ESSAY

COPYRIGHT INFRINGEMENT MARKETS

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Should copyright infringement claims be treated as marketable assets? Copyright law has long emphasized the free and independent alienability of its exclusive rights. Yet, the right to sue for infringement—which copyright law grants authors in order to render its exclusive rights operational—has never been thought of as independently assignable, or indeed as the target of investments by third parties. As a result, discussions of copyright law and policy rarely consider the possibility of an acquisition or investment market emerging for actionable copyright claims and the advantages that such a market might hold for copyright's goals, objectives, and functioning. This Essay analyzes the opportunities and challenges presented by an independent market for copyright claims, and argues that copyright law, policy, and practice would stand to benefit from the regulated involvement of third parties in acquiring, financing, bringing, and defending infringement claims.

* Assistant Professor of Law, University of Pennsylvania Law School. Many thanks to David Abrams, Tom Baker, Stephanos Bibas, Brett Frischmann, Scott Hemphill, Mark Lemley, Irene Lu, David Nimmer, Gideon Parchomovsky, Maya Steinitz, Peter Yu, and participants at the NYU Tri-State IP Workshop held at the NYU School of Law, for helpful comments and suggestions. All errors remain mine.

INTRODUCTION

The phenomenon of third parties acquiring, financing, or investing in private litigation has seen a sharp increase in the last few years.[1] Large commercial disputes, previously thought to be immune to any third party involvement, are today the principal targets for such involvement. In the process, rather robust claim markets have begun to emerge in various substantive areas.[2] Despite this general trend, the copyright system remains resistant to the role of third parties in acquiring and bringing infringement claims. The perceived one-sidedness of the system, which favors large commercial enterprises at the cost of individual user-defendants, and the general tendency among defendants to avoid litigating the question of fair use are together thought to render copyright litigation something of an evil that ought to be avoided unless absolutely necessary.[3] Allowing third parties to bring claims independently is, in this climate, seen as anathema. Copyright law thus contains stringent rules of

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1. See, e.g., Jonathan T. Molot, Litigation Finance: A Market Solution to a Procedural Problem, 99 Geo. L.J. 65, 96 (2010) (describing "recent development in litigation finance" where "investment funds and investment banks have begun to buy interests in commercial lawsuits"); Maya Steinitz, Whose Claim Is This Anyway? Third Party Litigation Funding, 95 Minn. L. Rev. 1268, 1275–85 (2011) [hereinafter Steinitz, Whose Claim?] (describing recent trend of third party litigation funding); Jason Lyon, Comment, Revolution in Progress: Third-Party Funding of American Litigation, 58 UCLA L. Rev. 571, 573 (2010) ("[B]y early 2010, there were at least six companies, both public and private, in three countries, that focused primarily on litigation finance, and that purported to have investments in U.S. commercial litigation.").

2. See Steinitz, Whose Claim?, supra note 1, at 1277 ("[T]he recent trend [in third party funding] is aimed at very different markets: corporate litigants, including corporate *defendants*, classes . . . , and individual plaintiffs in non-personal injury cases.").

3. For an analysis of how this affects the behavior of litigants, see Jennifer E. Rothman, The Questionable Use of Custom in Intellectual Property, 93 Va. L. Rev. 1899, 1909–24 (2007) (describing practices that participants—primarily potential defendants—adopt in order to avoid costly copyright litigation).

standing that courts all too readily invoke and extend in order to keep third parties out of the system.[4]

This tendency to view copyright litigation as an active hindrance that needs to be curbed has only been exacerbated by the recent public outcry against "copyright trolls," entities that seek to profit from litigation by monetizing it.[5] While the disquiet originated in the palpably problematic context of entities that merely sought to take advantage of copyright's statutory damages regime,[6] it has since extended to just about any effort to profit from copyright litigation, regardless of the legitimacy of the underlying claim itself. Copyright litigation is thus seen as deserving avoidance, and third parties' involvement therein is in turn viewed as doubly problematic and frowned upon.

This Essay argues that this approach is both myopic and counterproductive. Courts, scholars, and policymakers have for far too long believed that meaningful reform in the copyright system needs to occur through copyright doctrine, be it at the legislative level or through judicial interpretation.[7] In the process, they have ignored the possibility that market forces, if regulated and channeled appropriately, could do just as well and in certain respects perhaps even better than traditional law reform efforts. This is precisely what a regulated market for actionable copyright claims promises to do for copyright law. And contrary to popular belief, the increased involvement of third parties in the copy-

4. The rigidity originates in the Ninth Circuit's decision in Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881, 890 (9th Cir. 2005) (en banc) (holding "bare assignment of an accrued cause of action is impermissible" under copyright laws); see also 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.02 (2012) [hereinafter Nimmer on Copyright] (discussing standing to sue for copyright violations).

5. See, e.g., Copyright Trolls, Elec. Frontier Found., https://www.eff.org/issues/copyright-trolls (on file with the *Columbia Law Review*) (last visited Oct. 15, 2013) (identifying "harms of copyright trolling" and expressing outrage at trolls' "disrespect for due process"); Parker Higgins, Trouble in Trolltown: Judges Increasingly Catching On to Copyright Trolls' Unfair Tactics, Elec. Frontier Found.: Deeplinks Blog (Apr. 14, 2012), https://www.eff.org/deeplinks/2012/04/trouble-trolltown (on file with the *Columbia Law Review*) ("[Trolls are] victimizing Internet users at large."); Mike Masnick, Rapidshare Countersues Perfect 10 for Being a 'Copyright Troll' Who Only 'Shakes Down' Others, Techdirt (June 14, 2010, 7:46 AM), http://www.techdirt.com/articles/20100614/01050 19802.shtml (on file with the *Columbia Law Review*) (describing lawsuit against copyright troll); About, Fight Copyright Trolls, http://fightcopyrighttrolls.com/about/ (on file with the *Columbia Law Review*) (last visited Oct. 13, 2012) (describing copyright trolls as "law firms or individual lawyers who adopt[] a lucrative scheme to profit from copyright infringement allegations through extortion").

6. See generally Shyamkrishna Balganesh, The Uneasy Case Against Copyright Trolls, 86 S. Cal. L. Rev. 723 (2013) [hereinafter Balganesh, Uneasy Case] (arguing copyright trolls disrupt balance in copyright enforcement by enforcing otherwise actionable but tolerated claims).

7. See, e.g., Jessica Litman, Real Copyright Reform, 96 Iowa L. Rev. 1, 53–55 (2010) (noting reform will have to come through legislative process even though Congress is unlikely to undertake such reform efforts in near future).

right system will inure to the benefit of both plaintiffs and defendants in copyright infringement actions.

Copyright litigation today exhibits obvious malaises that litigation funding is well placed to correct. Litigating a copyright claim is no longer an affordable prospect for a vast majority of authors and creators. As of 2011, the average cost of litigating a copyright infringement case through trial, for either plaintiff or defendant—excluding judgment and awards—was estimated to range from $384,000 to a staggering $2 million.[8] To individual, small-business, or noncommercial creators, all of whom are intended beneficiaries of copyright, copyright litigation remains an unaffordable proposition. On the defendant side, users and copiers of creative works are, for identical reasons, all too reluctant to defend themselves in court when threatened with an infringement lawsuit, and go to extreme lengths to avoid the risk of being sued, even when their actions are fully defensible under copyright's fair use doctrine.[9] Needless licenses, clearances, and permissions—which are expensive, but cost less than litigation—are the norm today among users and copiers, even when wholly unnecessary as a legal matter, and they are often motivated entirely by the impulse to avoid costly litigation.[10]

The costs of copyright litigation thus have a distortionary effect on copyright law and policy. On the one hand, these costs hinder the system's purported ability to function as an incentive for creativity.[11] If creators and authors recognize that enforcing their copyright claims in court is an unworkable prospect (i.e., for cost reasons), copyright law's ability to induce creative expression begins to automatically diminish. Simultaneously, the costs also render copyright law's safety valves—such as the fair use doctrine and other limitations and exceptions to exclusive rights—meaningless, with defendants rarely invoking them (given their

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8. Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, at 35 (2012) (outlining costs associated with litigation). Much of this cost is attributable to the fact-intensive nature of copyright litigation, which entails extensive discovery during the litigation process.

9. See See Patricia Aufderheide & Peter Jaszi, Reclaiming Fair Use: How to Put Balance Back in Copyright 5 (2011) (describing this as "culture of fear and doubt"); James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 887–906 (2007) [hereinafter Gibson, Risk Aversion] ("[Various] factors cause copyright users to seek licenses even when they have a good fair use claim—i.e., even when proceeding unlicensed would probably result in no liability.").

10. See, e.g., Nancy Ramsey, The Hidden Cost of Documentaries, N.Y. Times (Oct. 16, 2005), http://www.nytimes.com/2005/10/16/movies/16rams.html?pagewanted=print (on file with the *Columbia Law Review*) (providing anecdotal evidence of this practice in documentary filmmaking).

11. For an overview of copyright's dominant incentives rationale, see Shyamkrishna Balganesh, Foreseeability and Copyright Incentives, 122 Harv. L. Rev. 1569, 1577–81 (2009) [hereinafter Balganesh, Foreseeability and Copyright] (describing copyright incentives in theory and practice).

dependence on a judicial determination), but instead actively undermining them through their litigation-avoidance strategies.[12]

Allowing third parties to enter copyright litigation and acquire, fund, or insure infringement claims—*in a regulated manner*—presents copyright law with a plausible solution. Third party entry is likely to lower the cost of litigation for participants in the system, in the process allowing both creators and users to focus more directly on their production and use of creative expression.[13] In addition, the entry of third parties will also produce a host of indirect benefits for the copyright system, as seen and predicted in other substantive areas where their participation is permitted. Indeed, third party funding (and acquisition) of litigation claims has begun to gain prominence in jurisdictions around the world, principally because the practice is believed to benefit litigants' access to justice via courts—an expensive proposition—without overwhelming the court system.

This Essay will show how copyright law, practice, and theory would all benefit from allowing third parties to fund infringement claims and defenses through diverse mechanisms and devices. Part I sets out the emerging practice of allowing third parties to acquire, fund, invest in, or insure against private legal claims and shows how the practice is absent in copyright litigation. Part II makes the theoretical case for more third party involvement in copyright litigation. It analyzes how the copyright system embodies certain features that make it a viable target for claim markets, and shows how copyright law, practice, and policy are likely to benefit through the greater involvement of third party funding in copyright litigation. Part III then examines the possible mechanics of a market for copyright claims, and the forms in which third parties can be involved. It then details the obstacles that exist under current law and policy to the emergence of such a market and the changes that will need to be made to induce greater participation of third parties in copyright litigation.

I. THIRD PARTY LITIGATION FUNDING AND ITS ABSENCE IN COPYRIGHT LITIGATION

The practice of third parties involving themselves in private litigation—also known as litigation funding—has seen a sharp increase in the last few years.[14] The industry is still in its early stages in the United States but is predicted to grow rapidly in the next few years as courts, state legis-

12. See Gibson, Risk Aversion, supra note 9, at 888–906 (describing "license, don't litigate" tendency in copyright law).

13. See infra Part II.B (discussing benefits to copyright from such funding).

14. See, e.g., Steinitz, Whose Claim?, supra note 1, at 1275 (describing this trend); Binyamin Appelbaum, Investors Put Money on Lawsuits to Get Payouts, N.Y. Times (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=print (on file with the *Columbia Law Review*) (same).

latures, and local bar associations begin to relax the several restrictions that surround the practice.[15]

Litigation funding, broadly speaking, refers to the practice of "providing money to a party to pursue a potential or filed lawsuit."[16] Put simply, "it is the provision of funds by companies who have no other connection with the litigation" than with its outcome.[17] Such funding can be on either the plaintiff or defendant side. In the former, it allows claims to be brought in court by providing the necessary capital, and in the latter, it enables defendants to defend against claims without having to settle earlier than necessary.[18] Recent estimates put the U.S. market for litigation funding at about $1 billion, and most predict that it is likely to grow rapidly in the next few years.[19]

As a practice, though, litigation funding is hardly new to the United States. Since at least the 1990s, lawyers and law firms have provided loans to clients who needed to bring expensive lawsuits, often at extremely high interest rates.[20] Their focus was on individual plaintiffs bringing personal injury claims. Whereas these early practices were on a small scale, and largely ad hoc, the last few years have seen the entry of large investment firms into the practice.[21] In addition to having significantly

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15. RAND Inst. for Civil Justice, Third-Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System 18 (Geoffrey McGovern et al. eds., 2010) (predicting ethics rules will change to accommodate development of third party financing structures); Appelbaum, supra note 14 (noting growing number of states are eliminating bans on investor funding).

16. State & Policy Affairs Dep't, Nat'l Ass'n of Mut. Ins. Cos., Third-Party Litigation Funding: Tipping the Scales of Justice for Profit 1 (2011), available at http://www.namic.org/pdf/publicpolicy/1106_thirdPartyLitigation.pdf (on file with the *Columbia Law Review*).

17. Steinitz, Whose Claim?, supra note 1, at 1276.

18. Id.

19. U.S. Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States 1 (2009), available at http://ilr.iwssites.com/uploads/sites/1/thirdpartylitigationfinancing.pdf (on file with the *Columbia Law Review*) ("Third-party litigation financing is a growing phenomenon in the United States . . . ."); Appelbaum, supra note 14 ("Total investments in lawsuits at any given time now exceed $1 billion, several industry participants estimated.").

20. N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011) [hereinafter N.Y.C. Bar Opinion], available at http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 (on file with the *Columbia Law Review*) ("Third party litigation financing first emerged as an industry in the United States in the early 1990s, when a handful of small lenders began providing cash advances to plaintiffs involved in contingency fee litigation."); Susan Lorde Martin, The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed, 10 Fordham J. Corp. & Fin. L. 55, 55 (2004) ("Lending money to plaintiffs to finance their lawsuits has become an industry within the last ten years.").

21. See Steinitz, Whose Claim?, supra note 1, at 1277 ("The new industry . . . is populated by institutional investors including some very prominent and sophisticated firms such as the leading Swiss bank, Credit Suisse, and the German insurance giant, Allianz.").

larger amounts of capital, these new entrants choose to invest in large commercial litigation (rather than personal injury claims) involving corporate entities—either as plaintiff or defendant. Both "the number and types of lawsuits financed" and indeed the "financing provided" have grown dramatically,[22] causing some scholars to refer to this as the "second-wave" of litigation funding in the United States.[23]

This growth is often attributed to two factors: international competitive pressures and the rising cost of litigation. Other common law jurisdictions—mostly notably the United Kingdom and Australia—have come to actively encourage the practice, and put in place a host of regulations to allow claim markets to develop and grow there. In Australia, the practice was formally approved in 2006 by the High Court.[24] Courts in the United Kingdom soon followed suit, and in 2011 a U.K. organization adopted a Code of Conduct for Litigation Funders to govern and regulate the practice.[25] The exponential rise of civil litigation costs is well known in the United States.[26] A recent estimate puts the cost of bringing a civil claim in federal court at $15,000 and the cost of defending a claim at $20,000 with both rising to well over $100,000 depending on subject matter.[27]

Broadly speaking, a third party's involvement in litigation can work in three possible ways: (i) through an outright claim acquisition, (ii) through investment in or funding of the litigation, or (iii) as "after the event" insurance on the defendant's side.[28] In a claim acquisition, the third party purchases the actionable claim in its entirety from the original plaintiff.[29] It is therefore also referred to as a "claim transfer."[30] In a

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22. N.Y.C. Bar Opinion, supra note 20.

