a work as parody.<sup>128</sup> This is because the three other factors—particularly in the parody context—tend to be overwhelmed by the first.<sup>129</sup>

Take the second factor, the nature of the copyrighted work: Although use of expressive, publicly available works, such as songs or

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122. See Elaine Dutka, *Legendary Film Clips: No Free Samples?*, N.Y. TIMES, May 28, 2006, at A16, available at [http://www.nytimes.com/2006/05/28/movies/28dutk.html?\\_r=0](http://www.nytimes.com/2006/05/28/movies/28dutk.html?_r=0).

123. *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4,901).

124. *Id.*

125. *Campbell*, 510 U.S. at 583–85.

126. *Id.* at 584 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

127. *Id.* at 597–98 (Kennedy, J., concurring).

128. *Id.*

129. See *id.* at 586–93 (majority opinion).

TV shows, are less likely to be fair, parody necessarily *has to* make use of such works; not only is it nearly impossible to make fun of purely factual materials (say, an automobile user manual), but making fun of works nobody has ever seen hardly benefits the public discourse.<sup>130</sup>

The third factor, the amount and substantiality of the portion used in relation to the whole, is similarly swallowed by the nature of parody: “In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying.”<sup>131</sup>

The fourth factor, the effect of the use on the market for the original, is admittedly a bit more nuanced, because it is possible (if not probable?) for a particularly biting instance of parody “to suppress demand for the original by its critical effect.”<sup>132</sup> But that is not the type of adverse market effect Congress was concerned with.<sup>133</sup> “What it may not do is usurp demand by its *substitutive* effect,”<sup>134</sup> and that rarely occurs, because parody almost never acts as a market substitute for its target.<sup>135</sup> Anyone pining to own a copy of Robin Thicke’s 2013 hit *Blurred Lines* will certainly not be satisfied with a copy of Weird Al Yankovic’s parody version, *Word Crimes*.<sup>136</sup> To be sure, someone may be interested in owning both. But it’s hard to envision a consumer who wants the former satisfying that desire by purchasing a potentially cheaper substitute in the form of the latter.<sup>137</sup>

When I defined the type of creator this Article will hopefully help in Part II.B, it was with these four factors in mind. When one makes use of a copyrighted work in such a way as to (1) create something new that does not merely supersede the original; (2) use no more of the original than is necessary (which, in some cases, may be the entire work); or (3) have no substitutive effect on the original’s market, then those creators should not feel compelled to give in to shakedown at-

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130. *See id.* at 586.

131. *Campbell*, 510 U.S. at 598 (Kennedy, J., concurring).

132. *Id.*

133. *See id.* at 592–93 (majority opinion). “[P]arody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.” BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 69 (Columbia Univ. Press 2d prtg. 1968) (1966).

134. *Campbell*, 510 U.S. at 598 (Kennedy, J., concurring) (emphasis added).

135. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996). In his *Campbell* concurrence, Justice Kennedy admits that it may not always be easy “to determine whether harm to the market results from a critical or substitutive effect.” *Campbell*, 510 U.S. at 598 (Kennedy, J., concurring).

136. *See* Hadley Freeman, *Weird Al Yankovic: “I Think Robin Thicke Was Glad I Just Mocked His Grammar,”* GUARDIAN (July 30, 2014, 1:42 PM), <http://www.theguardian.com/stage/2014/jul/30/weird-al-yankovic-interview>.

137. *See Cardtoons*, 95 F.3d at 974.

tempts by copyright owners holding licenses for ransom.<sup>138</sup> Rather, creators must have—and feel—the freedom to make works that inure to the benefit of the public at large without the chilling fear that their efforts will land them in court.<sup>139</sup> It's clear that freedom doesn't currently exist.<sup>140</sup>

#### IV. POTENTIAL SOLUTIONS?

*You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don't have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few.*<sup>141</sup>

In a recent article detailing the problem of copyright “trolls”—which are a subset of copyright thugs—commentator Brad Greenberg discusses a number of solutions, many of which he believes won't work, and one he believes will.<sup>142</sup> Specifically, he proposes applying a presumption of fair use against plaintiffs who meet the definition of a troll, in essence flipping the burden of proof and requiring the plaintiff to prove that a defendant's use was not fair.<sup>143</sup> In that light, he suggests focusing heavily on the market harm and purpose or character statutory fair use factors, as well as nonstatutory common law considerations, including bad faith.<sup>144</sup>

But as much as I appreciate Greenberg's idea and acknowledge that it could very well extinguish the scourge of copyright bullying, there are problems with applying a presumption, some of which he acknowledges.<sup>145</sup> For one, it could have the effect of protecting undeserving infringers—in essence, erasing liability from a work that would never qualify as a fair use but for the fact that it is owned by a troll.<sup>146</sup> And second, it would certainly place a new burden on legitimate copyright owners, who would now have to produce evidence establishing that they are not a troll anytime a defendant asserts fair use (which, of course, would be always).<sup>147</sup> Greenberg brushes that second concern aside, suggesting that “a legitimate copyright plaintiff could cheaply and quickly overcome the presumption that he is a copyright troll.

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138. See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012) (“[I]nfringement suits are often baseless shakedowns.”).

139. Greenberg, *supra* note 71, at 55.

140. See generally LESSIG, *supra* note 1.

141. *Id.* at 107.

142. Greenberg, *supra* note 71, at 114–24.

143. *Id.* at 114.

144. *Id.* at 96–114.

145. *Id.* at 114.

146. *Id.* at 116.

147. *Id.* at 114–15.

The plaintiff would simply need to show the existence of a bona fide licensing program or that he did not acquire the copyrighted work solely for litigation purposes.”<sup>148</sup>

But that answer is far too dismissive. For one, Greenberg seems to admit that this burden shifting would apply to *any* plaintiff—not just a troll—whenever the defendant claims fair use.<sup>149</sup> He concedes:

The primary procedural objection to this approach is that it turns an affirmative defense into something that, rather than being proven by the defendant, must be rebutted by the plaintiff. Any time a defendant asserts fair use and alleges that the plaintiff is copyright troll, the plaintiff will face the expense of rebutting this presumption.<sup>150</sup>

But I would contend it’s much more than a *presumption* for the plaintiff to overcome. Practically speaking, it would take the form of an entirely *new element* to the cause of action. The reason is simple: Nearly every defendant would answer the complaint by suggesting that its use was fair and that the plaintiff is a copyright troll. That would effectively force the plaintiff to prove an extra element in every instance, namely that it has a bona fide licensing program (which it may not, if it chooses not to license its copyright) or “did not acquire the copyrighted work solely for litigation purposes.”<sup>151</sup>

This extra element, which Greenberg argues the courts are free to impose without any change to the Copyright Act,<sup>152</sup> might very well contravene the Act itself. Congress—not the courts—has authorized the bringing of a suit for infringement.<sup>153</sup> Admittedly, the traditional elements of a copyright claim—the ownership of a valid copyright and copying of constituent elements of the work that are original<sup>154</sup>—are not codified. But I question whether the Supreme Court would sign off on the judicial addition of a new element of infringement with no congressional action suggesting such a change.

And second, Greenberg’s definition of a “troll”—one who lacks a bona fide licensing program or acquires or creates copyright work solely for litigation purposes<sup>155</sup>—seems to be both over- and underinclusive. It’s overinclusive because there’s nothing inherently wrong

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148. Greenberg, *supra* note 71, at 115.

149. *Id.* at 114–15.

150. *Id.* at 114.

