# Selective Enforcement

KRISTELIA GARCÍA*

*Private rights holders frequently engage in selective enforcement—that is, they elect to enforce against some wrongdoers, but not against others, under different, or even similar, circumstances. The conventional wisdom assumes that when we observe enforcement, there has been an economic loss, whereas when we observe nonenforcement, there either hasn't been an economic loss, or the rights holder lacks sufficient resources to pursue a claim. Utilizing copyright law as a case study, this Article challenges these assumptions by showing that some rights holders elect to enforce even when they haven't suffered an economic loss, just as some rights holders elect not to enforce even though they have both experienced a tangible loss and possess adequate resources to pursue a claim. Examination of these atypical enforcement decisions highlights the heterogeneity of rights holders and improves our understanding of the work that a legal regime is and isn't doing in the relevant market.*

*Through analysis of a broad-ranging set of enforcement decisions made by a particularly mercurial group of rights holders—copyright owners—this Article explores the implications of selectivity in private enforcement, both for private rights holders and the public, and updates our conventional understanding of private enforcement as serving solely a compensatory, deterrent, or efficiency function. In doing so, it demonstrates that selective enforcement shares some of the potential downsides observed in other forms of private ordering—including, among others, anticompetitive behavior, bias, and lack of transparency. In lieu of mandating enforcement—a "solution" that brings its own problems—this Article proposes several temporal and remedial limitations intended to mitigate the most significant concerns. Ultimately, this Article suggests that selectivity plays three additional and underappreciated roles in private law: First, it highlights and emphasizes the heterogeneity of rights holders as a class and identifies the inherent conflict that arises with one-size-fits-all legislation. Second, it recognizes dignitary harm and reinforces rights-holder autonomy, without regard to economic loss. Third, it reveals valuable private information that can help lawmakers improve statutory rights and remedies. These insights are applicable across*

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*the private law spectrum, and suggest that private enforcement is a subject ripe for further study.*

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## INTRODUCTION

In 1977, the classic rock band Fleetwood Mac topped the charts with its hit song "Dreams."[1] Forty-three years later, on September 25th, 2020—and in the days immediately following—"Dreams" was streamed over twenty-five million times on the popular social media platform TikTok.[2] This unexpected resurgence of interest in the classic song owed to a user-uploaded video posted by "@420doggface208," since identified as Nathan Apodaca from Idaho Falls.[3] In the video, Apodaca films himself singing along to "Dreams" while he rides his skateboard and drinks from a jug of Ocean Spray™ Cran-Raspberry juice.[4] At the time the video was posted, neither TikTok nor Apodaca had negotiated a license to use Fleetwood Mac's song, such that all of the millions of resulting streams arguably infringed the song's copyright.[5] However, instead of bringing a

1. *See* Keith Caulfield, *Chart Rewind: In 1977, Fleetwood Mac Hit No. 1 with 'Dreams'*, BILLBOARD (June 18, 2015), https://www.billboard.com/pro/fleetwood-mac-dreams-anniversary ("Fleetwood Mac's smash single 'Dreams,' from the 'Rumours' album, topped the Billboard Hot 100 on June 18, 1977.").

2. Dylan Smith, *Fleetwood Mac Wholeheartedly Embraces a Viral TikTok Video—Finds Millions of New Fans in the Process*, DIGIT. MUSIC NEWS (Oct. 6, 2020), https://www.digitalmusicnews.com/2020/10/06/fleetwood-mac-tiktok-success [https://perma.cc/N5M2-A853].

3. *Doggface Gives the World a Smile with Juice, a Skateboard, and All the Vibes*, TIKTOK: NEWSROOM (Oct. 14, 2020), https://newsroom.tiktok.com/en-us/doggface-gives-the-world-a-smile-with-juice-a-skateboard-and-all-the-vibes [https://perma.cc/5QAR-NUCL].

4. Nathan Apodaca (@420doggface208), TIKTOK (Sept. 25, 2020), https://www.tiktok.com/@420doggface208/video/6876424179084709126 [https://perma.cc/LU5P-YF2G].

5. I say "arguably" because although fair use could be argued, it is unlikely to succeed in this case where the use is neither transformative nor "competes" directly in the market for licensing. *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 532–33 (2023) ("In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the

claim for copyright infringement against TikTok, Apodaca, or both, members of the band both embraced the video and welcomed their new fans;[6] in a tweet posted from the band's official Twitter page, they embedded the video and exclaimed: "We love this!"[7] Mick Fleetwood even joined TikTok to post his own video remaking Apodaca's.[8] Far from suffering crippling copyright liability, Apodaca went on to sign an endorsement deal with Ocean Spray™[9] and TikTok lived to fight another day,[10] while millions of GenZers were introduced to a "new" band.[11] During the same time period, copyright owners issued hundreds of millions of claims against user-uploaded videos posted by users not named Nathan Apodaca.[12]

Part I of this Article describes how private rights of action granted to private rights holders make selective enforcement—the decision to enforce against one wrongdoer (or class of wrongdoers) while forbearing against another—possible. Conventionally understood to serve a compensatory, deterrent, or efficiency function, selective enforcement is a defining feature of private law. Many private rights of action are explicitly contemplated in the relevant statutes; others are implied by the courts. In both cases, private rights of action grant rights holders the authority—but not the obligation—to enforce a claim for remedies against an

commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.").