23. Steinitz, Whose Claim?, supra note 1, at 1277; see also Holly E. Loiseau, Eric C. Lyttle & Brianna N. Benfield, Third-Party Financing of Commercial Litigation, In-House Litigator, Summer 2010, at 1, 7 ("[L]itigation financing is increasingly being utilized in commercial litigation between businesses, such as lawsuits involving breach of contract, intellectual property, fraud, or price-fixing.").

24. Campbells Cash & Carry Pty. Ltd. v Fostif Pty. Ltd. (2006) 229 CLR 386 (Austl.).

25. Ass'n of Litig. Funders of Eng. & Wales, Code of Conduct for Litigation Funders (2011), available at http://www.calunius.com/media/2540/alf%20code%20of%20practice.pdf (on file with the *Columbia Law Review*).

26. See generally Emery G. Lee III & Thomas E. Willging, Defining the Problem of Cost in Federal Civil Litigation, 60 Duke L.J. 765 (2010) (discussing high costs of civil litigation and analyzing how discovery rules affect costs).

27. Id. at 770 (discussing findings of earlier empirical study authors conducted); see, e.g., Appelbaum, supra note 14 (noting cost can rise to over $100,000 for malpractice cases).

28. For a fuller elaboration of these alternatives as they apply to copyright law, see infra Part III. It is worth mentioning here that these categories are not necessarily watertight and are largely for explanatory purposes. A claim acquisition is thus in a sense an investment as well. Additionally, "after the event" insurance is in the end a form of insurance rather than investment or funding, which entails its own regulatory framework and requirements.

29. RAND Inst. for Civil Justice, supra note 15, at 11.

wide variety of subject areas, a complete acquisition confers standing to sue on the acquirer, allowing it to dictate the litigation and settlement strategy unilaterally.[31] In a litigation investment, the third party funds (i.e., invests in) a litigation by fronting capital to the plaintiff for litigation and related expenses in return for a percentage of any eventual recovery through judgment or settlement.[32] Here, the plaintiff remains in the picture and litigates in its own name, but the parties usually enter into complex arrangements to determine who controls the litigation.[33] The third form of funding operates on the defendant's side, and involves a third party purchasing a defendant's litigation risk after a claim has commenced. In effect, this operates as a form of insurance after an event has occurred, but where the magnitude of risk remains uncertain—hence its description as a form of "after-the-event insurance."[34] This form of funding is less common in the United States than the other two, especially since U.S. law does not allow fee-shifting by prevailing defendants, unlike in the United Kingdom, where this practice is well known.[35] Each of these forms of third party funding carries over rather well to the unique circumstances of copyright litigation, which is discussed in greater detail later.

All three forms of funding facilitate the creation of "claim markets," as the term is used here. While technically it is only in a claim acquisition that the third party takes a formal ownership stake in the claim, litigation investment and insurance too involve transferring the risk of litigation—either in part or in full—to the third party. While the third party may not obtain a formal ownership stake, it nonetheless alienates the risk that litigating the claim entails through a market mechanism.

30. Id.

31. See Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008) (holding assignees of legal claims have standing under federal law to commence actions).

32. N.Y.C. Bar Opinion, supra note 20 ("If the claim appears meritorious, the financing company will advance amounts to cover attorneys fees and the other costs of the litigation. These advances typically are made to the claimant or its outside litigation counsel, in return for a percentage of any eventual recovery." (footnote omitted)).

33. Maya Steinitz, The Litigation Finance Contract, 54 Wm. & Mary L. Rev. 455, 503–15 (2012) [hereinafter Steinitz, Litigation Finance Contract] (detailing complex finance and control structure of third party litigation).

34. Jonathan T. Molot, A Market in Litigation Risk, 76 U. Chi. L. Rev. 367, 380 & n.26 (2009) [hereinafter Molot, Market in Litigation Risk] (discussing English practice wherein parties buy insurance after lawsuit commences to cover opponent's legal fees in event they should lose and be burdened with these fees under rules of fee-shifting); see also Michael Faure & Jef De Mot, Comparing Third-Party Financing of Litigation and Legal Expenses Insurance, 8 J.L. Econ. & Pol'y 743, 746 (2012) ("[After-the-event] insurance covers future legal expenses in a case where an incident has already occurred, such as an accident that has caused an injury.").

35. See Philip S. Figa, The "American Rule" Has Outlived Its Usefulness: Adopt the "English Rule," Nat'l L.J., Oct. 20, 1986, at 13 (differentiating between American and English rules of fee-shifting).

Despite these trends, copyright litigation has remained by and large immune to third party involvement. Copyright litigation costs well over three times the already high average cost of litigation.[36] And yet, market-based solutions to the problem of copyright's litigation costs have been somewhat rare. Unlike in the patent context, where nonpracticing entities (NPEs) are known to acquire patents preemptively and then sue for infringement,[37] copyright trades rarely occur in active anticipation of future litigation.[38] Contingency fee-based arrangements in copyright litigation are rare.[39] So too are collective enforcement mechanisms, where individual rights-holders band together to collectively monitor and enforce their rights, thereby cross-subsidizing their litigation costs.[40]

II. THE BENEFITS OF A MARKET FOR COPYRIGHT CLAIMS

Having discussed how litigation funding operates and its failure—thus far—to influence copyright litigation, this Part examines what the copyright system stands to gain through such funding, which effectively would result in the creation of a market for copyright claims. It bears reemphasizing that the reference to a "market for claims" here includes not just situations where the claim is acquired in its entirety, but also those where third parties assume a portion of the risk associated with enforcing the claim by investing in or funding it directly.

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36. See Am. Intellectual Prop. Law Ass'n, supra note 8, at 35 (detailing median cost of copyright litigation from 2005 to 2011).

37. See generally Michael Risch, Patent Troll Myths, 42 Seton Hall L. Rev. 457 (2012) (discussing NPEs, also known as "patent trolls").

38. It is sometimes mistakenly believed that patent infringement claims can be transferred and assigned independent of the patent itself. See RAND Inst. for Civil Justice, supra note 15, at 12 ("Patent claims are transferable under federal law."). This is incorrect. Patent infringement claims, such as those for past infringement, can be transferred only when accompanied by a transfer or assignment of the patent itself. See Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 43 (1923) ("The sole exception to the rule that only he who is the owner of the patent . . . can sue for damages . . . is when such owner assigns the patent and also the claim for past infringements to the same person."); 8 Donald S. Chisum, Chisum on Patents § 21.03[2][g][i] (2011) ("The damage claim cannot be transferred as such apart from the patent."); Roger D. Blair & Thomas F. Cotter, The Elusive Logic of Standing Doctrine in Intellectual Property Law, 74 Tul. L. Rev. 1323, 1344 (2000) ("The assignor . . . may transfer . . . only if the transfer is express and is accompanied by an assignment of the underlying patent." (footnote omitted)). The rules of patent law are in this respect strikingly similar to those of copyright law. See infra Part III.B.2.a (explaining how courts have interpreted copyright claims to be nonassignable).

39. Remedies for Small Copyright Claims: Notice of Inquiry, 76 Fed. Reg. 66,758, 66,759 (Oct. 27, 2011) [hereinafter Remedies for Small Copyright Claims Notice] ("Contingency fee arrangements are relatively rare in copyright lawsuits . . . .").

40. See C. Scott Hemphill & Jeannie Suk, The Law, Culture, and Economics of Fashion, 61 Stan. L. Rev. 1147, 1193 (2009) (advocating collective enforcement mechanism for fashion industry).

This Part first looks at certain structural realities of the copyright entitlement and litigation, to highlight the need for such third party litigation funding (Part II.A), then proceeds to show how the entry of third party funders can provide copyright litigation with a host of direct and indirect benefits on both the plaintiff and defendant sides (Part II.B).

A. *Why the Copyright System Is Ripe for Litigation Funding*

While copyright litigation is no doubt very similar to traditional commercial litigation as a structural matter, it nonetheless embodies certain characteristics that make it well suited to the practice of litigation funding. Two in particular deserve elaboration here: (i) the copyright entitlement's fundamental dependence on litigation, and (ii) the exorbitant cost of copyright litigation (in comparison to other areas) and its distortionary effects on copyright law and policy. In some ways the two features are clearly at odds with each other, and copyright reform efforts have thus far done little to try to align them.

Copyright law's basic entitlement structure anticipates and operates in the shadow of private litigation. As an analytical matter, copyright grants its holder a set of exclusive rights in relation to the protected subject matter, i.e., the original expression.[41] These rights revolve around the act of copying, which is central to copyright law. All the same, since copyright's subject matter is intangible and therefore exhibits the characteristics of resource nonrivalry and nonexcludability,[42] the significance of the exclusive rights machinery operates in large part through the correlative duty that it imposes on others.[43] Copyright thus revolves around the "duty not to copy original expression" that it imposes on all but the copyright owner in society.[44]

In other words, ownership over a tangible object endows its owner with a set of exclusive rights to use the object. Yet, since the object is both rival and excludable in nature, these rights *enable* the owner to use the object in different ways without interference from others in society (i.e.,

41. 17 U.S.C. § 106 (2012).

42. See Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. Pa. L. Rev. 635, 637 (2007) (defining nonrivalry as situation where "consumption of the good by one consumer does not reduce the supply available for consumption by others" and nonexcludability as phenomenon where "producers cannot provide their benefits to one consumer without simultaneously providing the benefits to other consumers").

43. See Shyamkrishna Balganesh, The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying, 125 Harv. L. Rev. 1664, 1669 (2012) [hereinafter Balganesh, Obligatory Structure] ("The duty of forbearance, which operates once a resource is owned, signals to individuals to avoid interfering with the resource without the owner's authorization.").

44. Id. at 1667–74; see also Jeremy Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property, 68 Chi.-Kent L. Rev. 841, 844 (1993) (discussing correlativity of individual rights and individual duties in intellectual property).

nonowners). Moving to copyright though, since the object is intangible expression, the owner (the copyright holder) needs no actual enablement to use the object.[45] As a physical matter, the object is perfectly capable of multiple, simultaneous use (and copying) by other individuals. Copyright injects an artificial scarcity into this environment through its grant of exclusive rights. But given the nonrival nature of the object being protected, these exclusive rights *disable* nonowners (i.e., potential copiers) from interfering with the copyright holder's exclusive rights in the work.[46] Copyright's entitlement framework is therefore rooted in the disabling duties that it imposes on nonowners in society. And since copyright is in the end a private law system, for this disablement it relies heavily on the owner's power, ability, and threat to invoke the state's coercive machinery to ensure its realization. The copyright entitlement then, to put it simply, revolves analytically around the possibility of litigation.

As a functional matter, the copyright entitlement is formally determined for the first time only during litigation. Since the entitlement is premised on automatic protection once a work is created and fixed in a tangible medium of expression, litigation performs an important validation function for the existence and scope of the entitlement.[47] Unlike the patent entitlement, which involves a formal prosecution process that results in the patentee obtaining a prima facie entitlement accompanied by a strong presumption of validity, copyright law contains no analogous review process.[48] Litigation thus performs more than just a remedial function in copyright law—i.e., merely correcting a harm—but instead also performs an important constitutive function for the entitlement.

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45. See T. Cyprian Williams, Property, Things in Action and Copyright, 11 L.Q.R. 223, 232 (1895) (making similar point about centrality of forbearance to copyright law).

46. See Balganesh, Obligatory Structure, supra note 43, at 1670 ("[C]opyright law does not just declare that the rightholder is allowed to copy . . . but instead allows the rightholder to copy *to the exclusion of everyone else.*"); Williams, supra note 45, at 226 (discussing how law protects individual rights by imposing individual duties).

47. See generally Shyamkrishna Balganesh, Debunking Blackstonian Copyright, 118 Yale L.J. 1126, 1168–70 (2009) (book review) (describing this validation function as bipolar process by which courts define copyright entitlement by reference to plaintiff's contribution and defendant's actions).

48. For a recent account of this difference, see David Fagundes & Jonathan S. Masur, Costly Intellectual Property, 65 Vand. L. Rev. 677, 679 (2012) ("Patents vest only after an applicant successfully navigates a cumbersome examination process administered by the federal Patent and Trademark Office ('PTO'). Copyrights, by contrast, arise costlessly and often unintentionally, as soon as an author fixes a work of authorship in a tangible medium of expression."). This is not to suggest that the patent entitlement is not subject to the vagaries of the litigation process as well, rendering it problematic. See Mark A. Lemley & Carl Shapiro, Probabilistic Patents, J. Econ. Persp., Spring 2005, at 75, 75 ("Given [the uncertainties of patent entitlement], economists have increasingly recognized that a patent does not confer . . . the right to exclude but rather a right to *try* to exclude by asserting the patent in court.").

There remains an important respect in which copyright is also different from the entitlement underlying other private causes of action such as those involved in tort claims. While such private claims too are determined only during litigation (i.e., by a court), the abstract entitlements underlying them are almost never treated as alienable prior to their maturation into specific actions. Thus, it is uncommon to speak of trading (or transferring away) one's "right not to be negligently injured," prior to a negligent act actually transpiring.[49] Copyright, on the other hand, is treated as a tradable entitlement, even in its unmatured form, making it analytically very different.[50]

Indeed, the copyright entitlement's tradability in its unmatured form and its fundamental dependency on litigation caused some early scholars of the common law to argue that copyright was nothing more than a "chose in action," i.e., an actionable claim.[51] Since expression could never be "possessed" as an object, copyright was thought to be a "claim" that could "only be enforced by going to law."[52] Since all forms of property in the common law were choses in either action or possession, and copyright was clearly intended to be a tradable asset, this view insisted that a copyright claim had to be understood as a chose in action. Thus, as a structural matter, copyright law fundamentally anticipates and depends on the possibility of litigation. Unlike other substantive areas where litigation can be seen as performing a vindicatory, remedial, or punitive function, litigation is of constitutive analytical significance to copyright law.

This analytical reality, however, faces an obvious functional problem. In spite of the centrality of litigation to copyright's entitlement structure, copyright litigation remains unaffordable to a large number of litigants. The average cost of litigating a copyright case through trial ranges from $384,000 to over $2 million, for both plaintiffs and defendants.[53] These costs have risen dramatically over the last decade, which has in turn seen a corresponding reduction in the number of copyright claims that are actually litigated in court. In 2005, a total of 5,796 new copyright cases

49. See Robert Cooter, Towards a Market in Unmatured Tort Claims, 75 Va. L. Rev. 383, 383 (1989) (defining entitlement prior to injury as "unmatured tort claim"); see also Alan Schwartz, Commentary on "Towards a Market in Unmatured Tort Claims": A Long Way Yet to Go, 75 Va. L. Rev. 423, 423–24 (1989) (describing problems inherent in allowing such claims to be traded).

50. 17 U.S.C. § 201(d) (2012) (dealing with process through which copyright in work may be transferred, i.e., traded).

51. See Williams, supra note 45, at 223 ("[C]opyrights and similar rights are more analogous to choses in action than to choses in possession . . . .").