151. *See id.* at 115.

152. *Id.* at 128.

153. 17 U.S.C. § 501(b) (2012).

154. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

155. *See* Greenberg, *supra* note 71, at 115.

with “refusing to deal.”<sup>156</sup> The owner of a copyright may very well decline to license it to others, which is her right;<sup>157</sup> such a refusal doesn’t make her a troll. And without a definition of “litigation purposes,” it is possible that many plaintiffs will be swept out of court simply because a judge deems their high licensing asking price is a shakedown (as opposed to just poor valuation). The definition is underinclusive because it may be very easy to overcome—even a copyright troll whose *primary* purpose is to exact litigation on users of the work may have other motives (namely, profit or increasing the value of the copyright) that would overcome the “*solely* for litigation purposes” aspect of the definition.<sup>158</sup>

Some of Greenberg’s other mentioned solutions to the “trolling” problem—strengthening standing requirements to prevent an assignment for litigation purposes, common law prohibitions on champerty, relying on the First Amendment, and amending the Copyright Act to do away with statutory damages<sup>159</sup>—either do not address the larger issue of copyright bullying or are unrealistic. Standing and champerty, which focus on the identity of the plaintiff actually filing the suit, may be discussion-worthy solutions for the trolling problem, but they’re not applicable to the type of shakedown discussed in Part II.<sup>160</sup> As for the First Amendment, Greenberg correctly points out that “copyright is not subject to any First Amendment standard of review,” and copyright already has “built-in First Amendment accommodations” through the fair use defense.<sup>161</sup> And with respect to eliminating statutory damages, he notes that although there is merit to the idea, “any reform of statutory damages likely would be unpopular in Congress. Beyond being seen as an important tool for preserving author incentives for over a century, statutory damages are favored by the content industries, which have considerable clout in Washington.”<sup>162</sup>

Consequently, the problem of copyright bullying, if it is to be curbed, must be addressed in some way other than those already proposed above or waiting for congressional action. My suggested solution borrows from a similar bullying crisis seen in state tort actions alleging defamation, tortious interference, civil conspiracy, and nui-

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156. See Joseph P. Bauer, *Refusals To Deal with Competitors by Owners of Patents and Copyrights: Reflections on the Image Technical and Xerox Decisions*, 55 DEPAUL L. REV. 1211, 1231 (2006).

157. *Id.*

158. See Greenberg, *supra* note 71, at 115 (emphasis added).

159. See *id.* at 118–24.

160. See *id.* at 118–20.

161. *Id.* at 121 (quoting *Golan v. Holder*, 132 S. Ct. 873, 890 (2012)).

162. *Id.* at 123.

sance. As a result, I now discuss how many states have addressed that problem before explaining how federal courts can draw on these solutions to deal with copyright thugs.

#### V. "ANTI-SLAPP" STATUTES: A "NO-TOLERANCE" APPROACH TOWARD LITIGATION BULLYING

*Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.*<sup>163</sup>

##### A. The Problem of SLAPPs

Strategic Lawsuit Against Public Participation, or SLAPP, is a label used to describe a particular type of lawsuit brought by plaintiffs with the intention of "silencing [their] opponents, or at least diverting their resources."<sup>164</sup> The term was first coined by Professors George Pring and Penelope Canan in two 1989 law review articles.<sup>165</sup>

Pring observed that citizens, in exchange for doing things like circulating petitions, calling consumer protection offices, reporting police misconduct, and speaking up at school board meetings, were paying the price of "multimillion-dollar lawsuit[s] and the expenses, lost resources, and emotional stress such litigation brings."<sup>166</sup>

That's because unlike an ordinary plaintiff, a SLAPP plaintiff<sup>167</sup> "expects to lose and is willing to write off litigation expenses (and

163. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989).

164. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993).

165. Pring, *supra* note 163; Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989).

166. Pring, *supra* note 163, at 4, 6.

167. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* 9–10 (1996) (adopting the terms "filer" and "target," rather than "plaintiff" and "defendant," to label parties in SLAPP litigation for sake of clarity). Pring and Canan noted that some SLAPPs are brought as cross- and counterclaims, which makes using the traditional "plaintiff" and "defendant" labels potentially confusing. *Id.* Although I agree that such confusion is a possibility, I believe the "filer" and "target" dichotomy brings along its own set of problems, given the "SLAPP target" will often become a "filer" of a motion to dismiss. At least one other commentator has used the terms "SLAPP<sub>er</sub>" and "SLAPP<sub>ee</sub>" to respectively refer to the plaintiff and defendant, Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 803–04 (2000), but I find those terms equally unhelpful. Because the California anti-SLAPP statute (which will be dis-

even the defendant's attorney's fees where necessary) as the cost of doing business."<sup>168</sup> Otherwise stated, the point is not to win, but rather use the litigation process itself to intimidate, exact revenge, or both—all with the eventual effect of silencing the target.<sup>169</sup> These suits are often hard to recognize because they're camouflaged as ordinary tort actions.<sup>170</sup> A plaintiff can couch them in any number of labels: defamation, tortious interference (both with contract and prospective relations), conspiracy, nuisance, and intentional infliction of emotional distress.<sup>171</sup>

Regardless of the form, they achieve their intended effect because the plaintiff is usually better equipped to handle litigation than the defendant, possessing more money and more knowledge about the legal process.<sup>172</sup> Conversely, the defendant may lack the resources needed to mount a sophisticated defense.<sup>173</sup> Even if the plaintiff has zero chance of eventually "winning" on the merits of her claim, she nevertheless "succeeds" if her suit, which the defendant cannot afford to defend,<sup>174</sup> has the effect of silencing the defendant's speech.<sup>175</sup> Although nearly all states make it possible to fight back with requests for sanctions or counterclaims for malicious prosecution—so-called "SLAPP-back" suits—such remedies aren't likely to be of help to a SLAPP defendant.<sup>176</sup> Again, the reason SLAPP suits<sup>177</sup> work (if you're the plaintiff) is because the defendant is playing from a position of weakness.<sup>178</sup> If a defendant had access to the types of re-

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cussed later at length) utilizes the terms plaintiff and defendant, I too will stick with that traditional nomenclature. See CAL. CIV. PROC. CODE § 425.16 (West 2014).

168. Lauren McBrayer, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603, 609 (2005) (quoting Tate, *supra* note 167, at 805).

169. Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENVTL. L. & POL'Y F. 17, 17 (1993).

170. Pring, *supra* note 163, at 8–9.

171. Barker, *supra* note 164, at 402–03.

172. McBrayer, *supra* note 168, at 609.

173. See PRING & CANAN, *supra* note 167, at 11.

174. In her 1989 article, Canan reported that the average SLAPP suit sought \$9 million in damages and lasted an average of thirty-six months in the court system. Canan, *supra* note 165, at 26.

175. McBrayer, *supra* note 168, at 609.

176. See Barker, *supra* note 164, at 431–32.

177. The term "SLAPP suit" is "admittedly redundant, yet it has become an established part of the vernacular." Merriam & Benson, *supra* note 169, at 17 n.1.