6. *See* Rania Aniftos, *Here's a Timeline of the Viral 'Dreams' TikTok, from Cranberry Juice Gifts to Stevie Nicks' Recreation*, BILLBOARD (Oct. 14, 2020), https://www.billboard.com/music/music-news/viral-dreams-tiktok-timeline-9465600 [https://perma.cc/T6W7-A8FX] (highlighting Mick Fleetwood's and Stevie Nicks' admiration for and appreciation of Apodaca's video).

7. Fleetwood Mac (@fleetwoodmac), X (Oct. 5, 2020), https://twitter.com/fleetwoodmac/status/1309900389538566147 [https://perma.cc/9ZEQ-N6BY].

8. Mick Fleetwood (@mickfleetwood), TIKTOK (Oct. 4, 2020), https://www.tiktok.com/@mickfleetwood/video/6879849755204259077 [https://perma.cc/KS66-UGQT]; Aniftos, *supra* note 6.

9. Ilyse Liffreing, *Ocean Spray Partners with Doggface for Super Bowl TikTok Campaign*, AD AGE (Feb. 3, 2021), https://adage.com/article/special-report-super-bowl/ocean-spray-partners-doggface-super-bowl-tiktok-campaign/2310691 [https://perma.cc/XP8C-S5RM].

10. *Cf.* Adam Liptak, *TikTok and Government Clash in Last Round of Supreme Court Briefs*, N.Y. TIMES (Jan. 3, 2025), https://www.nytimes.com/2025/01/03/us/politics/tiktok-ban-supreme-court.html (discussing TikTok's final appeal before a congressional ban on the social media platform goes into effect in the United States).

11. *See, e.g.*, Smith, *supra* note 2 ("[Y]oung fans' unprecedented interest in Fleetwood Mac has translated into high-profile results outside of social media. 'Dreams' was the 50th most-streamed track on all of Spotify today, as well as the 12th most-streamed Spotify song in the U.S.").

12. These claims—which included both standard copyright takedown notices and "Content ID" claims—were filed against YouTube, one of TikTok's competitors in the user-uploaded content market. *See* YOUTUBE, COPYRIGHT TRANSPARENCY REPORT 10 (2022), https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf [https://perma.cc/94AC-Y9G6]. Unlike with TikTok, many major content owners have a deal with YouTube that allows them to respond to alleged copyright infringement in an expedited fashion through a web-based tool. *See id.* at 3. For a full explanation of Content ID and how it works, see Section III.A.3, *infra*.

alleged wrongdoer.[13] In contrast to public law—where enforcement discretion lies with the state—private law leaves the choice of whether, when, and how to pursue a legal remedy against a wrongdoer to private rights holders.[14] The role of the state in private law, then, is not solely, or even necessarily, to impose liability on a wrongdoer, but rather to empower private rights holders to hold wrongdoers accountable if they so choose.[15]

Private rights of action do not mandate enforcement. Instead, they establish a default of nonenforcement under which a private rights holder must affirmatively act to enforce their statutory right to a remedy. And because private rights of action do not require an explanation for the enforcement decision, different rights holders can—and often do—make different enforcement decisions in different (or similar) circumstances and vis-à-vis different (as well as similarly situated) wrongdoers. The conventional wisdom assumes that when we observe private enforcement, there has been an economic loss and that when we observe nonenforcement, either there hasn't been such a loss or the rights holder lacks sufficient resources to pursue a claim.[16] This Article challenges those assumptions by showing that some rights holders elect to enforce even when they haven't suffered an economic loss, just as some rights holders elect *not* to enforce even though they have both experienced a tangible loss and possess adequate resources to pursue a claim.

Part II details several features of copyright law that make it ideal for exploring the implications of selectivity in private enforcement. After laying out the statutory rights afforded to copyright owners, it describes how a successful claim for copyright infringement is made. In so doing, it explains how copyright's hybrid public–private structure comes into play. Copyright is ostensibly a private law regime, in that it governs the relationship between copyright owners on the one side and prospective users of copyrighted works on the other. At the same time, however, copyright has a decidedly public structure. It operates under a constitutional mandate[17] and features a spate of statutory licenses administered by various government agencies and offices, including the Copyright Office and the Copyright Royalty Board.[18] Copyright also operates in service of an inarguably public-facing purpose—namely, the incentivization of private creation *for the public benefit*.[19] But it accomplishes this public-facing purpose through a quintessential

13. *See* Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 630 (Jules L. Coleman et al. eds., 2004) ("[P]rivate law serves to transfer a loss to the party who ought to be bearing the loss.").

14. *See id.* at 649, 651.

15. *See id.* at 650 ("The state is making a decision that a plaintiff is entitled to act this way, and is empowering and permitting this action.").

16. For an overview of the history of the common law's tendency toward recognition of economic loss, see generally Ronen Perry, *The Economic Bias in Tort Law*, 5 U. ILL. L. REV. 1573 (2008).