52. Id. at 226.

53. Am. Intellectual Prop. Law Ass'n, supra note 8, at 35; see also Rothman, supra note 3, at 1909 (describing these costs as "skyrocketing").

were filed.[54] This figure has seen a steady decline since, and by 2011 this figure shrank to 2,297—an astounding sixty percent drop.[55] The Copyright Office attributes most of this to the rise in litigation costs, and in 2011 it began exploring the possibility of low-cost "small claims" courts to decide copyright infringement cases.[56] It thus observed the following:

> If a copyright owner hires a lawyer, the expenses can add up quickly. Contingency fee arrangements are relatively rare in copyright lawsuits; thus most copyright owners will have to pay an hourly fee for representation. Lawyers charge hundreds of dollars per hour, which could reach a total of tens or hundreds of thousands of dollars when a case does not immediately settle and instead requires discovery, motion practice, and trial.[57]

What makes copyright litigation expensive is the necessarily fact-intensive nature of the dispute. In bringing a claim, a plaintiff must show actual copying by the defendant, which entails proof of access and similarity between the works. If the works are not identical, the plaintiff also needs to establish that the works are "substantially similar," which is a subjective question of fact.[58] Courts treat both these issues as questions of fact, and are justifiably reluctant to decide them on motions for summary judgment.[59] The defendant faces the same fact-intensive burden. Fair use is a mixed question of law and fact, and the burden of establishing the facts that determine fair use, most notably the "effect" of the defendant's use on the market for the plaintiff's work,[60] falls to the defendant.[61] Discovery costs thus form a large part of copyright litigants' expenses.[62]

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54. Admin. Office of the U.S. Courts, 2006 Judicial Business of the United States Courts: Annual Report of the Director 167 (2007) (detailing filing statistics from 2002 through 2006).

55. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 2011 Annual Report of the Director 130 (2012) (detailing filing statistics from 2007 through 2011).

56. Remedies for Small Copyright Claims Notice, supra note 39, at 66,759.

57. Id. at 66,759–60.

58. Cf. Shyamkrishna Balganesh, The Normativity of Copying in Copyright Law, 62 Duke L.J. 203, 284 (2012) [hereinafter Balganesh, Normativity of Copying] (extolling subjectivity of substantial similarity for pluralist reasons).

59. See, e.g., Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 946 (8th Cir. 1992) (observing summary judgment on issue of substantial similarity is generally not favored); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165 (9th Cir. 1977) (observing "summary judgment may not be granted when there is the slightest doubt" on issue).

60. 17 U.S.C. § 107(4) (2012).

61. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("[F]air use is an affirmative defense . . . ."); 3 Nimmer on Copyright, supra note 4, § 13-05[A][4] (detailing problems associated with having defendant bear this burden).

62. See Sharon Cullars, Trends in IP Litigation Costs, Legal Fin. J. (Nov. 24, 2011), http://legalfinancejournal.com/trends-in-ip-litigation-costs/ (on file with the *Columbia Law Review*) ("One of the major factors contributing to the high litigation costs is collecting discovery.").

Litigation costs influence parties' behavior.[63] In addition to influencing parties' litigiousness, i.e., their willingness to bring a claim in court, litigation costs also affect parties' primary behavior when the substantive regime in question is premised on inducing behavior of a specific kind. Tort law is a prime example, where the costs of litigation play a major role in a regime's ability to deter negligent behavior. One scholar therefore notes that "costly litigation implies that the tort system fails to compel actors to exercise socially optimal precaution" and thus fails in its deterrent function.[64] When individuals know that the costs of litigation make it unlikely that suits will be brought, the law's ability to deter behavior begins to diminish in large measure. If litigation costs can influence a regime's ability to *deter* behavior, they must in equal measure be able to influence a regime's ability to *incentivize* behavior as well. And if copyright's primary purpose lies in providing creators with an incentive to create—as courts and policymakers routinely reiterate[65]—then rising litigation costs will, in a similar vein, impede the system's realization of its core objective. The decline in litigation rates might thus suggest not just that parties are unwilling to litigate their claims, but rather a decline in the very utilization of the copyright system, especially given the centrality of litigation to its functioning.

It is, of course, hard to assess the exact causes for the drop in copyright litigation rates without disaggregating the empirical evidence further. Yet, the anecdotal evidence accompanying the Copyright Office's recent study seems to suggest that copyright's litigation costs are doing more than just deterring lawsuits. In its comment submission, the American Society of Media Photographers, for instance, described how these costs, and the lack of a cost-effective mechanism of redressal, were "mak[ing] the investment necessary to become and remain a professional photographer a staggering and constant burden,"[66] in effect,

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63. RAND Inst. for Civil Justice, supra note 15, at 4 (explaining how litigation costs influence behavior).

64. Keith N. Hylton, Litigation Costs and the Economic Theory of Tort Law, 46 U. Miami L. Rev. 111, 113 (1991).

65. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create . . . ."); William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 38–39 (2003) (explaining economic incentives for creators); Justin Hughes, Fair Use Across Time, 50 UCLA L. Rev. 775, 797 (2003) (discussing "incentive language" used by courts and Congress when discussing copyright law); William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 327 (1989) (explaining economic incentives for creators); Joseph P. Liu, Copyright and Time: A Proposal, 101 Mich. L. Rev. 409, 428–36 (2002) (same).

66. Letter from Victor S. Perlman, Gen. Counsel & Managing Dir., Am. Soc'y of Media Photographers, to U.S. Copyright Office (Oct. 16, 2012), available at http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/asmp.comments.2.10.16.12.pdf (on file with the *Columbia Law Review*).

then, deterring the very creative enterprise, rather than just the commencement of lawsuits.

Copyright's high litigation costs also discourage defendants from contesting palpably frivolous and overbroad infringement claims by copyright owners. When offered a settlement that is much lower than what they would have spent defending the claim—even if they know that they are likely to succeed on the merits—rational defendants have good reason to prefer settling to litigating.[67] This only encourages copyright owners to make overbroad claims. Some courts then unthinkingly treat these settlements as evidence of vibrant licensing markets to constrain the scope of the fair use defense doctrinally.[68] In effect, then, defendants' failure to litigate fair use effectively whittles away its scope and significance. The fair use doctrine is, however, more than just a "defense" in copyright law. As copyright's primary safety valve, it safeguards a host of important First Amendment and free speech interests, and functions as an incentive for downstream creativity as well.[69] The functional evisceration of fair use thus has real downsides for social welfare and threatens to undermine the very legitimacy of the copyright system.

In short then, copyright's exorbitant litigation costs affect both plaintiffs and defendants, distort the system's core objectives and safety valves, and seem to show no sign of declining. Yet, few solutions seem to focus directly on the problem. They instead focus on reforming copyright doctrine, the lawmaking process, or the adjudicative process.[70] "Litigation" and the litigation process as such are blamed for these costs and treated as a part of the problem rather than the solution. Litigation funding allows copyright law to directly address the problem of spiraling litigation costs without undermining its very dependence on litigation.

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67. See Gideon Parchomovsky & Alex Stein, The Relational Contingency of Rights, 98 Va. L. Rev. 1313, 1348 (2012) (discussing how "settlements economize on litigation costs").

68. See James Gibson, Accidental Rights, 116 Yale L.J. Pocket Part 348, 351 (2007), http://yalelawjournal.org/images/pdfs/545.pdf (on file with the *Columbia Law Review*) (suggesting mechanism to remedy this problem); see also Gibson, Risk Aversion, supra note 9, at 895–98 (describing this phenomenon as "market circularity").

69. See Harry N. Rosenfield, The Constitutional Dimension of "Fair Use" in Copyright Law, 50 Notre Dame L. Rev. 790, 794–97 (1975) (noting "copyright privilege does not prevail against the constitutional guarantee of the first amendment" because "unlocking of ideas requires reasonable access to materials . . . through fair use"); see also Thomas Rogers & Andrew Szamosszegi, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use 17, 20–23 (2010), available at http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf (on file with the *Columbia Law Review*) (detailing extensive economic contributions made by "industries whose output is driven increasingly by activities made possible by fair use").

70. See, e.g., Remedies for Small Copyright Claims Notice, supra note 39, at 66,760 (examining possibility of "small claims tribunal" to allow individual copyright owners to bring infringement suits at lower cost than in federal courts); Litman, supra note 7, at 40–52 (suggesting reform of copyright doctrine).

B. *Third Party Funding in Copyright Law*

Having discussed why copyright litigation remains structurally well suited to third party funding, this section moves to identifying the concrete advantages that copyright law, practice, and policy are likely to see by allowing third parties to acquire and invest in infringement claims.

1. *Reducing Incentive Dissipation.* — Copyright's raison d'être is thought to lie in its ability to induce the production of creative expression.[71] Despite the lack of empirical confirmation for this theory, it continues to inform copyright lawmaking, judicial interpretation of copyright doctrine, and scholarly writing on the subject.[72] By promising creators a set of temporally limited exclusive rights in any original work of expression that they produce, copyright law is thought to incentivize the creation of such expression.[73] In other words, by promising creators recourse to the state's mechanism for disabling others from making unauthorized copies of an original work, copyright law is thought to motivate the production of such work. Now, if recourse to the state's enforcement mechanism to prevent unauthorized copying is unaffordable and rational creators know this up front, this fact will certainly interfere with copyright's ability to act as an inducement.

Assume that the cost of making a work to Anne, an author, is $2,000, and that she also knows that by selling copies of the work in the market she can earn $5,000, making a net profit of $3,000. Copyright law is thought to signal to the creator that by disabling others from copying the work (once created), it will allow her to exploit the full market potential (i.e., $5,000) for copies of the work, and in the process induce her to produce the work. Now assume that a competitor appropriates (i.e., copies) Anne's work, as a result of which the market for the original shrinks to sales of $1,000, below her initial investment (i.e., her costs of creation). At this point, for Anne to be incentivized to seek these lost profits in an infringement action, she will need to be assured of a net gain at the end, taking into account the costs of both creation and litigation.[74] In our scenario, this means that for Anne to recover $4,000 (i.e.,

71. See, e.g., Hughes, supra note 65, at 797 ("[I]t is through incentive language that judges are most empowered to make copyright law work as it should."); Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. Rev. 1197, 1197–204 (1996) (noting two traditional justifications for copyright are that it "provides an incentive" to create and "rewards authors").

72. See, e.g., Diane Leenheer Zimmerman, Copyrights as Incentives: Did We Just Imagine That?, 12 Theoretical Inquiries L. 29, 32–34 (2011) (questioning "basic premise that the promise of economic reward . . . is a key factor in incentivizing people to contribute original expression to the public").

73. Id. at 31 (noting how incentive theory "conceives of the creative individual as a rational profit-maximizer whose willingness to invest effort, time, and resources in creative enterprises is directly correlated to the expected extent of the returns that will be forthcoming").

74. If she spends $2,000 in creating the work and $3,000 in litigating for lost profits owing to copyright infringement, she ends up recovering $4,000 in lost profit compensa-

the lost profits), the cost of litigation must be well below $3,000 to make it economically viable. If this is unlikely, and she knows this prior to creation, her rational economic incentive to create the work will altogether disappear, since she will recognize simultaneously that (i) substitutive copying is likely to impact her profits, (ii) the costs of commencing an action against the copier to recoup these profits are very high, and (iii) as a result, they each individually and in conjunction make the creative activity altogether unprofitable.

The costs of copyright litigation thus influence not just the decision whether to litigate, but in scenarios where copying is both easy and very likely, they may also affect the decision whether to create the work at all. The same holds true in varying degrees even when the unauthorized copying does not cause the creator's profits to fall below the break-even point. The economic decision to create is thus impacted by high litigation costs; this factor is especially true for individual and one-off creators. The inefficiency of litigation effectively dilutes and dissipates the economic incentive that the copyright system purports to grant authors.

It might be thought that copyright's allowance for plaintiffs to elect for statutory damages and recover reasonable attorney's fees[75] alleviates this problem. In reality though, these mechanisms still require copyright owners to make significant out-of-pocket payments to sustain the litigation in the hope of obtaining these remedies, which, in addition, are "not guaranteed."[76] It is precisely because of copyright's rising litigation costs and their effect on creators that the Copyright Office has recently begun considering the possibility of alternative "small claims" dispute resolution

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tion and $1,000 in terms of independent sales, barely allowing her to break even. Even at this point, a rational creator who can predict these costs up front—which is improbable today—is unlikely to want to create in the first place.

75. 17 U.S.C. §§ 504–505 (2012). These provisions allow a plaintiff in a copyright infringement lawsuit to elect to receive statutory damages in lieu of actual damages at any point during the lawsuit. Id. § 504(c)(1). When the election is made, and if the court thereafter finds the defendant infringed, the provisions then require the court to award the plaintiff an amount that ranges between the minimum and maximum thresholds specified therein. Id. § 504(c)(1)–(2). Courts have generally awarded plaintiffs amounts far in excess of any actual damage they might have suffered from the infringement. For a discussion of this remedy and its problems, see Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439, 441 (2009) (discussing problems associated with statutory damages, e.g., they are "frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive").

76. Remedies for Small Copyright Claims Notice, supra note 39, at 66,760. These remedies are still to a large extent dependent on the court's discretion. While the statutory damages provisions specify a minimum and a maximum amount, 17 U.S.C. § 504(c), courts remain free to fix the award at any point between those two extremes. For costs and attorney's fees, the statute allows recovery based entirely on the court's "discretion." Id. § 505.

mechanisms where the litigation costs are likely to be significantly lower.[77]

Litigation funding, while not directly lowering the costs of copyright litigation, nonetheless can ensure that the effect of these costs is felt most directly by someone other than the creator. In the process, it reduces the extent to which these costs influence the incentive to create—the institution's primary purpose. When a creator's work is purportedly infringed by a copier, litigation funding would allow third parties to either acquire the infringement claim from the creator and pursue the claim directly or fund the claim by fronting capital to the creator, who will still bring the action in his or her own name.[78] In such an arrangement, the creator is able to obtain upfront payment for its claim (either directly or indirectly), which, while likely to be less than the total expected value of the claim, is nonetheless sure to be higher than what the creator might have gotten without the involvement of the third party. This is so for two possible reasons. One, the litigation funder is likely to have lower litigation costs, making the lawsuit potentially lucrative, with some of those benefits passing on to the creator. Two, the litigation funder—unlike the creator—will be able to value the lawsuit based not just on the creator's lost profits but on the availability of statutory damages, since this now becomes a realistic possibility.

The litigation funder has obvious incentives to enter into such arrangements. Remember that a litigation funder is usually an entity with expertise in litigation. The ability to accurately value a claim and assess the probability of a favorable outcome, the ready access to large stores of capital, and the expertise to run the process efficiently are characteristic features of such funders. The funder is thus well positioned to take advantage of copyright law's allowance for statutory damages, since the out-of-pocket expenses needed to run the litigation are hardly a deterrent. Going back to the earlier hypothetical involving Anne the creator reveals how this might work.

To Anne, the costs of litigating the claim for lost profits of $4,000 might be $3,000, making it economically impractical to pursue. But to a litigation funder, XYZ Inc., these costs might be significantly lower[79]—say $1,000. If XYZ now approaches Anne and offers to pay her $2,000 for the claim (which is worth $4,000), Anne still makes a net gain of $1,000 in the overall scheme of things, effectively preserving her incentive to create. XYZ can expect a gain from the litigation (of $1,000) as well, even if lost profits were the sole basis for valuing the claim. In reality though,

77. See Remedies for Small Copyright Claims Notice, supra note 39, at 66,759 (proposing this idea).

78. Part III.A.3, infra, details further how copyright law's rules on exclusive licensing make this a distinctively feasible possibility.