178. See Noah P. Peeters, Note, *Don't Raise That Hand: Why, Under Georgia's Anti-SLAPP Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 38 GA. L. REV. 769, 781–82 (2004).



sources needed to mount sanctions and abuse-of-process attacks, she wouldn't be intimidated by the SLAPP in the first place.<sup>179</sup>

The problem with SLAPPs from a larger public policy perspective is the chilling effect intimidation lawsuits may have on citizen free speech and efforts to petition the government for a redress of grievances—undoubtedly core First Amendment rights.<sup>180</sup> “SLAPPs dissuade not only named defendants, but also their neighbors and their community.”<sup>181</sup> Over time, as ordinary people learn about fellow citizens being dragged through the courts, they will—consciously or subconsciously—check their own speech on controversial matters, and in turn, the overall level of public discourse will suffer.<sup>182</sup>

The story of the Evergreen Eight illustrates this principal perfectly.<sup>183</sup> Setting aside the fact that their speech (the parodic musical using Disney tunes) may not be the same kind usually seen in SLAPP suits, the effect of Disney's (and similar companies') history of litigiousness is clear: Evergreen's administration self-censored out of fear that Disney would sue.<sup>184</sup> And that fear was not even premised on any communication or threat from Disney; it was entirely self-conceived, no doubt based on well-publicized stories of past salvos fired by Disney at other alleged infringers.<sup>185</sup>

In that light, the tactics of SLAPP plaintiffs bear eerie similarities to copyright bullies. The question, then, is whether a solution aimed at the former could be borrowed and used for the latter.

### B. *The Rise of the Anti-SLAPP Statute*

State legislatures, convinced that a chilling effect on citizen participation is a realistic problem worthy of legislative action, began jumping into the fray twenty-five years ago.<sup>186</sup> In 1989, Washington became the first state to pass what is known as an “anti-SLAPP” law.<sup>187</sup> Since then, twenty-seven other states (as well as the District of

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179. *See id.* at 782.

180. *See Tate, supra* note 167, at 803–04.

181. Barker, *supra* note 164, at 404.

182. Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113–14 (1988).

183. *See supra* Part I.

184. Evergreen Faculty Letter, *supra* note 4.

185. *See id.*

186. *See generally* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 984–1000 (1999).

187. WASH. REV. CODE §§ 4.24.500–4.25.520 (2014).

Columbia and Guam) have enacted some form of legislation to combat SLAPP suits.<sup>188</sup>

Naturally, each of the thirty statutory enactments differ in some degree from the rest.<sup>189</sup> But generally, the typical anti-SLAPP statute seeks to lay down procedural hurdles that make it harder for a plaintiff to maintain her suit.<sup>190</sup> They do so by establishing specific processes to allow for a motion to dismiss at an early stage in the litigation, the expedited hearing of such a motion and limitation of discovery until after disposition, and cost-shifting mechanisms to award attorney's fees and court costs to a defendant who can successfully show that the plaintiff's suit was a SLAPP.<sup>191</sup>

Take, for example, California's anti-SLAPP statute. Passed in 1993, the California law has become the model for other states.<sup>192</sup> It operates by creating a special motion to strike that a defendant can file whenever she believes she's been sued under a cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue."<sup>193</sup>

Two of the keys to the operation of the law are its timelines for rapid resolution and stay of discovery—each of these features disarms SLAPP plaintiffs of their most potent weapon, that is, the ability to exact financial revenge on defendants by drawing out litigation in the name of "collection of evidence."<sup>194</sup> The statute grants the defendant sixty days from the service of the complaint to file a motion to dismiss, although the court has discretion to allow its filing at any time "upon terms it deems proper."<sup>195</sup> The motion must be heard thirty days after it is served, unless the court's docket cannot accommodate such a hearing in that time period.<sup>196</sup> So, in this way, one who claims to be the target of a SLAPP suit has a mechanism to obtain early dismissal. Without the motion, a defendant's only remedy would be a motion for

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188. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Feb. 3, 2015) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington).

189. *See id.*

190. McBrayer, *supra* note 168, at 610.

191. Peeters, *supra* note 178, at 782.

192. Compare CAL. CIV. PROC. CODE § 425.16 (West 2014), with, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 27 (West 2014).

193. CAL. CIV. PROC. CODE § 425.16(b)(1).

194. Barker, *supra* note 164, at 408.

195. CAL. CIV. PROC. CODE § 425.16(f).

196. *Id.*

summary judgment, which, at least in California, could not be filed until sixty days *after* the plaintiff's first appearance, and could not be heard for at least another seventy-five days *after* the motion's filing.<sup>197</sup> And if a defendant were attempting to proceed under a *Celotex*-style "no-evidence" motion for summary judgment—in effect, arguing that the plaintiff has no evidence to support her claims—she would have to wait for an "adequate time for discovery"<sup>198</sup> to elapse before filing.

While the filing of the motion immediately stays all discovery in the case until the motion is ruled on, the court, on a separate motion for good cause, may allow for specified discovery.<sup>199</sup> This provision was the legislature's effort at balancing the goal of giving defendants a chance to achieve speedy resolution with the due process rights of plaintiffs to build their cases through discovery.<sup>200</sup> Indeed, "[b]ecause the motion is heard within 30 days of the notice of the motion, the plaintiff's case may not be developed. However, the provision allowing discovery for good cause provides [the] plaintiff a means to avoid any legitimate prejudice due to the alacrity of the proceedings."<sup>201</sup>

Once the motion is filed and the movant has established that the suit falls within the scope of the anti-SLAPP statute, the burden then effectively "shifts" to the plaintiff to show "that there is a probability that [she] will prevail on the claim."<sup>202</sup> Although the California legislature gave no guidance as to what it meant by "probability," most courts have accepted<sup>203</sup> the analysis of *Wilcox v. Superior Court*,<sup>204</sup> which held the term meant only that the

plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If either of these requirements is not met, the motion to strike must be granted; if both are satisfied, it must be denied.<sup>205</sup>

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197. *Id.* § 437c(a). No such time restraint exists at the federal level. See FED. R. CIV. P. 56(b).

198. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

199. CAL. CIV. PROC. CODE § 425.16(g).

200. Tate, *supra* note 167, at 841 (citing *Church of Scientology of Cal. v. Wollersheim*, 49 Cal. Rptr. 2d 620, 631 n.3 (Ct. App. 1996)); see also *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 54 (Ct. App. 1995) (noting that a discovery stay "literally applied in all cases might well adversely implicate a plaintiff's due process rights," especially in a libel case brought by a private plaintiff against a large media defendant).

201. *Wollersheim*, 49 Cal. Rptr. 2d at 631 n.3.

202. CAL. CIV. PROC. CODE § 425.16(b)(1).

203. Tate, *supra* note 167, at 838 & n.199.

204. 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

205. *Id.* at 454.

The court in *Wilcox* likened the standard to that of a motion for nonsuit or directed verdict, even while noting that there are some significant differences, most notably that the language of the anti-SLAPP law requires only a showing of “probability” of success, while other statutes providing dismissal mechanisms require the plaintiff to show “a reasonable probability” or “a substantial probability” of prevailing.<sup>206</sup> Still, it refused to impose any standard lower than reasonable probability, opining that “[s]urely [the legislature] did not mean the court should accept an ‘unreasonable’ probability.”<sup>207</sup>

Assuming the plaintiff presents competent, admissible evidence establishing a reasonable probability of success at trial, the court must then turn to the constitutional defenses raised by the defendant’s motion and affidavits.<sup>208</sup> After considering those defenses, the court then determines whether the plaintiff established a probability that she will ultimately prevail on her claims.<sup>209</sup>

If the court denies the motion to dismiss, the freeze on discovery is lifted, and the case proceeds in routine fashion.<sup>210</sup> Notably, the statute specifically warns that a finding of probability of success is inadmissible “at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.”<sup>211</sup> On the other hand, if the court grants the motion to dismiss, not only is that the end of the case, but the plaintiff is charged with paying the defendant’s attorney’s fees and costs.<sup>212</sup>

The mandatory award of the defendant’s attorney’s fees is hardly an insubstantial deterrent component of the statute. Although most fee awards range from \$15,000 to \$40,000,<sup>213</sup> one case decided by the Southern District of California in 2002 awarded more than \$315,000 in fees and costs.<sup>214</sup>

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206. *Id.* at 455.