79. This is because of the economies of scale that the funder might benefit from due to its expertise in litigation.

even if XYZ's costs of litigation are the same as what they were for Anne, XYZ might value the claim much higher—say at $20,000—under copyright's statutory damages regime.[80] Since XYZ has the liquidity for large out-of-pocket expenses, they are still likely to be far lower than its recovery, especially if attorney's fees are also awarded, and the lawsuit now becomes a potentially lucrative investment opportunity. Importantly, this might even have an effect on Anne's arrangement with XYZ. If Anne knows that XYZ values the litigation not just on the basis of lost profits but also using the possible recovery of statutory damages, Anne is likely to negotiate for a much higher upfront payment for the claim. XYZ might thus choose to pay Anne $6,000 if it knows that statutory damages are very likely, based on its assessment of the claim. Anne thus stands to earn a net profit of $5,000 from the overall scheme. If creators such as Anne know that litigation funders exist to assist them with infringement claims, the presence of these funders not only preserves the original incentive to create, but introduces the distinct possibility of *enlarging* it, by making the availability of statutory damages seem realistic.

In effect, then, litigation funding is likely to do two things simultaneously for copyright's incentive structure. First, it will likely prevent the complete dissipation of the incentive to create by ensuring that creators do not have to feel compelled to litigate the claim themselves in order to recover lost profits. Creators could rely on third parties to enforce the claim, and thereby obtain a significant *portion* of these lost profits. Second, it will form a bridge between the creator and the Copyright Act's provision for statutory damages. By introducing a new set of participants into the system for whom the availability of large statutory damages after expensive litigation is both an independent incentive and of little hardship, it raises the market value of creators' actionable infringement claims and allows them to internalize a significant portion of this surplus. In the process, it allows for the possibility that copyright litigation might, counterintuitively, now actively enhance creators' incentives to produce.

2. *Lowering Agency Costs.* — A second benefit of litigation funding in copyright is the possibility that it will lower agency costs between clients and lawyers in monitoring and enforcing infringement. Agency costs originate from a principal-agent problem, where an agent tasked with protecting a principal's interest has insufficient incentives to do so, producing a net welfare loss.[81] These costs arise from "the impossibility of

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80. Copyright's statutory damages regime contained in 17 U.S.C. § 504 allows a plaintiff to elect to receive statutory damages in lieu of actual damages, without having to establish a reason for the election. Once the election is made, and the court finds an infringement, the court is obligated to award the plaintiff no less than $750 and no more than $30,000 per work infringed. Id. § 504(c)(1). In the event that the court finds the infringement willful, it can increase damages to as high as $150,000 per work infringed. Id. § 504(c)(2).

81. For a general overview of the principal-agent problem, see Hal R. Varian, Intermediate Microeconomics: A Modern Approach 667–88 (6th ed. 2003); Kenneth J.

complete contracting when one party (the agent) has discretionary and unobservable decisionmaking authority that affects the wealth of another party (the principal)."[82] It originates in situations where the principal has no way of monitoring the implementation of an arrangement with the agent, as a result of which the principal has little basis to know whether it was the agent's own conduct or external factors that produced a less-than-desirable outcome.[83]

While agency costs are endemic to the attorney-client relationship in all substantive areas, they remain exacerbated in copyright law for a variety of interrelated reasons. As a direct consequence of its idiosyncratic subject matter (i.e., expression) that is protected automatically upon creation and fixation,[84] copyright law operates primarily through standards rather than rules. As is well known, standards, which tend to be imprecise and open-ended, lack the certainty of rules and entail higher costs in their application.[85] Actors, who seek to be guided by the law, are the principal bearers of these costs, which usually manifest themselves either in the time and effort needed to understand the law and precedents, in obtaining professional legal advice, or in needing a comprehensive process of adjudication for courts to fill the content of these standards circumstantially ex post.[86] Copyright's standards thus exacerbate the information asymmetry between the nonspecialist creator/copier and his or her lawyer, which is the basis of the principal-agent problem.[87] And perhaps most importantly, this is so *for both plaintiffs and defendants*.

Take the plaintiff's side first. In situations where a defendant's copying is not literal or verbatim, a plaintiff is obligated to establish that the defendant's work is "substantially similar" to the plaintiff's protected

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Arrow, The Economics of Agency, *in* Principals and Agents: The Structure of Business 37, 37–38 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

82. Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 Cornell L. Rev. 621, 636 (2004).

83. See Sanford J. Grossman & Oliver D. Hart, An Analysis of the Principal-Agent Problem, 51 Econometrica 7, 10 (1983) (analyzing principal-agent problem); Stephen A. Ross, The Economic Theory of Agency: The Principal's Problem, 63 Am. Econ. Rev. 134, 134–38 (1973) (mathematically analyzing principal-agent problem).

84. See 1 Nimmer on Copyright, supra note 4, § 2.03[B] (discussing copyright's requirement that work be fixed in tangible form in order to obtain statutory protection).

85. For an early account of the rules versus standards debate, see Ronald M. Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 22–23 (1967) (distinguishing "rules" from "principles, policies, and other sorts of standards"). The leading economic analysis of the distinction is by Louis Kaplow. Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559 (1992) (analyzing "extent to which legal commands should be promulgated as rules or standards" based on economic analysis).

86. See Kaplow, supra note 85, at 569 (discussing individual's options when faced with poorly defined standards).

87. See David Fagundes, Crystals in the Public Domain, 50 B.C. L. Rev. 139, 151 (2009) (noting inability of creators to ascertain "with clarity the scope of entitlements in information").

work to establish a prima facie case of infringement.[88] As is obvious from its title, substantial similarity is hardly a straightforward question, and is, by most accounts, copyright law's most complex mechanism.[89] Determining whether substantial similarity is met in an individual case is a probabilistic assessment that entails examining a host of precedents and expert reports and predicting a jury's intuitive response to the comparison. On the defendant's side, fair use is at once copyright law's primary defense, but also its most uncertain doctrine.[90] Note that all of the principal-agent problems previously discussed apply with equal force to defendants in copyright cases as well. Determining whether a use is noninfringing under the fair use doctrine in similar fashion requires resort to expert legal advice in order to predict what a court is likely to do. Once again, this structure exacerbates the information asymmetry between principal and agent. Indeed, for copyright defendants, empirical data suggests that avoiding any reliance on expert advice—and thereby minimizing both litigation and agency costs—seems to be a preferred option, even when it is overall welfare-minimizing and inefficient (i.e., when the defendant does indeed have a valid claim of fair use).[91]

To see how these costs impact copyright plaintiffs and defendants, consider the following hypothetical. Assume that Anne, the creator from the previous hypothetical, identifies the infringement that is causing her to lose profits, chooses to litigate the claim, and to this end retains the law firm ABC LLP for the same. Seeing her unwillingness to pay the firm's exorbitant hourly charges, the firm offers to litigate the matter on a contingency fee basis. It agrees to take one-third of any settlement or judgment, instead of its hourly rate of $200 per hour. Early on in the litigation, the defendant agrees to settle the matter instead of proceeding to trial, and offers to settle the claim for $3,900. At this point, ABC has invested no more than two billable hours of time into the matter.

For now, this Essay will leave aside any question of Anne's ex ante incentives to create and how the litigation costs might impact them.[92] In this scenario, ABC makes $1,300 from the settlement, and having spent two billable hours (worth $400 in all), its net gain is $900. Anne takes $2,600 from the settlement. On the face of things, this outcome seems fine for all parties involved: Anne stands in a positive position, the firm

88. Id. at 157–60.

89. For a fuller discussion of substantial similarity in copyright law, see Balganesh, Normativity of Copying, supra note 58, at 206 (detailing complexity of substantial similarity and finding rationale for such complexity).

90. See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (describing fair use doctrine as copyright's "most troublesome" doctrine).

91. See, e.g., Fagundes, supra note 87, at 153 (noting "trend toward clearing all possible rights due to extreme risk-aversion"); Gibson, Risk Aversion, supra note 9, at 887 (discussing how certain factors "cause copyright users to seek licenses even when they have a good fair use claim").

92. For a discussion of this, see supra Part II.B.1.

makes a net gain, and neither plaintiff nor defendant wastes large expenses in protracted copyright litigation. Assume, however, that an extra hour's worth of research (say, into the jurisprudence of substantial similarity in order to allege that the defendant's copying might have allowed the court to decide the matter on summary judgment) would have forced the defendant to raise its settlement offer by another $600, to $4,500. Assuming that ABC knows this to be likely, in deciding whether to spend the extra time doing this research, ABC has *no incentive* to do so. For even though it will raise the award by $400 for Anne (making her payout $3,000), the extra effort produces no net gain for the law firm. The extra hour is worth $200 to it, which is also exactly what it will likely make from the increased settlement. The agent's (i.e., ABC's) failure to make this extra effort now causes the principal (Anne) a loss of $400, which is a welfare loss. Anne has no way of knowing this, since her ability to monitor ABC's actions is very limited. This welfare loss is entirely a result of the principal-agent problem.

Even if Anne had opted for hourly billing, the problem would nonetheless have manifested itself, albeit in a different form. In the initial settlement offer, Anne would have made $3,500, and the firm $400. Here, however, ABC has every reason to continue negotiating with the defendant for every minor increment in the settlement. Thus if it takes ABC an additional ten hours to raise the settlement by an added $750, it might choose to do so to make an additional $2,000, and raise Anne's settlement to $4,650. Again Anne has no way of knowing this or monitoring ABC's incremental actions. All the same, Anne is paying $2,000 for the added $750, producing a welfare loss of $1,250, caused once again by the principal-agent problem.

The welfare loss that these situations produce together with the costs it would take for a principal to effectively monitor the agent's actions to ensure compliance constitute the "agency costs" produced.[93] The principal-agent problem and the accompanying agency costs and welfare losses that it produces are the result of a misalignment of parties' interests, which produces contradictory incentives. An obvious solution is thus one that aligns parties' interests, or at least minimizes the possibility that they point in opposite directions.[94] In the copyright context, the extensive information asymmetry between lawyers and clients exacerbates the problem of misaligned incentives. This is where the involvement of third parties will help.

Litigation funding arrangements allow for control—complete or substantial—over the copyright litigation process to be vested in the

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93. See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976) (defining agency costs as sum of monitoring costs, bonding costs, and residual loss).

94. See generally Sitkoff, supra note 82, at 637–38 (summarizing some of these solutions in other areas of law).

entity or individual actually bearing its full costs. Litigation funders are usually entities with significant legal expertise of their own, which allows them to avoid relying entirely on outside representation to value, litigate, and settle the copyright claims that they acquire.[95] The process of claim acquisition enables funders to obtain the claim from plaintiffs and litigate it on their own. This, in turn, consolidates ownership and control over the process in a single entity. Even when the funding is short of an outright acquisition—for instance, partial funding or an investment—it still ordinarily delegates a good deal of control over the process to the third party funder, specifically to ensure that the funding is used effectively and to reduce the moral hazard previously identified.[96] In short, the principal-agent problem is pervasive in copyright litigation and produces a host of social welfare losses, which could be significantly minimized by a market for infringement claims.

3. *Lowering the Costs of Defendant Risk Aversion.* — Defendant risk aversion remains a major problem in copyright law. In addition to generating a host of socially inefficient practices, it also routinely distorts interpretations of the fair use doctrine.[97] Solutions to the problem have almost always focused on changes to copyright doctrine or institutions in order to introduce more bright line rules into the system, in the belief that this would introduce greater certainty for litigants threatened with lawsuits.[98] The fair use doctrine, the device around which much of this risk aversion manifests itself, is thus thought to be in need of serious reform. And yet, there is little reason to believe that courts or Congress will do anything at all to amend the current version of the doctrine.[99] Here again, litigation funding can ameliorate the situation—at least partially.

Litigation funding is ordinarily thought to operate exclusively on the plaintiff's side. This need not be the case. In several common law juris-

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95. See Lyon, supra note 1, at 593, 602, 608 (detailing expertise of litigation funders).

96. See, e.g., Steinitz, Litigation Finance Contract, supra note 33, at 503–15 (analyzing control mechanism in place for complex litigation financing arrangement involving investment rather than outright acquisition).

97. See Gibson, Risk Aversion, supra note 9, at 898–99. Gibson describes the process of "doctrinal feedback," wherein risk-averse defendants obtain licenses from copyright owners even when their use would qualify as a fair use, in order to avoid the possibility of losing after an expensive trial. Gibson explains that courts sometimes construe this practice as representing a vibrant and legitimate licensing market for the work and, as a result, shrink the fair use doctrine to no longer cover such uses.

98. See, e.g., Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev. 1087, 1143 (2007) (suggesting creation of "Fair Use Board" to, among other things, promote greater clarity in copyright law); Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors, 93 Va. L. Rev. 1483, 1488 (2007) (advocating use of bright line safe harbors in fair use law to add certainty).

99. See Litman, supra note 7, at 41 (articulating series of reforms but noting they are very unlikely to be enacted into law).

dictions, a market has begun to emerge for what is known as "after the event" insurance.[100] In these situations, a third party insurer enters the picture and offers to insure a party—the defendant—*after* litigation has commenced.[101] The premium for these policies is usually based on the unique nature of the claim and the possibility of a successful defense. The insurer of these policies, importantly, does not offer to insure against the actual outcome or verdict, but rather against the expenses that the defendant needs to incur to defend the claim in court.[102] This includes attorney's fees, litigation costs, discovery costs, and the like. Indeed, in jurisdictions where the market for such policies is fairly robust on both the plaintiff and defendant sides, courts today allow claims for fee-shifting (i.e., to recover any attorney's fees) to include the premiums that a party has paid for any "after the event" insurance.[103]

This model could expand to include instances where the defendant insures not just the expenses of litigation, but also the underlying settlement/award as well. In this scenario, the defendant would purchase insurance from a third party that covers the expenses of litigation and a likely settlement/award figure, which is based not on what the plaintiff seeks in its claim or settlement offer, but rather on what the third party insurer objectively values the suit at. This valuation judgment would be based on the insurer's own independent assessment of its ability to defend the claim or force the plaintiff to a lower settlement. In recent work, Jonathan Molot has made the tentative case for such a modification of the insurance model into what he calls the "market in litigation risk."[104] He notes, however, that for this model to work, among other things, insurers would need to develop a way of valuing the litigation risk being acquired, which is highly problematic given how individualized it is likely to be.[105] The heterogeneity of the risk is thought to impede insur-

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100. For a recent overview of this phenomenon, see Collin M. Davison, Note, Fee Shifting and After-the-Event Insurance: A Twist to a Thirteenth Century Approach to Shifting Attorneys' Fees to Solve a Twenty-First Century Problem, 59 Drake L. Rev. 1199, 1202–04 (2011).

101. See id. at 1203 ("After-the-event insurance must be thought of not as insuring against the triggering, litigable event that has already occurred, but against the risk of litigation or an adverse judgment after the suit is filed.").

102. See, e.g., ATE Insurance Explained, TheJudge, http://www.thejudge.co.uk/ate-insurance/ate-insurance-explained (on file with the *Columbia Law Review*) (last visited Oct. 25, 2013) ("After the Event Insurance . . . provides an indemnity for legal costs in the event that a client loses a piece of litigation or arbitration.").

103. See, e.g., U.K. CPR 44.3A–B (2010) (providing rules for assessing costs, including rules governing provision of costs for third party insurance).

104. Molot, Market in Litigation Risk, supra note 34, at 375–78 (proposing "to develop a risk-transfer and risk-pooling mechanism that could reduce the secondary and tertiary costs of litigation").

105. Id. at 383. Molot observes the following:

> For an insurance actuary, the unique characteristics of individual lawsuits make litigation risk seem almost uninsurable. Insurance actuaries are trained to price risks for large groups of similarly situated policyholders. Indeed, actuaries

ers' ability to pool it together.[106] Molot, however, assumes the third party insurer's portfolio of litigation risks to be sufficiently diversified—either in actuality or as a goal. In other words, the problems of individualized risk are enhanced by the diverse areas at which the insurer is looking. With a diversified portfolio, the insurer would have to make an individualized assessment of each litigation being insured and would remain unable to pool them together to trade off the risks. If the insurer were to instead focus on one specialized area, and rely on the valuations and assessments of its lawyers (rather than actuaries) as Molot suggests,[107] a large part of this problem is likely to disappear. The insurer would now be able to aggregate the claims into a common pool and calculate the risks and benefits in the aggregate rather than individually. In this way, a fair use insurance market might begin to emerge in copyright litigation.

Aiding in the development of this market is the legal jurisprudence of the fair use doctrine. While its results may seem uncertain to the layperson, this doctrine is far from completely unpredictable. With the vast amount of fair use jurisprudence that has developed over the years, coupled with the fact that it is normally a question for the court and not the jury, lawyers are today in a position to make a decent probabilistic assessment of whether a fair use defense remains viable in any particular case. In an extensive new empirical study, Matthew Sag reviews all fair use decisions handed down by federal courts to see if the doctrine is predictably applied and whether some coherence can be seen in cases decided using the doctrine.[108] Sag concludes that contrary to common perception, fair use decisions are indeed predictable along multiple dimensions.[109] He goes on to note that in practice, the doctrine is hardly as incoherent as some believe it to be.[110] Over time and context, there exists today a vast amount of fair use jurisprudence that actuaries—working with lawyers, as Molot suggests—should be able to synthesize into probabilistic assessments of the defense succeeding in any particular case. With time, this pool is only likely to expand, allowing the market for fair use insurance to expand and become relatively stable.

Third party litigation funders might thus, with the right set of procedural changes, begin to offer a tailored insurance product to

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> calculate insurance premiums by fitting each policyholder into a large, homogenous group and examining the historical performance of the group as a whole. The fewer distinguishing features, the better, as this enables actuaries to use broad statistical evidence to price policyholder risks. The fact that a lawsuit is unique places it largely beyond actuarial science.

Id.

106. Id. at 381–85.

107. Id. at 384.

108. Matthew Sag, Predicting Fair Use, 73 Ohio St. L.J. 47 (2012).

109. Id. at 84–85.

110. Id. at 85 (noting study "offers considerable evidence against the oft-repeated assertion that fair use adjudication is blighted by unpredictability and doctrinal incoherence").

defendants in copyright infringement claims—known as "fair use insurance." The insurer would thus assess the likelihood of a defendant successfully raising the fair use defense in a copyright claim and offer to acquire the litigation risk from the defendant in return for a premium. If the premium is tied directly to the likely payout that the insurer will have to make, it may be lower than a settlement offer made by the plaintiff, especially when the fair use defense is strong. Copyright law already contains a provision allowing for attorney fee-shifting, which applies to defendants as well as plaintiffs.[111] If courts begin interpreting it purposively and follow the approach of U.K. courts in allowing litigation insurance premiums to be recovered as well,[112] it is likely defendants will transfer their litigation risk to an insurer. The insurer would then take over the defense from the litigant (as a subrogation) instead of defendants caving in and settling for the amount demanded by the plaintiff. The insurer might hope that its entry and expertise will force the plaintiff to offer a low settlement, or withdraw the claim altogether where it is without merit. Consider the following hypothetical.

ABC Studios commences an action against Joe for using a ten-second clip of its new blockbuster movie in a documentary film that Joe makes for his college project. ABC sends him a cease and desist letter (which he ignores), then threatens him with damages of $150,000 for willful infringement. ABC also offers to settle the matter if he admits liability and pays $12,000 for a license. Joe knows that his use is very likely (if not certainly) a fair use of the work, but recognizes that even if he were to litigate the claim, it would cost him $20,000 in attorney's fees to do so. Even though current law allows courts to award successful defendants their "reasonable" attorney's fees,[113] to Joe the risk of this award not covering his fees and the need for immediate liquidity to cover the out-of-pocket expenses that this entails makes him more willing to accede to ABC's demands and settle. This in many ways represents precisely what happens today. If litigation funding were to develop in copyright law, a litigation funder, called, say, LF Inc., would provide copyright defendants with an insurance product once the plaintiff files a claim. LF Inc. would be an entity with significant expertise in copyright matters with the capital to take on the risks to which Joe is averse. To make it viable for Joe, LF would have to offer Joe a premium lower than the projected settlement offer from ABC. Suppose LF offers Joe insurance for $6,000. LF knows—from its assessment of past fair use cases—that (a) ABC's claim is without merit, (b) litigation is likely to result in an award of

111. See 17 U.S.C. § 505 (2012) (allowing courts to award reasonable attorney's fees to prevailing party); Fogerty v. Fantasy, Inc., 510 U.S. 517, 525–27 (1994) (concluding § 505 applies to defendants and observing "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement").

112. U.K. CPR 44.3A–B (2010).

113. 17 U.S.C. § 505.

attorney's fees, and (c) LF has the ability and expertise to deal with the matter at a cost much lower than Joe's. In acquiring the defense claim from Joe, LF also hopes that ABC will come to recognize that the bargaining asymmetry that previously existed has now been eliminated, making it more willing to withdraw its claim altogether, or at worst to settle for a significantly lower amount (say, $1,000)—rendering its own investment profitable.

As an insurer with the ability to spread its risk across a wide range of parties, LF is likely to be far less risk-averse than Joe, an individual litigant. LF also has the resources and expertise at its disposal to lower its risk. This, in turn, allows it to fund defendants with otherwise high-risk claims. While such funding certainly does not eliminate defendant risk aversion in its entirety, and in some ways is parasitic on it, it has the direct effect of reducing the socially wasteful costs associated with such risk aversion—both to the defendant and the copyright system as a whole. In the aggregate, the funder's risk taking neutralizes some of the effects of the defendant's risk aversion.

A more direct solution to the problem might seem to lie in reducing defendants' overall litigation costs, thereby curtailing their risk aversion and its negative effects at the source. As a practical matter though, this is highly unlikely. First, extremely high litigation costs are hardly unique to copyright litigation. Most forms of commercial litigation face the same problem, and given that copyright disputes are litigated in general (rather than specialized) federal courts, copyright litigants must endure the realities of the overall system. What makes litigation problematic for copyright, however, is how heavily dependent the entitlement and its functioning are on such litigation. Thus, any lowering of costs will need to happen on a system-wide basis. Second, plaintiff-side lawyers—and the legal profession more generally—have little to gain from such a reduction, since most of these litigation costs consist of attorney's fees. Both of these factors render it highly unlikely that lowering litigation costs remains a viable solution. The entry of defendant funders, however, ensures that the *full impact* of these costs is not felt solely by defendants, which in turn distorts copyright doctrine.

To be sure, the entry of defense funders will not eliminate the socially wasteful effects of defendant risk aversion altogether. In the hypothetical above, Joe still is forced to buy insurance (and transfer the defense to LF) when he should not have to do so at all as a matter of law, owing to the fair use doctrine. All that LF's entry achieves is a *reduction*, albeit a significant one, in the wasted expense. At the same time though, as more and more defense funders begin to enter copyright litigation and the market becomes more robust, it is likely that a huge reduction in the number of frivolous lawsuits—lawsuits where a defendant has a complete defense and the plaintiff is merely seeking to take advantage of a defendant's risk aversion—will occur. Just as funding on the claim (i.e., plaintiff's) side forms a bridge between the creator and the regime of statutory damages, funding on the defense side is likely to form an analogous bridge between a defendant with a strong defense and copyright's fee-shifting provision, if sufficiently strengthened.[114]

4. *Valuing and Sorting Claims.* — In addition to performing an allocative function, markets in numerous contexts also serve the important purpose of enabling a price-based "commensuration."[115] Commensuration refers to the process of transforming "different qualities into a common metric."[116] A market for copyright claims would thus, in addition to allowing the claim to vest in an entity best positioned to enforce it, also result in a process wherein those very entities come to value the claim based on its probability of succeeding. With their purchase of or investment in the claim becoming public, this would signal to the parties involved, and indeed to the court, the strength of the claim in question.

This is especially likely to be true in situations where the third party's involvement is an acquisition of the claim outright, i.e., a claim transfer.[117] At the time the action commences, or during discovery thereafter, a third party's acquisition of the claim and the price of such acquisition are likely to become public. This will send an important signal—both to the other side, and potentially to courts as well. To the other side, it will

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114. It is worth noting that the model being suggested here—in terms of fair use insurance—is quite different from forms of "media liability insurance" and "errors and omissions insurance" that are routinely available to creators and movie producers. See, e.g., James T. Borelli, Caveat Emptor: A Buyer's Guide to Media Liability Insurance, Comm. Law., Winter 2006, at 23, 23–24, 28 (providing concise overview of media liability insurance); see also Melvin Simensky & Eric C. Osterberg, The Insurance and Management of Intellectual Property Risks, 17 Cardozo Arts & Ent. L.J. 321, 325–29 (1999) (discussing such insurance). Whereas the idea of fair use insurance proposed here involves the purchase of insurance after the potential liability-triggering event, i.e., the litigation, has arisen, those other forms of insurance are usually put in place before the triggering event. Additionally, studies seem to suggest that the extensive use of "before the event" insurance has exacerbated defendant risk aversion in the copyright licensing market. See Gibson, Risk Aversion, supra note 9, at 893–94 (describing how such liability insurance facilitates defendant risk aversion). But see Thomas Plotkin & Tarae Howell, "Fair is Foul and Foul is Fair:" Have Insurers Loosened the Chokepoint of Copyright and Permitted Fair Use's Breathing Space in Documentary Films?, 15 Conn. Ins. L.J. 407, 470–85 (2009) (arguing insurers have embraced fair use, despite its uncertainty, since 2007). The use of "after the event" fair use insurance is, on the other hand, directed at *reducing* such risk aversion.

115. See Daniel Markovits, Market Solidarity 1: Price as Commensuration, Contract as Integration 22 (Oct. 18, 2011) (unpublished manuscript) (on file with the *Columbia Law Review*) ("One of the signal achievements of markets is that . . . [they] serve, quite literally, as the means of market-commensuration.").

116. Wendy Nelson Espeland & Mitchell L. Stevens, Commensuration as a Social Process, 24 Ann. Rev. Soc. 313, 314 (1998).

117. Every plaintiff in a copyright infringement suit bears the burden of establishing ownership of a valid copyright. See 4 Nimmer on Copyright, supra note 4, § 13.01[A] (discussing plaintiff and defendant burdens in copyright disputes). In situations where a third party acquires the claim from a creator-plaintiff, it too will have to present evidence of this ownership; the details of its acquisition will have to be entered into the court record.

signal the possibility that the claim has *some* merit, evidenced by the third party's willingness to assume some of the risk that it entails. Meritless or frivolous claims are unlikely to attract such investment or acquisition. To a court, similarly, the third party's involvement might signal the absence of a frivolous or meritless claim. Yet, as a functional matter, the *absence* of such an acquisition in a robust market is likely to be more important to the system than what an actual acquisition or investment signals.[118]

In due course, when infringement claims of a certain kind are routinely financed by third parties, a litigant's inability to secure such third party involvement might signal that the claim has a low probability of success, or indeed that it is meritless. This is in turn likely to make a defendant more willing to contest the claim, rather than settle early. In addition, this considered noninvolvement by third parties is also likely to deter plaintiffs themselves from bringing such claims. In other words, a third party's refusal to fund or acquire an infringement claim for reasons having to do with the strength of the claim might in reality work to deter the very entry of such claims into the litigation system.[119]

The idea of third party involvement in the funding and acquisition of legal claims has faced a good deal of objection from those who believe that it is likely to raise the overall volume of litigation in courts and encourage parties to bring lawsuits they otherwise might not have brought.[120] Some have even suggested that it is likely to result in more frivolous lawsuits being brought.[121] Yet it is more likely that just the opposite will occur. When a potential plaintiff receives information from a third party to the effect that the claim is very weak and unworthy of outside investment, the plaintiff is likely to abandon it altogether. Litigation, scholars often forget, involves large emotional, dignitary, and reputational costs, besides the obvious first-order costs of its own.[122] Max Schanzenbach and David Dana point this out in advocating for the greater involvement of third parties in tort litigation. They note that "the flip side to . . . communicating the high value of strong, low-risk claims, is

118. For an insightful recent account of the problems involved in pricing legal claims during a third party's involvement and a solution to them, see Maya Steinitz, How Much Is That Lawsuit in the Window? Pricing Legal Claims, 67 Vand. L. Rev. (forthcoming 2013), available at http://ssrn.com/abstract=2310244 (on file with the *Columbia Law Review*) (suggesting process of "staged funding" as solution to uncertainty problems involved in pricing legal claims).

119. See David Dana & Max Schanzenbach, How Would Third Party Financing Change the Face of American Tort Litigation? The Role of Agency Costs in the Attorney-Client Relationship 2 (Sept. 14, 2009) (unpublished manuscript) (on file with the *Columbia Law Review*) ("In addition, third party financing may convey information to the client about the expected recovery. In this case, low-value litigation, beneficial to the attorney but not the client, may be deterred.").

120. See U.S. Chamber Inst. for Legal Reform, supra note 19, at 5–6 (arguing against third party litigation financing).

121. Id.

122. Dana & Schanzenbach, supra note 119, at 9.

that it will also communicate the low value of nuisance claims [and] [a]ssuming a distaste for litigation among most people, a strong *ex ante* signal of claim value may act as a deterrent to low-value claims."[123] When the probability of success is objectively calibrated—using third parties—even an otherwise risk-prone or overoptimistic plaintiff is likely to exhibit a reduced willingness to bring and continue the claim in court.

In short, then, the entry of third parties into copyright litigation is likely to introduce a valuable sorting mechanism into the system. Key beneficiaries of this sorting are likely to be potential defendants, courts, and, on occasion, plaintiffs themselves.[124]

III. Structuring a Market for Copyright Claims

This Essay has discussed how the involvement of third parties in copyright litigation—through a market for actionable copyright claims—might serve to benefit both plaintiffs and defendants, and in the process reduce the various social costs traditionally associated with protracted litigation. This Part describes how such a market might take shape and some of the necessary doctrinal changes that will need to be put in place to encourage and regulate the development of this market.

Part III.A describes five possible market arrangements wherein third parties play a role in copyright litigation. Part III.B then looks at some of the current doctrinal hurdles that serve as impediments to such arrangements.

A. *Possible Forms of Third Party Involvement in Copyright Litigation*

As noted earlier, the "market for copyright claims" need not always involve an outright purchase of the actionable claim by a third party.[125] All that it entails, as used here, is the process by which a third party acquires some degree of control over the copyright litigation by funding a primary litigating party and through which the third party hopes to obtain a net benefit when the litigation ends. Arrangements short of outright sales are thus equally effective market mechanisms.

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123. Id. at 10.

124. For this benefit to be realized, however, it is crucial that rules emerge mandating plaintiffs disclose any financial involvement of a third party (or indeed its own status as a third party) during the litigation. Without such a rule, third parties are unlikely to find the incentive to disclose their involvement and will likely go to extreme lengths to conceal it, effectively ensuring that any valuation and sorting benefits are not realized. See, e.g., Roger Parloff, Have You Got a Piece of This Lawsuit?, CNNMoney (June 28, 2011, 2:06 PM), http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-law suit-2/ (on file with the *Columbia Law Review*) (discussing one third party funder's tactics in trying to keep its involvement confidential).