207. *Id.*

208. See CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2014); see also *Wilcox*, 33 Cal. Rptr. 2d at 455 (part of the plaintiff’s burden of proving a prima facie case means “showing the defendant’s purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses”).

209. CAL. CIV. PROC. CODE § 425.16(b)(1).

210. See Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 639, 642–43 (2009).

211. CAL. CIV. PROC. CODE § 425.16(b)(3).

212. *Id.* § 425.16(c). The statute also provides that if the court finds the defendant filed the motion frivolously or solely with the intent of causing unnecessary delay, then the plaintiff recovers its attorney’s fees and costs incurred in responding to the motion. *Id.*; see also *id.* § 128.5.

213. Tate, *supra* note 167, at 845.

214. *Metabolife Int’l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1228 (S.D. Cal. 2002).

As one would expect, an order dismissing a case under the California anti-SLAPP statute would be appealable.<sup>215</sup> But two potential outcomes of a motion to dismiss are worth special mention: First, what if only *part* of a plaintiff's case is subject to the motion to strike, and thus, a dismissal is interlocutory? For example, a plaintiff could assert numerous causes of action, with only one coming under the anti-SLAPP law.<sup>216</sup> And second, what if the motion to dismiss is *denied*? Because such an order would be interlocutory, should the case proceed, or should the defendant be able to appeal? The statute itself answers both questions.<sup>217</sup> Section 425.16(j) specifically states that “[a]n order *granting or denying* a special motion to strike shall be appealable.”<sup>218</sup> For good measure, it cross-references California Civil Procedure Code § 904.1, which is the general “Appealable judgments and orders” title of the Code.<sup>219</sup> Section 904.1(a)(13) of that statute also lists orders granting or denying motions to strike under the anti-SLAPP statute as being appealable.<sup>220</sup>

### C. *The Problem with Applying Anti-SLAPP Statutes to Copyright Cases*

Having discussed in detail the operation and effect of an anti-SLAPP law (with California's being only a representative example), the next question might be, “Is there any way to apply such a state statute to a copyright suit in federal court?” Before discussing the answer (which, in case you're wondering, is “no”), it's worth saying that the question is not, at least from a wishful-thinking standpoint, entirely ludicrous. For one, many federal courts sitting in diversity actions have applied state anti-SLAPP statutes under the *Erie* doctrine.<sup>221</sup> Although it's true that such laws are procedural in the way

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215. Tate, *supra* note 167, at 848.

216. See *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 49 (Ct. App. 1995).

217. See CAL. CIV. PROC. CODE § 425.16(j).

218. *Id.* (emphasis added).

219. *Id.* §§ 425.16(j), 904.1.

220. *Id.* §§ 425.16(j), 904.1(13).

221. In *Erie Railroad Co. v. Tompkins*, the Supreme Court held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” 304 U.S. 64, 78 (1938). In addition to giving millions of first-year law students fits, this became known as the *Erie* doctrine, which stands for the proposition that “federal courts sitting in diversity apply state substantive law and federal procedural law.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

*E.g.*, *Brown v. Wimberly*, 477 F. App'x 214, 216 (5th Cir. 2012) (per curiam) (applying Louisiana's anti-SLAPP statute pursuant to the *Erie* doctrine); *Godin v. Schencks*, 629 F.3d 79, 85–91 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (holding that California's anti-SLAPP statute was crafted to serve an

they impose specific time constraints, stay discovery, and require an expedited decisions, courts have recognized that these “procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation.”<sup>222</sup>

Still, the application of state anti-SLAPP statutes in federal court is not without problems or controversy. For starters, some federal courts in California (including, possibly, the Ninth Circuit) have held that the key component of the special motion to dismiss—that being the freeze on costly discovery—directly conflicts with Federal Rule of Civil Procedure 56, and therefore should be ignored.<sup>223</sup> Specifically, in *Rogers v. Home Shopping Network, Inc.*,<sup>224</sup> the Central District of California held:

[Section] 425.16 and Rule 56(f) have different objectives. Section 425.16 was designed to allow a party defending a SLAPP action to resolve the matter as early as possible, before extensive discovery is permitted. Rule 56(f), however, was designed to ensure that a non-moving party will not be forced to defend a summary judgment motion without having an opportunity to marshal supporting evidence. These divergent goals can produce directly conflicting outcomes.<sup>225</sup>

For instance, the court noted that California courts have denied discovery under the statute because the defendant failed to identify what additional facts she expected to unearth, while federal courts have allowed parties “with no clear idea of what specific facts they hope to obtain” to postpone a summary judgment ruling while they conduct more discovery.<sup>226</sup> The court concluded that the “discovery-limiting aspects” of the anti-SLAPP law are in direct conflict with the “discovery-allowing aspects” of the Federal Rules of Civil Procedure and, therefore, can’t be enforced in federal court.<sup>227</sup>

The Ninth Circuit has quite likely agreed. In a 2001 case, the court approvingly referenced *Rogers*, noting that the United States Supreme Court has held that discovery is required—as opposed to merely per-

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interest, namely the protection of the rights of free speech and redress of grievances, not directly addressed by the Federal Rules of Civil Procedure).

222. *Williams v. Cordillera Commc'ns, Inc.*, No. 2:13-CV-124, 2014 WL 2611746, at \*1 (S.D. Tex. June 11, 2014).

223. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845–47 (9th Cir. 2001).

224. 57 F. Supp. 2d 973 (C.D. Cal. 1999).

225. *Id.* at 981–82.

226. *Id.* at 982 (quoting *Sipple v. Found. for Nat'l Progress*, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999) and 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2711 (3d ed. 1998)).

227. *Rogers*, 57 F. Supp. 2d at 982.

mitted—“where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.”<sup>228</sup> Still, it’s not entirely clear whether the Ninth Circuit held the discovery freeze to be per se invalid in *any* federal case; it *did not* remand to the district court with instructions to allow full discovery, but rather limited its order to allow the plaintiff to discover only information about the defendant’s consulting experts.<sup>229</sup> Indeed, at least one lower court construed the Ninth Circuit’s holding to be limited, opining that it did not say there was a conflict between the anti-SLAPP statute’s discovery limitations and Federal Rule of Civil Procedure 56.<sup>230</sup>

But even setting aside the question of whether the discovery-freezing aspects of state anti-SLAPP laws could live peacefully alongside Rule 56, their application in the first place has come under fire from an appellate heavyweight. Recently, the Ninth Circuit’s Chief Judge Kozinski penned a scathing concurrence in which he urged an en banc court to take a “fresh look at the question” of whether federal courts should entertain anti-SLAPP motions to dismiss.<sup>231</sup> He wrote that “[t]he California anti-SLAPP statute cuts an ugly gash through th[e] orderly process” of pre-discovery motions, discovery, summary adjudication, and trial.<sup>232</sup> He characterized the effect of the statute as “quite a bit of disruption,” noting that he “find[s] it passing strange that state legislatures have now displaced Congress as the delimiters of our jurisdiction.”<sup>233</sup> He concluded by calling the First and Fifth Circuits “foolish” for adopting his own court’s holding in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,<sup>234</sup> arguing that “[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes[,] and Supreme Court interpretations thereof.”<sup>235</sup>

In any event, regardless of whether future federal courts will heed Judge Kozinski’s call to “back out of the wilderness” of state anti-SLAPP statutes,<sup>236</sup> this much is clear: No court has ever applied such a law to a federal cause of action, and in fact, courts have uniformly

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228. *Metabolife*, 264 F.3d at 846 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

229. *Id.* at 846–47.