125. See text accompanying notes 28–35 (outlining three forms of third party involvement in litigation).

1. *Assignments of the Right to Sue for Infringement.* — The most obvious market mechanism involving actionable copyright claims is allowing the third party to acquire the claim as an asset from the plaintiff in return for valuable consideration.[126] It is important to understand that in this arrangement, the third party obtains no interest whatsoever in the actual copyrighted work itself, meaning it obtains no interest in the exclusive rights obtained by the original copyright holder under the copyright system. The third party merely obtains the right to commence an action for copyright infringement either generally or against defendants specified in the arrangement. The assignment can be prospective, i.e., for yet-to-occur infringements, or retroactive, i.e., for already-accrued instances of infringement.[127]

In ordinary assignments of actionable claims, the original litigant drops out of the picture altogether and the assignee thereafter commences (or continues) the litigation in its own name against the defendant.[128] For this process to work, it is essential that the law allow a third party assignee to bring the action in its own name without imposing onerous standing requirements on the third party, which render the acquisition meaningless. Courts today are divided on whether copyright law allows third parties to bring infringement actions when they acquire the bare right to sue—a factor that is likely to inhibit the early development of this arrangement.[129]

Assignments provide obvious advantages over most other forms of arrangements for third parties. They give the third party complete control and autonomy over the litigation and settlement processes, since the original plaintiff drops out of the picture. They also allow the third party to itself alienate (or reassign) the claim to another third party should it need to, without any restrictions at all. Assignments are also the most beneficial arrangement from an information sharing perspective. With the court and the public easily obtaining information about the

126. See generally Walter Wheeler Cook, The Alienability of Choses in Action, 29 Harv. L. Rev. 816 (1916) (surveying common law's historical treatment of assigning choses in action); Percy H. Winfield, Assignment of Choses in Action in Relation to Maintenance and Champerty, 35 L.Q.R. 143 (1919) (same).

127. For a useful overview of copyright law's treatment of retroactive transfers, see James K. Rothstein, Comment, Unilateral Settlements and Retroactive Transfers: A Problem of Copyright Co-Ownership, 157 U. Pa. L. Rev. 881, 890–902 (2009).

128. The law treats the assignee as the "real party in interest." See Charles E. Clark & Robert M. Hutchins, The Real Party in Interest, 34 Yale L.J. 259, 261–62 (1925) ("[T]he real party in interest is he who by substantive law has the right of action.").

129. Compare Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 890 (9th Cir. 2005) (en banc) (finding such assignments to be impermissible), with Prather v. Neva Paperbacks, Inc., 410 F.2d 698, 700 (5th Cir. 1969) (permitting such assignment). For a fuller discussion of the obstacles current copyright law presents to the creation of a market for copyright claims, see infra Part III.B.2.

third party's direct involvement in the claim, the sorting and classification advantages discussed earlier are much more likely to be realized.[130]

2. *Nonrecourse Financing of Infringement Lawsuits.* — Instead of acquiring the lawsuit as an actionable claim from the original plaintiff, third parties might instead choose to invest in the copyright infringement lawsuit through a financing arrangement. In other forms of litigation, such financing is normally done through a nonrecourse loan, under which the plaintiff accepts no personal liability for repayment, and satisfaction of the debt (i.e., the loan) occurs exclusively through the proceeds from the litigation—either the judgment award or the settlement.[131] Unlike in an assignment, the original plaintiff continues to remain a part of the litigation since the lawsuit continues in its name.[132] The third party funder would nonetheless exert a good degree of control over the litigation process and strategy through a contractual arrangement with the plaintiff.

Arrangements of this kind leave the third party funder with less control and autonomy over the lawsuit than in an assignment,[133] and are likely to be seen in situations where the plaintiff (and its team) has significant expertise in copyright litigation, which the third party funder trusts and upon which it is willing to rely. In addition to needing an independent contract on the question of control, these arrangements also serve the information disclosure function to a far lesser degree, since the role of the third party is never made public—and is only ever learned of during discovery.[134] As a result, the possibility of any ex ante sorting and signaling is diminished quite significantly (or eliminated). Lastly, these arrangements also leave the third party with fewer exit options. Whereas in an assignment the third party can readily alienate the claim to another party or choose to terminate the litigation, in financing arrangements the third party has little ability to stop the lawsuit and would need to find another investor to acquire the loan made to the plaintiff.

Nonrecourse financing of this kind is likely to be seen in copyright infringement lawsuits between two large commercial competitors, not in

130. See supra Part II.B.4 (suggesting entry of third parties into copyright litigation likely provides valuable sorting mechanism for copyright claims).

131. Nonrecourse funding more generally is defined as involving "[a] secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid." Black's Law Dictionary 1020 (9th ed. 2009).

132. See Marco de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo J. Int'l & Comp. L. 343, 356 (2011) ("[T]he central issue around . . . the distinction between the practice of selling claims and [third party litigation funding] . . . is control over the litigation.").

133. See id. (describing third party litigation funding as when "claimant receives from the funder coverage of all litigation costs, in exchange for a share of the award, but maintains full control over the litigation").

134. In the copyright context, the Righthaven episode remains a prime example. See Balganesh, Uneasy Case, supra note 6, at 738–46 (examining strategy and business model of Righthaven, "perhaps the first entity to capitalize on copyright law's lax rules on standing, assignment, and damages").

individual lawsuits where an assignment is likely to be preferred by both the original plaintiff and the third party.[135]

3. *Tailored Exclusive Licenses.* — A third way that third parties might choose to be involved in the infringement action is unique to copyright law. It seeks to work around the ambiguity surrounding the permissibility of open assignments to sue by using the law's standing requirements. The copyright statute treats an "exclusive license" as a transfer of copyright ownership for the purposes of the statute,[136] and additionally allows copyright's bundle of exclusive rights to be disaggregated and broken down into idiosyncratic and narrow subrights in whatever way parties choose.[137] Thus, not only can the exclusive right to distribute the work be licensed independently of other rights, but that right itself can be broken down further (e.g., the exclusive right to distribute the work in Santa Clara County, San Jose City, or California) and licensed or assigned independently.[138] This disaggregation is significant because the law then confers on the legal or beneficial owner of an "exclusive right" the power to commence an action for infringement of that right.[139] Therefore, in order to effect a de facto assignment of the right to sue for copyright infringement to a third party, the original copyright holder has to grant the third party an exclusive license that is artificially tailored to the market or context in which the infringement is occurring. This confers standing on the third party to bring the action in its own name, and the artificial tailoring of the license ensures that the original copyright owner (i.e., the licensor) has no reason to worry about the third party exploiting the work or doing anything other than bringing the infringement action. This is best illustrated through an example.

Assume that Jonathan is a first-time novelist based in New York City who self-publishes his book *The Seasons* in hardback on October 1, 2010, and begins marketing it shortly thereafter. He retains all the rights to his work. On January 1, 2011, Jonathan learns that a publisher located in Cambridge, Massachusetts, has begun making paperback copies of *The Seasons* and distributing them without his permission. Jonathan wants to bring an action against the publisher; TF Inc., a litigation funder, approaches him on June 1, 2011. Instead of granting TF an assignment of the bare right to sue—which would be of questionable validity—Jonathan grants TF an exclusive license to reproduce *The Seasons* in paperback book form in Cambridge, Massachusetts, from January 1 to June 1, 2011. This arrangement confers on TF the power to commence the lawsuit for copyright infringement on its own, since it is the legal

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135. For an example of a prominent copyright case involving two large companies, see Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995).

136. 17 U.S.C. § 101 (2012) (defining "transfer of copyright ownership").

137. Id. § 201(d)(2).

138. Id. § 201(d)(1).

139. Id. § 501(b).

owner of the right in question, even though the right has been chopped up along the dimensions of time (six months), geography (Cambridge), and form (paperback). Even though TF obtains an exclusive license, the retroactive and limited nature of the grant renders it highly unlikely, if not impossible, that TF will actually exploit the work by reproducing it. The exclusive license thus operates exactly like an assignment.

The obvious downside to using tailored exclusive licenses instead of actual assignments of the actionable claim is that it requires identifying specific defendants by region or market, before the license is executed—i.e., tailoring. An assignment of the bare right to sue, on the other hand, does not require such identification and can transfer the power to bring infringement suits against whole classes of defendants, which an exclusive license cannot. The exclusive license route is thus likely to be used only until courts (and perhaps Congress) come to accept the legality of assignments of the right to sue for copyright infringement.[140]

4. *Assignments of the Copyright in Its Entirety.* — The most obvious way for a third party to be involved in a copyright infringement action is by acquiring the copyright in the infringed work in its entirety. Once the assignment has been properly executed,[141] the third party becomes the new owner of the copyrighted work, with the power to commence an infringement action.[142] Much like the assignment of the actionable claim, the original owner exits the picture altogether, giving the third party complete control over the process. However, unlike in the assignment of just the claim, the original owner retains no rights whatsoever to continue exploiting or using the work, since the third party becomes the owner for *all* purposes. Consequently, assignments of a work in its entirety merely in order to allow a third party to bring suit are likely to be somewhat rare, since they confer more authority than is necessary for the commencement of the lawsuit. Thus, they only occur in situations where either the original copyright holder obtains a large enough payout from the third party, rendering it willing to avoid dealing in the work altogether, or where the third party is willing to acquire the copyright for the potential to commence lawsuits against future defendants as well.

Third parties that acquire the copyright with the sole objective of litigating infringement claims or licensing its use to others resemble nonpracticing entities or "patent trolls" in the area of patent law.[143] The probabilistic and prospect-like nature of the patent right encourages this

140. See infra Part III.B.2 (discussing obstacles to realizing copyright claims market).

141. See 17 U.S.C. § 204 (prescribing proper execution of copyright transfer).

142. Id. § 201(d).

143. See Colleen V. Chien, Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents, 87 N.C. L. Rev. 1571, 1577–82 (2009) (defining nonpracticing entities as "corporate patent enforcement entit[ies] that neither practice[] nor seek[] to commercialize [their] inventions").

model in relation to patents.[144] Copyright's entitlement, on the other hand, which is tied to the specific expression in question, allows for such prospecting to a much lesser extent, which is likely to result in this approach to third party involvement being somewhat rare.[145]

5. *Fair Use Insurance.* — The previous discussion describes mechanisms through which third parties may come to be involved in copyright infringement litigation on the plaintiff's side. Yet, as discussed earlier, third party litigation funding can benefit defendants as well.[146] The principal way in which this is likely to come about is through a mechanism best described as fair use insurance—where the third party underwrites the defendant's likelihood of success in its fair use defense. Importantly, the defendant obtains such insurance *after* the litigation has commenced and fair use is raised as a defense, thereby rendering fair use insurance, as described here, a form of "after the event" insurance.[147]

Situations could thus arise where a defendant being sued for copyright infringement raises a colorable defense of fair use. If a sufficiently robust fee-shifting regime were put in place, the beginnings of which are already contained in current law,[148] third parties would likely be willing to underwrite the defense by pricing the risk associated with its success (and factoring in their own expertise in litigating the claim), and then potentially would bring the defense themselves. If the premium offered by the third party for such underwriting is significantly lower than the

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144. Lemley & Shapiro, supra note 48, at 95 (arguing patent rights are not well-defined property rights but are probabilistic because they embody good deal of uncertainty as to commercial value, legal validity, and scope). The original idea for this conception of the patent goes back to Ed Kitch's seminal work. Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265, 266 (1977) (analogizing patent rights to mineral prospecting claims).

145. For the argument that copyright law does not embody an architecture similar to patent law, see Balganesh, Foreseeability and Copyright, supra note 11, at 1621–24.

146. See Molot, Market in Litigation Risk, supra note 34, at 374 ("Even if we did nothing to reduce the time and money spent on the litigation process, we could ease the burdens on corporate defendants by spreading litigation risk over a larger pool of risk bearers."); supra Part II.B.3 (discussing how litigation funding can lower costs of defendant risk aversion).

147. It is also important to note that, technically speaking, after the event insurance is fundamentally different from traditional litigation funding in that it is not an actual investment by a third party, even though it involves passing on risk to the third party for consideration. Additionally, as an insurance product, it is likely to be regulated by the ordinary rules and norms governing the insurance industry. See Michelle Boardman, Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation, 8 J.L. Econ. & Pol'y 673, 673 (2012) (discussing differences between insurance and litigation funding and their implications). Yet, because it is routinely discussed as a form of defendant-side litigation funding (or third party involvement), it is worth considering in the context of copyright claims as well. See id. at 690–91 (noting prevalence of this comparison and criticizing "not its inaccuracy but its superficiality").

148. See 17 U.S.C. § 505 (2012) (allowing "reasonable attorney's fee" to be awarded to prevailing party); Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (holding successful defendants were entitled to invoke § 505).

settlement offer from the plaintiff (which is in turn likely to be lower than the amount demanded at trial), defendants—especially those whose existence depends on their continued reliance on the fair use doctrine[149]—are likely to obtain such insurance. In due course, variations in the coverage offered by third parties are likely to occur, correlating to the amount of control third parties assume over the litigation and settlement processes. Here, a variety of arrangements might materialize, which may track some of the options just discussed on the plaintiff's side. The third party may simply fund the defendant's case, or instead might choose to take the lead in defending the claim and deciding on litigation strategy. What distinguishes these policies from traditional liability insurance is the fact that they are obtained by defendants *after* the litigation (or the threat of litigation) actually materializes, and not necessarily in advance.

B. *Obstacles*

In order to develop a copyright claims market, participants in the copyright system must view litigation as an integral part of the system and its functioning. In addition to this attitudinal shift, developing the market will require overcoming a host of legal obstacles rooted in the common law and in the statutory language and judicial interpretation of the Copyright Act. This section explores the primary legal obstacles that a market for copyright claims is likely to face and suggests possible remedial fixes. This section discusses two somewhat independent sets of obstacles: (i) those originating in the common law and (ii) those internal to copyright law.

1. *Common Law Obstacles.* — The first set of obstacles is likely to originate in a set of principles and doctrines that have been known to the common law since time immemorial, and which could be reasonably construed as extending to transactions involving copyright claims.

a. *The Nonassignability of Claims.* — The alienability of actionable claims in the common law has long been a controversial topic.[150] Early in the development of the law, courts invalidated all attempts to transfer claims, worrying that it would result in courts being overburdened with contentious lawsuits brought by disruptive third parties.[151] Over time, the

149. Examples include search engines, manufacturers of recording devices, or makers of photocopying machinery. These might be called fair use industries. See Rogers & Szamosszegi, supra note 69, at 32–38 (describing different fair use industries and nature of their reliance on fair use doctrine).

150. For early works documenting the history of this development, see Cook, supra note 126; W.S. Holdsworth, The History of the Treatment of Choses in Action by the Common Law, 33 Harv. L. Rev. 997 (1920).

151. 2 William Blackstone, Commentaries *442; see, e.g., Lampet's Case, (1612) 77 Eng. Rep. 994 (K.B.) 997; 10 Co. Rep. 46b, 48a (forbidding assignment of "thing in action" to stranger); Holdsworth, supra note 150, at 1006–09 (discussing potential for abuse in legal systems that allow assignment of right to recover property).

common law relaxed the stringency with which the prohibition was applied and enforced.[152] Purely personal claims were still placed under the restriction, whereas nonpersonal ones came to be understood as alienable.[153] Since nonpersonal claims survived the death of the original plaintiff, while personal ones were terminated (under the maxim *actio personalis moritur cum persona*), alienability came to be tied to the survivability of the claim.[154] And property claims, such as those relating to trespass and conversion, were paradigmatic of nonpersonal claims.[155] Two reasons seem to suggest that the historic common law rule of nonassignability is unlikely to be invoked in relation to copyright claims.

The first reason is conceptual. Given its exclusive rights framework, copyright law is often thought of in terms of a property interest rather than as a purely personal claim. Copyright claims are thus paradigmatic of the kinds of claims that the common law itself came to allow assignments of in due course. Thus, even under the old rule, copyright claims are unlikely to be seen as nonassignable.

The second reason originates in the Supreme Court's more recent approach to the common law rule, especially as it applies to federal statutory claims. The Supreme Court's decision in *Sprint Communications Co. v. APCC Services, Inc.* considered whether the common law's general approach to nonassignability ought to be extended to more recent statutory regimes created by Congress—and concluded against applying the rule.[156] In *Sprint*, the Court was presented with the question of whether the assignee of a bare right to commence a legal claim for money, based on a provision of the Communications Act of 1934, had standing to commence the action.[157] The original entitlement to sue was entirely statutory in origin, and a practice had emerged wherein third parties accumulated the claims of multiple parties and then, through an assignment, commenced actions for recovery (against the original defendants) in their own names.[158] Despite the statutory nature of the right to sue, a majority of the Court considered the applicability of the common law,

152. Commercial considerations are believed to have been responsible for these changes. See James Barr Ames, Lectures on Legal History and Miscellaneous Legal Essays 213 & n.3, 214 (1913) (describing how rule, which originated in doctrine of maintenance, came to be relaxed statutorily and by case law).

153. See W.W. Allen, Annotation, Assignability of Claim in Tort for Damage to Personal Property, 57 A.L.R.2d 603, § I.2 (1958) ("The theory that a cause of action is assignable if it will survive to the personal representatives of the owner has gained very wide acceptance in this country."); Anthony J. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 61, 74–75 (2011) ("The leading test of assignability is whether or not the cause of action survives the death of the plaintiff . . . .").

154. Sebok, supra note 153, at 75.

155. 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 1275 (2d ed. 1892); Sebok, supra note 153, at 76.

156. 554 U.S. 269 (2008).

157. Id. at 271–72.

158. Id.

but concluded that the common law itself had evolved and come to permit the assignability of claims as a default position—even when done so exclusively to bring suit. The majority thus found that the assignee had standing to sue.[159] *Sprint* can thus be seen as confirming two ideas at once: (i) that the common law's default position is no longer one of nonassignability and (ii) that this new default (i.e., of assignability) extends to federal statutes.

b. *Champerty and Maintenance.* — In addition to its rules on nonassignability, the common law developed specialized doctrines that policed (and continue to regulate) a third party's involvement in bringing an actionable claim to court. The doctrines of "maintenance," "champerty," and "barratry" serve this purpose.[160] These rules do not apply directly to outright transfers. Maintenance entails assisting a plaintiff in either bringing or defending a lawsuit when the person so providing the assistance "has no bona fide interest in the case."[161] It thus involves encouraging another to bring a lawsuit, often by "'stirring up strife'" and assisting the person with the actual lawsuit.[162] Champerty is a species of maintenance, where one party provides assistance to another to bring a lawsuit for consideration, usually in the form of a share of any proceeds recovered in the suit or through settlement.[163] Barratry is "adjudicative cheerleading" wherein one person encourages an action to be brought.[164] In practice, all three usually meld into each other. As a historical matter, the common law treated maintenance and champerty as both crimes and torts.[165] In due course, their criminal dimension receded in importance, as did their tortious element.[166] Today, courts enforce these doctrines by rendering contractual arrangements that partake of their characteristics as unenforceable.[167]

State common law courts routinely use these doctrines to regulate lawsuits brought by third parties.[168] They usually scrutinize the individual claim brought in court to see if it is affected by the third party's involve-

159. Id. at 285.

160. Sebok, supra note 153, at 98; Steinitz, Whose Claim?, supra note 1, at 1289.

161. Black's Law Dictionary 1039 (9th ed. 2009).

162. Sebok, supra note 153, at 114 (quoting Casserleigh v. Wood, 59 P. 1024, 1027 (Colo. App. 1900)).

163. Id. at 98.

164. Charles W. Wolfram, Modern Legal Ethics § 8.13, at 490 (1986).

165. For an exceptional historical overview of these doctrines and their origins, see Max Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48, 61–67 (1935).

166. Id. at 67 ("As crimes, they have become obsolete. . . . As a tort, maintenance is more likely to be lost in such specific torts as slander, libel, conspiracy or malicious prosecution.").

167. See Paul Bond, Comment, Making Champerty Work: An Invitation to State Action, 150 U. Pa. L. Rev. 1297, 1300–01 (2002) ("[I]n most states . . . champertous assignments are unenforceable.").

168. For an excellent discussion of the connection between assignments and maintenance, see Sebok, supra note 153, at 94–97.

ment. They either focus on the type of action being brought or on the relationship between the original claimant and the investor.[169] Some states, for instance, forbid the investor from "intermeddling" in the litigation,[170] others forbid third parties from getting involved in cases involving specific subject matter,[171] and yet others regulate maintenance contextually by examining the plaintiff's real motivations for commencing the action.[172]

On the face of things, it may appear as though these doctrines are unlikely to apply to copyright claims, given that they originate in state common law while copyright disputes are always questions of federal statutory law. Yet, the fact of the matter is that even while copyright infringement lawsuits are a question of federal law, agreements that govern the conditions under which the lawsuit may be brought are matters of contract law that must necessarily be governed by state law. Federal courts have in the past used state common law during infringement disputes and applied the doctrines of champerty and maintenance to contractual arrangements. For example, in *Refac International, Ltd. v. Lotus Development Corp.*, a third party had acquired a five percent stake in a patent "[t]o facilitate suit in [the third party's] name as plaintiff and to avoid the need for having [the original owner] named or brought into the suit as a co-plaintiff."[173] The court found this arrangement to be champertous under New York state law, and invalidated the arrangement during an infringement lawsuit.[174]

The doctrines of champerty and maintenance remain an obstacle for third party involvement not just in copyright claims, but also in other

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169. See id. at 108–09 (noting "limitations based on *how* the maintenance is performed" are more common than those based on "what kind of litigation is supported").

170. Id. at 109–12 ("[W]here a contract allows the third party to take too much control over the conduct of what otherwise would be a meritorious suit by another, the maintenance will be prohibited."). Florida law is a good example here. See, e.g., Kraft v. Mason, 668 So. 2d 679, 682–83 (Fla. Dist. Ct. App. 1996) (finding arrangement between brother and sister where latter had lent former money to pursue antitrust litigation in consideration of share of any recovery not to be instance of "officious intermeddling"); Anderson v. Trade Winds Enters. Corp., 241 So. 2d 174, 176–77 (Fla. Dist. Ct. App. 1970) (refusing to invalidate promissory note since there was no "officious intermeddling" in lawsuit).

171. See Sebok, supra note 153, at 108 (noting Tennessee law forbids third party involvement in lawsuits involving land and Texas law forbids similar involvement in claims of legal malpractice).

172. See, e.g., id. at 113–17 (observing Colorado law asks whether lawsuit would have been brought but for third party's involvement in deciding whether arrangement is champertous in nature).

173. 131 F.R.D. 56, 58 (S.D.N.Y. 1990) (first alteration in original) (internal quotation marks omitted).

174. Id.; see also Am. Optical Co. v. Curtiss, 56 F.R.D. 26, 27 (S.D.N.Y. 1971) (granting summary judgment to defendant in patent infringement suit because plaintiff was not real party in interest).

forms of litigation. Though the doctrines have been in use for centuries, courts and scholars have struggled to find a coherent reason for their existence. The principal motivation behind these doctrines appears to be the idea that litigation is something of a necessary evil, but worthy of being avoided when possible.[175] As courts have come to recognize the absurdity of this idea, so too have they come to relax the stringency with which the doctrines of champerty and maintenance are applied.[176] It is thus quite conceivable that in the near future, a large number of states will come to abandon the doctrines altogether, or at least limit their application to cases of truly frivolous litigation.

2. *Copyright Law Obstacles.* — Even if the common law's traditional rules against assignability and its doctrines of maintenance and champerty were rendered inapplicable to copyright infringement claims, copyright law's internal doctrines present a host of additional (and direct) obstacles to the realization of a market for copyright claims. Three in particular stand out: (i) copyright law's rule against the assignment of the right to sue—affirmed by the Ninth Circuit, (ii) copyright's requirement of formalities for statutory damages, and (iii) the reluctance with which courts award defendants costs and attorney's fees in unsuccessful infringement actions.

a. *The Nonassignability of Infringement Claims.* — Quite independent of the common law's rules on assignment, some courts have interpreted the Copyright Act as precluding assignments of the "bare" right to sue, independent of assignments involving the underlying copyright itself. The Ninth Circuit's en banc decision in *Silvers v. Sony Pictures Entertainment, Inc.* crystallized this position.[177] *Silvers* involved a plaintiff who had produced a copyrighted work under the work for hire doctrine, under which ownership of all rights vested with her employer.[178] On

175. See, e.g., Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit 2–4 (1991) (observing "America's common law tradition . . . formerly viewed a lawsuit as an evil, at best a necessary evil"); Radin, supra note 165, at 68–69 (describing "medieval and Christian" origin of these doctrines, in which "litigation is at best a necessary evil" and "something to be avoided under all circumstances"); Lyon, supra note 1, at 580 (describing how this view further posited litigation was "to be tolerated but never encouraged").

176. See Bluebird Partners, L.P. v. First Fid. Bank, N.A., 731 N.E.2d 581, 582 (N.Y. 2000) (recognizing absurdity of "attempt[] to squeeze the ancient prohibition into a modern financial transaction" via affirmative defense of champerty); Steinitz, Whose Claim?, supra note 1, at 1289–90 (noting New York courts in particular have adopted pragmatic approach to rule).

177. 402 F.3d 881 (9th Cir. 2005) (en banc).

178. Id. at 883. The plaintiff was the scriptwriter for the television movie *The Other Woman*, which was produced by a company known as Frank and Bob Films, which owned all the rights in the movie under the work for hire doctrine. Under copyright law, a work made for hire is either work prepared by an employee during the course of his or her employment or a work ordered or commissioned by someone under an agreement treating the work as a work made for hire. 17 U.S.C. § 101 (2012) (defining "work made for hire"). In such situations, the law treats the employer or the person ordering or

learning that the defendant was possibly infringing the work in question and realizing that her employer (i.e., the copyright owner) was unwilling to commence the action, she approached her employer and obtained an assignment of "all right, title and interest in and to any claims and causes of action against" the named defendant and other possible infringers of the work in question.[179]

Hearing the matter en banc, the Ninth Circuit found the assignment to be invalid. The court offered four reasons for its conclusion. First, it noted that the copyright statute vested the right to commence an infringement action only with the "legal or beneficial owner" of the work, which the court had in turn circumscribed through a narrowly tailored interpretation.[180] Second, it looked to the legislative history of the Act to conclude that Congress had intended the list of assignable rights to be exhaustive and enumerated in the Act itself.[181] Congress's failure to list the right to sue, in other words, implied its nonassignability. Third, the Ninth Circuit looked to patent law, copyright's cousin, to find that in patent law too courts had historically disallowed similar assignments of the mere right to sue.[182] Fourth, it looked to precedent from other circuits that had similarly disapproved of such transfers.[183]

The court's overall reasoning in reaching its conclusion remains deeply problematic. In creating a set of enumerated rights and treating them as independently assignable, Congress was doing little more than attempting to simulate the basic structure of a property right. It was, in the process, saying very little about the enforceability of those enumerated rights, for which it needed to create an independent provision in the Copyright Act. That the Act specifies the mechanisms by which copyright's exclusive rights may be transferred or assigned need not imply that it forbids other forms of assignments. The simple point is that assignments of claims (even copyright claims) are technically not actual transfers of copyright, and are therefore outside the scope of the statute to begin with. The Supreme Court's opinion in *Sprint*, discussed earlier,

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commissioning the work as the initial owner of the copyright in the work, unless there is an agreement to the contrary. Id. § 201(b). Despite being the creator of the work, the plaintiff therefore had no rights in it.

179. *Silvers*, 402 F.3d at 883 (internal quotation marks omitted).

180. Id. at 885 (insisting such ownership be "owner[ship] of any *exclusive* right" in work (emphasis added)).

181. Id. at 886–87.

182. Id. at 887–88.

183. Id. at 888–90. The court disapproved of the Fifth Circuit's precedent to the contrary in Prather v. Neva Paperbacks, Inc., 410 F.2d 698 (5th Cir. 1969), since the case was decided under the Copyright Act of 1909. It instead relied on precedent from the Second Circuit which had disapproved of such transfers. See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991) (concerning infringement of copyrighted song); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 36 (2d Cir. 1982) (regarding infringement of Paddington Bear), superseded by statute on other grounds.

makes this fairly clear.[184] In *Sprint*, the Court rightly relied on the common law's allowance for the assignability of claims—even when done so exclusively to bring suit—to find that the assignee had standing to sue.[185] The mere fact that the statute in question—the Communications Act—was silent on the point did not present the Court with a problem on this issue. In light of this, the Ninth Circuit's belief that a statutory scheme somehow has to be self-contained in *all respects* seems rather myopic.

The Ninth Circuit's other reasons remain equally flawed. Copyright and patent law derive from fundamentally different theoretical and structural rationales, which ought to have cautioned it against the ready use of comparisons between the two. Indeed, even the Supreme Court has cautioned against overreliance on the analogy between the two regimes.[186] In choosing precedent to follow from other circuits on the question of assignability, the Ninth Circuit could have easily chosen a more permissive precedent to follow instead of the one that it finally did. The court was in the end likely motivated by the same policy concerns that have historically informed the common law rules against the assignment of claims, even though it masked these concerns in its formalist rhetoric.[187]

Other circuits seem to adopt a different position. The Fifth Circuit, for instance, has adopted the position that assignments of accrued copyright claims are perfectly valid, present no problems under public policy, and comply with the "real party in interest" rule.[188] In fact, the Fifth Circuit has suggested that accrued copyright infringement claims can be treated as distinct from the copyright in the work itself, and can as a result be owned and assigned independently.[189] While this position was framed under the 1909 Act, there seems little reason to believe that the 1976 Act changed this logic in any way or form. The Second Circuit's

184. See Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 271 (2008) ("[A]n assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor."). For a more in-depth discussion of this case, see supra text accompanying notes 156–159.

185. *Sprint*, 554 U.S. at 289.

186. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 216 (2003) (distinguishing the two kinds of intellectual property); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 498 n.4 (1974) (Douglas, J., dissenting) (explaining difference between patent and copyright (quoting Baker v. Selden, 101 U.S. 99, 101–02 (1879)). But see *Eldred*, 537 U.S. at 201 (recognizing both patent and copyright law originate from same constitutional clause).

187. See *Silvers*, 402 F.3d at 893–94 (Berzon, J., dissenting) (discussing how policy considerations favored assignment, in disagreement with majority).

188. *Prather*, 410 F.2d at 700. The "real party in interest" rule requires that the person holding the substantive right that forms the basis of the cause of action be the one actually commencing or filing the lawsuit. See Fed. R. Civ. P. 17(a) ("An action must be prosecuted in the name of the real party in interest.").