230. *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1101 (C.D. Cal. 2004).

231. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring).

232. *Id.* at 274.

233. *Id.* at 275.

234. 190 F.3d 963, 973 (9th Cir. 1999).

235. *Makaeff*, 715 F.3d at 275.

236. *Id.*

held that anti-SLAPP laws only apply to state law claims.<sup>237</sup> Because copyright claims are exclusively federal, they would never be subject to a special motion to dismiss procedure crafted by a state legislature.<sup>238</sup> Nor should they be; because Congress is the body that has drafted the Copyright Act and has authorized causes of action under it,<sup>239</sup> it is Congress, and Congress alone, that should fashion any kind of remedy that would affect one's ability to sue under it.

#### VI. BUILDING THE FRANKENSTEIN: SIMULATING AN ANTI-SLAPP PROCEDURE TO VINDICATE FAIR USERS

*[F]air use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim.*<sup>240</sup>

I suppose it's possible that Congress, if it were as concerned as me (and others) about the problem of copyright bullying, could enact an anti-SLAPP-like solution. I suppose it would take the form of a special motion to dismiss enumerated in Chapter 5, or perhaps an extension of the fair use provisions in § 107 of the Copyright Act, and would provide for anti-SLAPP-type protections such as an early-filing deadline, freeze on discovery, speedy resolution deadline, mandatory award of attorney's fees, and an interlocutory appeals provision. But hoping for such legislative intervention is obviously unreasonable, for reasons not worth discussing in any detail here.<sup>241</sup>

Fortunately, parties who believe they're the victims of bullying already have a potential solution. If the courts follow the lead of the Court of Appeals for the Seventh Circuit, it is an answer that would be, substantively speaking, nearly indistinguishable from the effect of an anti-SLAPP statute. And because it's a solution that requires no

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237. See, e.g., *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2009) (“[A] federal court can only entertain anti-SLAPP special motions to strike in connection with state law claims . . . .”); *Restaino v. Bah (In re Bah)*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005) (“[T]he anti-SLAPP statute may not be applied to matters involving federal questions . . . .”); *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006) (“Although the anti-SLAPP statute does apply to state law claims brought in federal court, it does not apply to federal question claims in federal court because such application would frustrate substantive federal rights” (citations omitted)).

238. See 28 U.S.C. § 1338(a) (2012) (granting exclusive jurisdiction to federal courts over copyright claims).

239. See 17 U.S.C. § 501(b).

240. LESSIG, *supra* note 1, at 187.

241. See Greenberg, *supra* note 71, at 128 n.354 (noting congressional gridlock is greater than ever before).



legislative change to the Copyright Act, it's one that could prove to be an effective weapon in defeating baseless "shakedown" attempts by copyright holders.

A. "What What (*In the Butters???*)": *The Seventh Circuit Meets Eric Cartman*

In 2008, the animated Comedy Central Show *South Park* aired an episode titled "Canada on Strike," which satirized the 2007–2008 Writers' Guild of America strike.<sup>242</sup> The episode's plot has the entire country of Canada going on strike, demanding a share of the "Internet money" being generated by viral videos and the like.<sup>243</sup> The show's main characters, Cartman, Stan, Kyle, and Butters, decide to make their own viral meme in an attempt to generate enough "Internet money" to pay the Canadians and settle the strike.<sup>244</sup> Their effort results in Butters starring in a video called *What What (In the Butt)*, which the Seventh Circuit characterizes as "a paean to anal sex."<sup>245</sup>

The video, as it turns out, is a parody of an actual video of the same name by an "artist" named Samwell.<sup>246</sup> The *South Park* version is, more or less, a shot-for-shot remake of the original, except that *South Park's* is animated and sung by Butters, who is featured in several costumes that draw attention to his nine-year-old innocence.<sup>247</sup>

Brownmark Films, which owned the copyright on the original video, filed an infringement suit against the various entities responsible for *South Park*.<sup>248</sup> Obviously, the defendants asserted fair use in response.<sup>249</sup> Interestingly, they filed a motion to dismiss under Rule 12(b)(6) for failing to state a claim upon which relief could be granted.<sup>250</sup> The District Court for the Eastern District of Wisconsin granted the motion, despite acknowledging that fair use is viewed as an affirmative *defense* to infringement, whereas 12(b)(6) motions to dismiss normally test the legal sufficiency of a plaintiff's claim.<sup>251</sup>

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242. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012), *aff'g* 800 F. Supp. 2d 991 (E.D. Wis. 2011).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*; see also *What What (In the Butt)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/What\\_What\\_%28In\\_the\\_Butt%29](http://en.wikipedia.org/wiki/What_What_%28In_the_Butt%29) (last modified Sept. 21, 2014, 9:51 PM).

247. *Brownmark*, 682 F.3d at 689.

248. *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 994 (E.D. Wis. 2011).

249. *Id.* at 997–98.

250. *Id.* at 994.

251. *Id.* at 998, 1002.

On appeal, the Seventh Circuit began its analysis by agreeing with *Brownmark* that “courts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses.”<sup>252</sup> The court wrote, “Rule 12(b)(6) tests whether the complaint states a claim for relief, and a plaintiff may state a claim even though there is a defense to that claim. The mere presence of a potential affirmative defense does not render the claim for relief invalid.”<sup>253</sup>

But that didn’t mean the district court improperly granted the motion to dismiss.<sup>254</sup> The Seventh Circuit noted that a court *may* properly dismiss a case on the basis of an affirmative defense through a Rule 12(c) Motion for Judgment on the Pleadings or Rule 56 Motion for Summary Judgment.<sup>255</sup> And indeed, the court affirmed on that ground, “elect[ing] to treat [the] motion as a motion for summary judgment.”<sup>256</sup> The court reasoned that while the defendants should have captioned their motion that way from the start, “the miscaptioning in this case should not have caused confusion, as the procedures for both motions are essentially the same.”<sup>257</sup>

The obvious question that comes to mind is why wouldn’t the defendants have captioned their motion as a 12(c) or summary judgment motion from the outset? The answer, it seems, is precisely the same as the concern voiced by Evergreen State College:

It appears [the defendants’] reason for [filing the motion as a 12(b)(6)], rather than simply captioning its motion as a motion for summary judgment, was its concern that such a maneuver would open the door to discovery. The expense of discovery, which [defendants] stressed at oral argument, looms over this suit. [Defendants], and amicus, the Electronic Frontier Foundation, remind this court that infringement suits are often baseless shakedowns.<sup>258</sup>

The Seventh Circuit brushed aside that concern, oddly writing that “discovery would only follow a Rule 56 motion [for summary judgment] if the district court granted a request for discovery.”<sup>259</sup> I describe the statement as odd only because there’s no authority stating that judges must specifically authorize discovery in a summary judgment context.<sup>260</sup> Of course, judges have discretion to *limit* discovery if

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252. *Brownmark*, 682 F.3d at 690.

253. *Id.*

254. *See id.* at 690, 692.

255. *Id.* at 690.