189. *Prather*, 410 F.2d at 699–700.

position, unlike the Fifth Circuit's, remains somewhat unclear.[190] While the majority in *Silvers* thought that the Second Circuit disallowed assignments of the bare right to sue,[191] one of the dissents parsed the Second Circuit's opinions on the matter and came to the exact opposite conclusion: It found that the Second Circuit in fact permitted just such an assignment and found it to confer standing on an assignee plaintiff.[192] The dissent thus read the Second Circuit precedent to merely stand for the proposition that an assignment of the right to sue conditioned on the copyright holder choosing not to sue was impermissible.[193] Accrued causes of action were, in the dissent's view, perfectly legitimate even in the Second Circuit.[194] In short, the law is fairly unclear on the permissibility of such assignments under copyright law, which in itself forms a major obstacle.

Facilitating a market for copyright claims will of necessity require adopting a clear rule that permits assignments of the right to sue. Given the Supreme Court's position in *Sprint* and the flawed reasoning of the Ninth Circuit in *Silvers*, there is little reason to believe that this will be hard to realize. Indeed, no circuit court has seriously revisited the issue since the Supreme Court's decision in *Sprint*, which seemed to implicitly override the interpretive logic of *Silvers* and its progeny.[195] Were the issue to surface again, the logic and holding of *Sprint* is likely to force courts to validate such assignments, barring a misplaced argument that copyright law merits differential treatment.

b. *Formalities for Statutory Damages and Attorney's Fees.* — A robust damages regime is central to facilitating the involvement of third parties in copyright litigation—and copyright's provision for statutory damages can ideally perform that role. As noted earlier, the entry of third parties can form a bridge between plaintiffs, who would have otherwise been unable to access statutory damages, and such damages.[196] Additionally, a rule allowing courts to award a successful plaintiff its attorney's fees (a version of the English rule on fee-shifting) provides third parties with a further incentive to fund copyright plaintiffs. Yet, under current law, the availability of both statutory damages and attorney's fees depends

190. Compare Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 36 (2d Cir. 1982) (noting licensee's ability to sue in own name without joining copyright owner), superseded by statute on other grounds, with ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991) (finding if accrued causes of action are not expressly included in assignment assignee cannot bring such actions).

191. 402 F.3d at 889–90.

192. Id. at 909–11 (Bea, J., dissenting).

193. Id. at 909 (finding Second Circuit's rule to be "copyright holder who maintains ownership of the exclusive right to reproduce cannot assign to a third party the bare right to sue should the copyright holder choose not to do so" (emphasis omitted)).

194. Id.

195. See Righthaven LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013) (reaffirming holding of *Silvers* without discussing *Sprint*).

196. See supra Part II.B.1 (discussing statutory damages as incentive for funding).

entirely on actions undertaken by the copyright owner well in advance of the litigation, or indeed the third party's entry into the picture. Section 412 of the Copyright Act renders the availability of these remedies (for a published work) contingent on the copyright owner having registered the work within three months from the first publication of the work when the infringement commences *before* registration.[197] In effect, the copyright owner needs to register the work prior to the commencement of the infringement for statutory damages and attorney's fees to remain available.[198] The legislative history accompanying this provision indicates that it was introduced in order to "induce" adherence to copyright's formalities once they were rendered optional.[199] The idea was to prevent recourse to copyright's special remedies in situations where the infringement had occurred prior to registration, and the three-month duration was intended to operate as a "grace period."[200]

Section 412 is likely to reduce—rather drastically—a third party's willingness to be involved in copyright litigation, since a large majority of copyright owners are unlikely to register their works prior to first publication or even shortly thereafter.[201] This provision is in contrast to § 411, which mandates that the work be registered prior to the commencement of the infringement *action*, but not necessarily before the infringement itself.[202]

In an ideal world, the stringency of § 412 would be relaxed, and it would come to operate along the lines of § 411—requiring registration prior to commencing the lawsuit and not earlier. Alternatively, the "grace

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197. 17 U.S.C. § 412 (2012). The section provides:

> In any action under this title . . . no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—
>
> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
>
> (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Id.

198. 2 Nimmer on Copyright, supra note 4, § 7.16[C][1][a].

199. See H.R. Rep. No. 94-1476, at 158 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5774 ("Copyright registration for published works . . . [will] no longer be compulsory, and should therefore be induced in some practical way."). Copyright formalities—registration, notice, and deposit—are treated by the 1976 Act as purely optional and in no way affect copyright protection. See 17 U.S.C. §§ 407(a), 408 (treating deposit as optional and registration as permissive).

200. H.R. Rep. No. 94-1476, at 158.

201. Under current copyright law, registration is completely unnecessary in order to obtain copyright protection for a work. It is merely a formal prerequisite to commencing a lawsuit. Consequently, most copyright owners today hardly ever register their work until the prospect of a lawsuit emerges.

202. 17 U.S.C. § 411(a) (providing "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with" Copyright Act).

period" might be extended, especially given the periodic term extensions that copyright law has seen over the years,[203] which rely on the assumption that creative works hold value for longer and longer periods of time.[204] Yet, legislative modification of § 412 is highly unlikely, and will likely have to accompany a broader reform of copyright's statutory damages regime.[205] The net effect of the provision and the possibility of third party funding is therefore likely to accrue to authors (i.e., creators) who worry about high litigation costs and about being unable to litigate an infringement suit on their own, who then choose to register their works voluntarily merely in order to preserve the option of enticing third party funders to acquire their claims in due course. In the short term, then, § 412 will serve to deter the entry of third parties into copyright litigation; in the medium term, however, it is likely to induce a greater number of creators to register their works hoping to entice third parties. As the involvement of third parties grows, and copyright owners are able to anticipate the kinds of claims that the market best responds to, § 412 is likely to produce an equilibrium where works most suited to third party funding come to be registered.

c. *Defendants and Fee-Shifting.* — As discussed earlier, third party funding can come to benefit defendants in copyright infringement law-

203. See generally Eldred v. Ashcroft, 537 U.S. 186, 195–97 (2003) (describing Congress's practice of extending copyright's term retroactively).

204. Cf. id. at 206–07 ("Congress passed [term extensions] in light of demographic, economic, and technological changes and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works." (footnote omitted) (citations omitted)).

205. Any modification to § 412 suggested here would certainly have to accompany other reforms to copyright's regime of statutory damages, as others have already noted. See Samuelson & Wheatland, supra note 75, at 509–10 (documenting problems with copyright's statutory damages regime and suggesting potential legislative reforms). As currently operationalized, courts award plaintiffs statutory damages simply upon request, without any inquiry into the purpose of the award. See 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages . . . ."). This practice undoubtedly originated in the Copyright Act's fusion of compensatory and punitive purposes into a single award of statutory damages. The author has elsewhere argued that this reality has encouraged the emergence of copyright trolls and that the only way to curb their activities is by reforming copyright's regime of statutory damages by making a court's award of such damages contingent upon a plaintiff's showing that it suffered some injury of the kind that would have triggered copyright law's very need to award damages. See Balganesh, Uneasy Case, supra note 6, at 736–38 (describing phenomenon of trolling and its reliance on statutory damages). This regime would in principle track antitrust law's "antitrust injury" rule, and serve to ensure that the regime is not misused opportunistically. Id. at 770–73. Expanding the allowance for statutory damages by relaxing the requirement in § 412 would thus have to accompany the introduction of this safeguard, so as to ensure that the entry of third parties seeking to fund legitimate claims does not exacerbate the problem of copyright trolling. Cf. James DeBriyn, Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages, 19 UCLA Ent. L. Rev. 79, 110 (2012) (claiming "statutory damages give copyright holders the incentive to litigate over such small losses," thereby creating "a flood of litigation").

suits as well, by moving the risk of litigation away from them through a mechanism of insurance.[206] For this to work, however, third parties need a somewhat strong incentive to acquire such risk. In the ordinary scheme of things, American law does not allow courts to award a successful party (plaintiff or defendant) attorney's fees, but instead requires each side to bear its own lawyering costs.[207] The copyright statute is, however, an exception to this. Section 505 of the Act gives the court "discretion" to award the recovery of "full costs" to a party and "reasonable attorney's fees" to a successful party in an infringement lawsuit.[208] On the face of things, § 505 draws no distinction between a plaintiff and defendant regarding the court's exercise of its discretion.[209] Yet, as a historical matter, several courts tended to make such awards to plaintiffs rather than defendants and even adopted rules to this effect, which came to be known as the "dual approach."[210]

In *Fogerty v. Fantasy, Inc.*, the Supreme Court clarified that successful defendants must be treated no differently from successful plaintiffs with respect to awards of attorney's fees.[211] Central to the Court's conclusion was the recognition that defendants too needed to be given an incentive to defend themselves.[212] It thus explicitly noted that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."[213] Encouraging defendants to contest the claim through litigation, rather than settling, was thus central to the Court's holding, and something that third party funding will stimulate.

Despite the Court's holding in *Fogerty*, as a practical matter defendants rarely ever succeed in being awarded costs and attorney's fees, even

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206. See supra notes 117–118 and accompanying text (discussing ability of third party involvement to reduce frivolous claims).

207. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

208. 17 U.S.C. § 505.

209. Id. It provides:

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

Id.

210. See 4 Nimmer on Copyright, supra note 4, § 14.10[D][2][a] ("[A] number of courts developed the rule that a prevailing plaintiff should be awarded fees routinely.").

211. 510 U.S. 517, 523 (1994). The Court based its holding that § 505 requires courts to treat prevailing plaintiffs and prevailing defendants alike on the legislative history and wording of the provision.

212. Id. at 527.

213. Id.

if they prevail in the lawsuit.[214] The reason for this originates in the Court's own reasoning. In order to preserve lower courts' discretion on when to make such awards, the Court identified the use of factors such as "'frivolousness, motivation, objective unreasonableness'" and ideals of "'compensation and deterrence.'"[215] As a result of this observation, courts in most jurisdictions remain unwilling to award defendant's attorney's fees unless convinced of the plaintiff's blameworthiness or culpability in bringing the suit.[216] As long as a plaintiff has a reasonable copyright claim, such culpability is extremely hard to establish—and is usually associated with "bad faith motivation," "hard-ball tactics," or "objective unreasonableness."[217] The net effect is thus that both *Fogerty* and § 505's limited move away from the traditional American rule have meant very little to defendants in practice. This will likely put a major damper on the role that third party funding can play for defendants.

Overcoming this obstacle is entirely up to courts, and requires treating the fair use defense as something that the plaintiff ought to factor into its decision of whether to bring the infringement suit. One court has already taken this position and found fault with the plaintiff when the defendant had a valid fair use defense.[218] The court thus treated a plaintiff's insistence on pursuing a claim when the defendant had a valid fair use defense as objectively unreasonable and potentially frivolous.[219] To be sure, not all courts take this position, and indeed one has even taken the view that a defendant's risk taking (by copying) required the defendant to bear its own attorney's costs and expenses.[220] A uniform rule would thus be one that treats a defendant's colorable fair use defense—when ascertainable in advance—as a basis for invoking § 505. It would also require the plaintiff to bear the defendant's full litigation costs, including its attorney's fees. In some ways, this approach derives support from the very structure of the copyright owner's (i.e., the plaintiff's) basic entitlement, under which the set of exclusive rights is "subject to" the fair

214. See 4 Nimmer on Copyright, supra note 4, § 14.10[D][3][b] ("[M]ost courts deny fees to prevailing defendants when the plaintiffs' claims were not motivated by bad faith.").

215. *Fogerty*, 510 U.S. at 534 n.19 (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)).

216. 4 Nimmer on Copyright, supra note 4, § 14.10[D][3][a].

217. Id. § 14.10[D][3][b].

218. See Mattel, Inc. v. Walking Mountain Prods., No. CV99-8543RSWL(RZX), 2004 WL 1454100, at *1–*2 (C.D. Cal. June 21, 2004) (finding defendant's parodic use of plaintiff's toy designs in its photographs to be fair use and concluding "Plaintiff's arguments, therefore, lack factual or legal support, making Plaintiff's copyright claims objectively unreasonable and frivolous in light of the fair use exception").

219. Id.

220. See Blanch v. Koons, 485 F. Supp. 2d 516, 518 (S.D.N.Y. 2007) (refusing to award defendant reasonable attorney's fees because defendant was "appropriation artist" and such artists "must accept the risks of defense, including the time, effort, and expenses involved").

use defense (among other exceptions).[221] Some scholars have used this language to suggest that the plaintiff ought to bear the burden of establishing that the defendant's use is not a fair use to begin with.[222] At the very least, the plaintiff ought to bear the risk of incurring the other side's full litigation costs, even if not the actual burden of establishing the absence of fair use.[223]

CONCLUSION

The copyright system today is in a state of deep crisis. In its current form, it imposes enormous costs on society, with its limited benefits flowing to a small minority of creators and users. And yet, those attempting to reform the system remain largely unwilling to think creatively to bring about fundamental change. Specifically, the possibility that solutions to some of the system's problems can come from the market, rather than from doctrinal reform, remains largely unexplored. This Essay has argued that facilitating a regulated market for copyright infringement claims, where third parties can acquire or invest in infringement or fair use claims in court, might make the system more egalitarian, less inefficient, and likely to thereby serve its goal of inducing

221. 17 U.S.C. § 106 (2012).

222. See Ned Snow, Proving Fair Use: Burden of Proof as Burden of Speech, 31 Cardozo L. Rev. 1781, 1807–08 (2010) ("A copyright holder's general burden of demonstrating that a defendant's use falls within the scope of the holder's rights should require the copyright holder to demonstrate that the defendant's use is not fair.").

223. An additional reform, beyond ensuring that prevailing defendants can shift costs to plaintiffs, is the potential expansion of the "copyright misuse" doctrine to allow defendants to, after prevailing in the infringement lawsuit, commence an action for damages against the losing plaintiff. As interpreted today, the copyright misuse doctrine is by and large treated as an equitable defense that allows defendants to avoid infringement claims by showing that the plaintiff's behavior misuses the copyright privilege—either by enforcing it inequitably, in an anticompetitive manner, or to the detriment of copyright's safeguards. See Brett Frischmann & Dan Moylan, The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software, 15 Berkeley Tech. L.J. 865, 880–902 (2000) ("[T]he common law development of copyright misuse has yielded two schools—(1) courts that apply a 'public policy approach' to assessing misuse, and (2) courts that apply an 'antitrust approach.'"); Kathryn Judge, Note, Rethinking Copyright Misuse, 57 Stan. L. Rev. 901, 903–35 (2004) ("Copyright misuse can arise . . . when a copyright holder uses rights granted to him under the Copyright Act in a manner that violates federal antitrust law [or] when a copyright holder attempts to extend his copyright . . . in a manner that violates the public policy embodied in copyright law."). The doctrine thus has not yet fully allowed defendants to counterclaim for damages. While courts certainly should not make a § 505 recovery contingent on a showing of misuse, an independent misuse claim that allows defendants to sue for actual damages could conceivably support the working of § 505. The effect of such a doctrine would be to actively encourage third parties to invest in defendants' fair use defenses (or insure them after the fact), especially when the claim is without merit to begin with, in the hope of obtaining a windfall through a counterclaim for misuse. While this reform is unlikely to be brought into effect in the near future, those who discuss § 505 would do well to consider its connection to the misuse doctrine.

creativity. Accepting this, of course, requires recognizing that litigation is not an unavoidable reality of the copyright system, but rather a central analytical and functional part of how it works, a mindset that scholars and courts have thus far resisted.

Once litigation is seen as part of the solution rather than as part of the problem, harnessing the resources and expertise that third parties can bring to copyright law can become a powerful source of reform for the system. To be sure, claim markets are unlikely to solve all of copyright's problems, many of which will indeed require doctrinal changes. At the very least though, scholars and courts should recognize that such markets form a legitimate part of the conversation about copyright reform.

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