256. *Id.* at 692.

257. *Id.*

258. *Brownmark*, 682 F.3d at 691.

259. *Id.*

260. *See* Gideon Mark, *Federal Discovery Stays*, 45 U. MICH. J.L. REFORM 405, 408–10 (2012).

a party requests and shows good cause,<sup>261</sup> but the Seventh Circuit seemed to imply that the default rule would require no discovery until one of the parties asked and received permission from the court.<sup>262</sup>

Regardless, neither party in *Brownmark* did ask for discovery, at least not at the trial court level.<sup>263</sup> The Seventh Circuit noted that Brownmark argued the reason it didn't ask was because "the matter before the court was a 12(b)(6) motion, which does not allow for discovery requests."<sup>264</sup> But the court scoffed, writing that "this is hard to believe. The caption on a motion does not have some independent authority that litigants or courts must respect."<sup>265</sup> It noted that Brownmark Films could have easily identified to the trial court the kinds of evidence it would have needed to defeat a fair use defense.<sup>266</sup> In fact, Brownmark Films did exactly that in its appellate brief, arguing it should have been allowed to discover, among other things, the defendants' intent at the time the episode was created.<sup>267</sup> That is not to say that identifying such evidence would have done any good—the court opined that any such discovery requests would have "surely entail[ed] expensive e-discovery of emails or other internal communications" that the district court would have certainly denied.<sup>268</sup>

The reason any requests would have—or at least should have—been denied, of course, is because no discovery was necessary.<sup>269</sup> This case, like most of the others discussed in Part II, required nothing more than a side-by-side comparison of the two works.<sup>270</sup> As the court observed, "When a defendant raises a fair use defense claiming [her] work is a parody, a court can often decide the merits of the claim without discovery or a trial."<sup>271</sup> Aside from the "lamprooning" of the original video, the *South Park* version placed Butters "alongside other YouTube hits including, among others, the Numa Numa Guy, the Sneezing Panda and the Afro Ninja."<sup>272</sup> "This kind of parodic use has obvious transformative value," thereby satisfying the first fair use factor examining the purpose and character of the use.<sup>273</sup>

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261. *Id.* at 410 (citing FED. R. CIV. P. 26(c)(1) and other authorities).

262. *See Brownmark*, 682 F.3d at 691.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Brownmark*, 682 F.3d at 691–92.

269. *See id.* at 691.

270. *See id.* at 692.

271. *Id.*

272. *Id.* at 693.

273. *Id.*

And, as is often the case with works of parody, the other three factors fell quickly in line:<sup>274</sup> For the second factor—the nature of the copyrighted work—the court conceded that “[t]he creative and expressive nature of the original [video] places the work within the core of copyright protection.”<sup>275</sup> But, it said, “this factor offers little help to *Brownmark* because ‘parodies almost invariably copy publicly known, expressive works.’”<sup>276</sup> As for the third factor regarding the amount used, again the court acknowledged that *South Park* used the “heart” of the original.<sup>277</sup> That’s hardly surprising, though, because “parody, a favored use, must use a substantial amount of qualitative and quantitative elements to create the intended allusion; there are few alternatives.”<sup>278</sup> Finally, as to the fourth factor regarding market harm, the court reasoned the *South Park* parody’s “likely effect, ironically, would only increase ad revenue” for the original video.<sup>279</sup> And, of course, “[a]ny effect on the derivative market for criticism is not protectable.”<sup>280</sup>

*B. Combining Existing Federal Rules of Civil Procedure with the Copyright Act To Deter Copyright Thugs*

The Seventh Circuit’s opinion in *Brownmark* is instructive in a number of respects, and, if read appropriately, can be interpreted in such a way as to closely simulate the effect of an anti-SLAPP statute.

First, and perhaps most importantly, the district court and Seventh Circuit were perfectly comfortable deciding the merits of the case without any discovery having been conducted.<sup>281</sup> This is key to equating the dismissal to one under an anti-SLAPP law, because the evil such statutes seek to cure is the SLAPP plaintiff’s ability to drag a defendant into years of costly litigation.<sup>282</sup>

Certainly, not every claim of fair use—or even every claim of parody within the context of fair use—will be ripe for adjudication sans discovery. In *Brownmark*, both courts were able to do a side-by-side comparison and quickly conclude that the *South Park* video was pa-

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274. See *supra* Part III.

275. *Brownmark*, 682 F.3d at 693.

276. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* (citing *Campbell*, 510 U.S. at 592).

281. See *Brownmark*, 682 F.3d at 691; *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 999 (E.D. Wis. 2011).

282. See *Barker*, *supra* note 164, at 408.

rodic and transformative.<sup>283</sup> But not all comparisons are so easy. For example, many comparisons require a sense of each work's context.<sup>284</sup> Yet context may not be establishable without testimony or other evidence gained through discovery.<sup>285</sup> Likewise, because market harm is an enumerated fair use factor, it needs to be considered alongside the other three.<sup>286</sup> Although such harm—or the lack thereof—is easy to discern in parody cases, it may not be in other fair use instances, even when the allegedly infringing work's transformative nature is obvious.<sup>287</sup>

All that said, even despite the fact that many claims of fair use are not appropriately disposed of in pre-discovery motions,<sup>288</sup> many others are.<sup>289</sup> And courts are beginning to take note. For example, in a 2010 case that reached the Second Circuit, the court, albeit in a “substantial similarity” infringement context, held that in some cases, “no discovery or fact-finding is typically necessary, because ‘what is required is only a visual comparison of the works.’”<sup>290</sup> The Second Circuit cited to a long string of authority, including no less than six of its own cases and four of its sister courts, to support the notion that comparison can be performed by a court at a pre-discovery stage “because the court has before it all that is necessary in order to make such an evaluation.”<sup>291</sup>

Likewise, a district court in Nevada granted a 12(b)(6) motion to dismiss alleging fair use against a well-known “copyright troll.”<sup>292</sup> In analyzing the four fair use factors without the benefit of anything other than the pleadings and the two works themselves, the court held the defendant's use was fair because the copyrighted work was informational rather than creative, the defendant used only eight sentences

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283. *Brownmark*, 682 F.3d at 692; *Brownmark*, 800 F. Supp. 2d at 1000.

284. *Brown*, *supra* note 102, at 88.

285. *Id.*

286. *See* *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir.), *amended by* 313 F.3d 1093 (9th Cir. 2002).

287. *Brown*, *supra* note 102, at 88–89.

288. *See* *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 627 (7th Cir. 2003) (holding that it was “irregular” to rule on a fair use defense on the pleadings because “no evidence had yet been presented”); *see also* *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (“[T]he issue of fair use . . . is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain.”).

289. *See* *Brown*, *supra* note 102, at 84–88 (discussing cases).

290. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)).

291. *Id.* at 64–65.

292. *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413, at \*3 (D. Nev. Oct. 19, 2010). *See generally* *Greenberg*, *supra* note 71, at 61, 65–69 (describing *Righthaven* and its business practices).

of a thirty-sentence news article, and the use would not have diluted the market for the copyrighted work.<sup>293</sup>

These decisions are in line with longstanding precedent. For example, in *Fisher v. Dees*,<sup>294</sup> the Ninth Circuit affirmed the district court's prediscovery grant of summary judgment on fair use grounds, noting that "[t]he parties dispute only the ultimate conclusions to be drawn from [the two works]. Because . . . these judgments are legal in nature, we can make them without usurping the function of the jury."<sup>295</sup>

Although there are certainly instances in which claims of fair use cannot and should not be adjudicated at a prediscovery stage,<sup>296</sup> courts should ask themselves whether any discovery is actually necessary to rule on a motion to dismiss. In many cases, all that is needed are the two works, and a side-by-side comparison will reveal that the defendant's use was fair.<sup>297</sup>

The second key to comparing the Seventh Circuit's *Brownmark* decision to an anti-SLAPP dismissal is the timing of the motion to dismiss. In that case, the defendant filed a Rule 12(b)(6) motion, which the district court had little problem granting.<sup>298</sup> And indeed, other courts have done the same in the context of affirmative defenses.<sup>299</sup> Yet, although it affirmed the holding (and actually described it as "delightful"), the Seventh Circuit did take issue with the procedural posture.<sup>300</sup> As it discussed, the problem with determining fair use on a motion for failure to state a claim is that Rule 12(b)(6) asks whether the complaint states a claim for relief, and it's possible to state a claim even though an affirmative defense may kill it.<sup>301</sup>

So, the court held, the preferable way for a defendant with a clear fair use defense to proceed is through either a Rule 12(c) motion for judgment on the pleadings or a Rule 56 motion for summary judgment.<sup>302</sup> I would argue the Rule 12(c) motion more closely aligns with

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293. *Righthaven*, 2010 WL 4115413, at \*2.

294. 794 F.2d 432 (9th Cir. 1986).

295. *Id.* at 436.

296. *See, e.g.*, *Forest River, Inc. v. Heartland Recreational Vehicles, LLC*, 753 F. Supp. 2d 753, 766 (N.D. Ind. 2010) (holding that it could not determine at the pleading stage whether use was fair because "further development of the record" was needed to rule on the first three fair use factors).

297. *See, e.g.*, *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (finding an "obvious case of fair use" after a side-by-side comparison).

298. *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 999–1000 (E.D. Wis. 2011).

299. *Id.* (listing cases).

300. *Brownmark*, 682 F.3d at 690, 694.

301. *Id.* at 690.

302. *Id.* at 691.

the idea of an anti-SLAPP motion and is better suited for preventing costly discovery. A key component of an anti-SLAPP motion to dismiss is its early filing; in California, it must be filed within sixty days of the complaint's service.<sup>303</sup> This ensures that the motion will be heard before the parties have an opportunity to conduct costly discovery.<sup>304</sup> Although there's no time limit to filing a federal Rule 12(c) motion—the only requirements are that the pleadings be closed and that it be filed early enough to not delay trial<sup>305</sup>—there might be a difference between it and a motion for summary judgment when it comes to discovery. Many courts have held that summary judgment is not appropriate without an opportunity for discovery.<sup>306</sup> To be sure, nothing about the filing of a Rule 12(c) motion freezes discovery either.<sup>307</sup> But by its own title, the Rule 12(c) motion—contrary to a motion for summary judgment—should not concern itself with extrinsic evidence.<sup>308</sup> Rather, it should be based on the pleadings and any evidence attached to the pleadings, without any reference to what may have been turned up in discovery.<sup>309</sup>

The only aspect missing from the *Brownmark* cases was, admittedly, a fairly large component of anti-SLAPP motions: the award of attorney's fees. Although the district court granted the motion to dismiss, and the Seventh Circuit affirmed that dismissal, neither court made any mention of an award of attorney's fees in the defendants' favor.<sup>310</sup> One could argue that without the specter of an adverse award of attorney's fees, copyright bullies may not be deterred from filing suits in the first place.

The Copyright Act, however, does provide a fee-shifting provision that allows meritorious defendants to recover attorney's fees.<sup>311</sup> Specifically, § 505 of the Copyright Act gives courts discretion to award the prevailing party its reasonable attorney's fees as part of its costs.<sup>312</sup> Indeed, in some of the *Righthaven* “troll” cases, defendants won large

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303. CAL. CIV. PROC. CODE § 425.16(f) (West 2014).

304. See Tate, *supra* note 167, at 811.

305. FED. R. CIV. P. 12(c). “Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and an answer . . . .” 5C WRIGHT ET AL., *supra* note 226, § 1367.

306. See, e.g., Hammons *ex rel.* Vance v. United States, 90 F.3d 1145, 1148 (6th Cir. 1996) (“The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery.”).

307. See Mark, *supra* note 260, at 408–10.

308. 5C WRIGHT ET AL., *supra* note 226, § 1367.

309. *Id.*

310. See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012), *aff'g* 800 F. Supp. 2d 991 (E.D. Wis. 2011).

311. See Greenberg, *supra* note 71, at 126.

312. 17 U.S.C. § 505 (2012).

sums of money—hundreds of thousands of dollars, in fact—after obtaining prediscovery dismissal.<sup>313</sup> One would imagine that any court willing to summarily dismiss a plaintiff's copyright claim on fair use grounds would not look unfavorably on a Rule 54 Motion<sup>314</sup> for attorney's fees. At least one commentator has noted that the possibility of an adverse attorney-fee award could serve as “a substantial deterrent” to frivolous filing.<sup>315</sup>

So, in short, a defendant with a clear fair use defense—for example, the Evergreen Eight, had they been sued—should do the following:

- File a 12(c) motion to dismiss simultaneous to her answer and seek a hearing at the earliest possible date. If the plaintiff did not attach copies of the copyrighted and allegedly infringing works to her complaint, the defendant should attach them to the motion so the court can conduct a side-by-side comparison.<sup>316</sup>
- In the event the plaintiff seeks discovery (something she can't do until the parties meet and confer,<sup>317</sup> which they don't have to do until twenty-one days before a Rule 16(b) scheduling conference),<sup>318</sup> the defendant should seek a protective order from such requests<sup>319</sup> pending the resolution of the motion to dismiss, arguing instead that no discovery is necessary.<sup>320</sup>
- If the court grants the motion to dismiss, the defendant should, within fourteen days, move pursuant to Rule 54(d)(2)<sup>321</sup> for an award of attorney's fees under § 505 of the Copyright Act.<sup>322</sup>

Assuming a defendant and the court followed that procedure—something not unlike what occurred in *Brownmark* and *Righthaven*—the defendant would receive all the benefits of an anti-SLAPP-like dismissal, and perhaps copyright thugs would begin to take notice that their bullying is far riskier than it once was.

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313. Greenberg, *supra* note 71, at 69 n.82.

314. FED. R. CIV. P. 54(d)(2).

315. Greenberg, *supra* note 71, at 127.

316. *See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690–91 (7th Cir. 2012) (approving of the incorporation-by-reference doctrine to allow the court to consider evidence referred, but not attached, to a plaintiff's complaint).

317. FED. R. CIV. P. 26(d)(1).

318. FED. R. CIV. P. 26(f)(1).

319. FED. R. CIV. P. 26(e).

320. *See Brownmark*, 682 F.3d at 691 (“District courts need not, and indeed ought not, allow discovery when it is clear that the case turns on facts already in evidence.”).

321. FED. R. CIV. P. 54(d)(2).

322. 17 U.S.C. § 505 (2012).



### C. *Potential Criticisms*

Those who would support something akin to an anti-SLAPP dismissal mechanism for clear cases of copyright fair use might have some criticisms of my suggested approach. First, there's no guarantee of a discovery freeze. Second, enterprising plaintiffs may find ways to craft their complaint to escape summary adjudication. Third, there's no guarantee of an award of attorney's fees if the defendant prevails. And finally, there's no right to an interlocutory appeal if the motion is unsuccessful. I will address each of these arguments in turn.

#### 1. *Discovery Stay*

As discussed above, preventing discovery until the motion to dismiss is ruled on is a key component to an anti-SLAPP law's operation.<sup>323</sup> Because discovery can be responsible for much of the litigants' expenses, making the plaintiff wait until she can show a reasonable probability of success on the merits has the effect of discouraging nuisance suits brought solely to harass another party.<sup>324</sup>

But most anti-SLAPP statutes don't absolutely prohibit discovery.<sup>325</sup> In fact, they provide plaintiffs with the ability to request it, albeit in a limited form, for the purpose of defeating the motion to dismiss.<sup>326</sup> So even in an anti-SLAPP context, defendants aren't guaranteed a discovery-free period.<sup>327</sup>

And if a defendant follows the procedure I suggest in Part VI.B—that is, filing a Rule 12(c) motion simultaneously with her answer—she should be able to obtain a hearing on the motion before she is forced to “meet and confer” under Rule 26(f).<sup>328</sup> Because neither party can request discovery of the other side before that point, the Federal Rules actually provide a built-in discovery stay that provides a window for prediscovery dismissal.<sup>329</sup>

It's also possible that a court may require some evidence—for example, on market harm—before it can rule on a fair use defense.<sup>330</sup> But again, that same possibility exists in the anti-SLAPP context.<sup>331</sup> Defendants are always free to move for a protective order under Rule

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323. *See supra* Part IV.

324. *See Tate, supra* note 167, at 841–42.

325. *See id.*

326. *See id.*

327. *See id.*

328. *See* FED. R. CIV. P. 26(d), (f).

329. *See id.*

330. *See Brown, supra* note 102, at 83.

331. *See Tate, supra* note 167, at 841–42.

26(c),<sup>332</sup> which courts should use to narrow the scope of discovery to only those areas needed for the dismissal motion's resolution.

## 2. *Creative Pleading*

I suppose it's possible that some plaintiffs, as an anticipatory countermeasure, could attempt to plead their complaint in such a way as to avoid summary disposition or, at the very least, cause the court to grant a request to conduct discovery.<sup>333</sup>

But this concern would be unrealistic for at least two reasons. First, given the heightened pleading standards announced by the Supreme Court in *Ashcroft v. Iqbal*<sup>334</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>335</sup> plaintiffs would risk a different kind of dismissal by trying to be more vague or "hide" from the court the specific nature of their allegations.<sup>336</sup> And second, simply alleging something like market harm, for example, in an attempt to entitle oneself to discovery on that specific topic, is still not likely to support a request for discovery when the law is clear that parody and other types of transformative uses don't adversely affect the market for the original work.<sup>337</sup>

## 3. *Attorney's Fees*

Admittedly, anti-SLAPP statutes contain a significant disincentive to plaintiffs in the form of a *mandatory* attorney-fee award in defendants' favor.<sup>338</sup> But it wouldn't be accurate to say that the disincentive is entirely absent in the copyright context; indeed, the statute clearly provides for the *possibility* that a plaintiff, should she not prevail, will have to pay the defendants' attorney's fees.<sup>339</sup> With a built-in fee-shifting mechanism already in place, courts need to use their discretion to curb "shakedown" copyright lawsuits by overaggressive bullies.<sup>340</sup>

## 4. *Interlocutory Appeal*

This is the one true area where the victim of copyright bullying—unlike the victim of a SLAPP suit—is disadvantaged by the lack of statutory protection. In the anti-SLAPP arena, a defendant who loses

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332. FED. R. CIV. P. 26(c).

333. See Brown, *supra* note 102, at 86.

334. 556 U.S. 662 (2009).

335. 550 U.S. 544 (2007).

336. Brown, *supra* note 102, at 86.

337. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1993).

338. See Tate, *supra* note 167, at 807.

339. 17 U.S.C. § 505 (2012).

340. See Greenberg, *supra* note 71, at 127.

a motion to dismiss can appeal, thereby delaying discovery until her appellate avenues become dead ends.<sup>341</sup> A copyright defendant has no similar luxury. Although the denial of a motion to dismiss may be premised on the fact that more discovery is needed—in which case the defendant could presumably renew the motion once sufficient discovery is obtained—it is also possible that a denial could mean the fair use defense is not as clear as the defendant believes. In any event, the lack of the particular ability to interlocutorily appeal the denial means that the defendant must engage in costly discovery and proceed to trial before she achieves a victory.<sup>342</sup> If there is one upside, however, it is that the Copyright Act allows for the award of attorney's fees in the defendant's favor if she ultimately prevails.<sup>343</sup> That possibility sets copyright claims apart from most standard state law tort claims, which typically don't provide for any award of attorney's fees in a prevailing party's favor.<sup>344</sup> Thus, one could argue that while an interlocutory appeal is truly necessary in the SLAPP context, the Copyright Act's fee-shifting provision makes the appeal less important to bullying victims.

## VII. CONCLUSION

In the 1980s and 1990s, companies like Apple and Microsoft introduced the world to products that, by the early 2000s, enabled each of us to be artistic creators in ways that were unimaginable mere decades ago.<sup>345</sup> The Internet revolution of the early aughts has allowed us to be instantaneous global self-distributors of that work.<sup>346</sup> Although copyright thugs—those who use litigation or the threat of it to snuff out what is clearly fair use—are not a new problem, their ranks are ever increasing in today's world of music mashups, YouTube cover videos, and viral Facebook memes that build on and transform existing works.<sup>347</sup>

Creators must feel free to make fair use of others' work.<sup>348</sup> But the fair use doctrine has arguably become little more than “the right to hire a lawyer” to defend your actions in court.<sup>349</sup> That defense can

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341. See Tate, *supra* note 167, at 848.

342. See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012).

343. 17 U.S.C. § 505.

344. See *Case Analysis: Recovering Defendants' Attorney's Fees in Copyright-Infringement Cases*, BILLBOARDBIZ (Sept. 6, 2004, 12:00 AM), <http://www.billboard.com/biz/articles/news/1429304/Case-Analysis-Recovering-Defendants-Attorneys-Fees-in-Copyright>.

345. See generally LESSIG, *supra* note 1.

346. See generally *id.*

347. See generally *supra* Part II.

348. See generally LESSIG, *supra* note 1.

349. *Id.* at 187.

costs hundreds of thousands of dollars, so standing up to copyright bullies is not cheap.<sup>350</sup>

State legislatures have observed a similar phenomenon associated with defamation and tortious interference actions—citizens speaking out on public issues were being silenced by the threat of litigation.<sup>351</sup> As a result, they fashioned statutory disincentives, popularly known as anti-SLAPP laws, to curb the bullying.<sup>352</sup> These laws allow defendants to avoid costly discovery by moving for early dismissal and shifting the burden to the plaintiff to show she has a reasonable probability of prevailing at trial.<sup>353</sup>

Litigants and judges can use existing rules of civil procedure, along with the fee-shifting provision in the Copyright Act, to simulate an anti-SLAPP effect in federal copyright actions.<sup>354</sup> Because many fair use cases require nothing more than a side-by-side comparison of the two works, no costly discovery is necessary.<sup>355</sup> If these procedures are followed by copyright defendants and courts, we may begin to see a decrease in bullying, and creators will begin to feel free to make fair use of existing media.

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350. *See id.* at 200.

351. *See supra* Part V.

352. *See supra* Part V.

353. *See supra* Part V.

354. *See supra* Part VI.

355. *See supra* Part VI.