17. *See* U.S. CONST. art. I, § 8, cl. 8.

18. *E.g.*, 17. U.S.C. §§ 701, 801 (respectively establishing the Copyright Office and position of Copyright Royalty Judge).

19. *See* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to provide copyright protection as a way "[t]o promote the Progress of Science and useful Arts").

private law mechanism: the private right of action.[20] As a result, the selective enforcement regime observed in copyright law doesn't fit neatly into either the conventional public enforcement model or the conventional private enforcement model. Instead, copyright's enforcement regime is best described as a paradoxical hybrid that serves an important, if imperfect, function while struggling to reconcile its dual public and private purposes. A number of other private law regimes—including tort law and property law—share copyright's public–private structure (albeit to varying degrees), further recommending copyright as an ideal case study.

The second feature explored is copyright's propensity for rights consolidation. The players in copyright industries—record labels, movie studios, and the like—typically amass a large portfolio of copyrights, affording them many more potential claims and defendants than, for example, the typical tort victim. This affords scholars a broad-ranging set of commonly held claims to analyze for differential treatment.

Another factor that makes copyright an ideal case study for research on selective enforcement is its near-exclusive reliance on statutory enforcement due to the intangible nature of most copyrighted works. Unlike real and personal property (e.g., a house, car, or laptop), which is tangible, much of the intellectual property protected by copyright (e.g., a piece of music, a film, or an e-book) is intangible and so not physically excludable. Once distributed, you cannot build a fence around a song or lock up an e-book. For this reason, protecting these copyrighted works depends exclusively on statutory exclusion mechanisms, making the private right of action afforded to copyright owners in the Copyright Act of 1976 (the Copyright Act) singularly important.[21]

The last feature which is conducive to research on the role of selectivity in private enforcement is copyright infringement's status as a strict liability tort.[22] This has a couple of relevant implications. First, as with the propensity for rights consolidation, there is a quantitative element: because intent is not required for a finding of liability for copyright infringement, copyright owners see more actionable claims than they might otherwise. Second, statutory damages for copyright infringement do not require a showing of harm.[23] The lack of a harm requirement leads to a propensity in copyright for both "lossless wrongdoing"—a situation in which a private right is violated, but the rights holder does not suffer an economic loss—and "beneficial wrongdoing"—a situation in which the rights holder benefits in some way from the transgression, as demonstrated by the Fleetwood Mac example.[24]

Part III analyzes a series of copyright enforcement decisions in various contexts, both conventional—that is, involving economic loss—and unconventional—that is, not involving economic loss but including transgressions that involve dignitary

20. As discussed further herein, the Copyright Act does provide for criminal enforcement. *See generally* 17 U.S.C. § 506. However, this provision is not only quite limited but also infrequently invoked, such that for most intents and purposes, copyright enforcement is substantively private. *See infra* Section I.

21. *See id.* §§ 101–1511 (as amended).

22. *See* discussion *infra* Section II.D.

23. *See id.* § 504(c).

24. *See infra* Section II.E.2.

harm, strategic behavior, and even those that actually benefit the rights holder. The resulting taxonomy observes that one copyright owner may enforce against one alleged infringer while declining to enforce against another and that this may be either a categorical decision or a one-off decision. Another copyright owner may categorically decline to enforce a legal remedy against a class of alleged infringers for some duration of time but then have a change of heart and decide to start enforcing against that same class of infringers. Still another copyright owner might delegate their enforcement decision(s) to an algorithm, which may or may not consistently apply the criteria it is given (and whose criteria may or may not comply with legal requirements). Some copyright owners wield the threat of enforcement to accomplish ends either wholly or largely unrelated to the alleged wrong. Still others elect not to enforce because they benefit in some way from the infringement. Ultimately, the taxonomy of enforcement decisions both highlights the heterogeneity of rights holders and improves our understanding of the work that a legal regime is and isn't doing in the relevant market.

Part IV describes selective enforcement as prone to many of the same downsides as other forms of private ordering:[25] anticompetitive behavior, bias, transparency and accountability, confusion and the setting of contra-statutory norms, and divergence between the public and private interests. Part IV details these concerns using examples from the taxonomy and determines that, while all of the concerns could be resolved by simply mandating enforcement, that solution would bring its own challenges. Instead, it suggests that a better approach to ameliorating some of the more serious concerns wrought by selective enforcement, while retaining its benefits, is a two-pronged focus on (1) temporal limits and (2) remedies.

Part V explores the implications of selectivity in private enforcement, both for rights holders and the public, and suggests that the role of selectivity is broader than suggested by the conventional explanation. First, it describes rights holders as a heterogeneous class, not best served by one-size-fits-all legislation. Next, it demonstrates that selectivity also plays an important role in establishing and reinforcing rights-holder autonomy. This is especially true in the cases of lossless and beneficial wrongdoing. Finally, it shows how selective enforcement decisions observed across a class of rights holders can provide valuable private information to lawmakers on ways to improve statutory rights and remedies. In closing, this Article describes an expanded role for selectivity in private enforcement and considers the implications that can be imported from the copyright context into future research on selective enforcement across the private law spectrum.

## I. PRIVATE ENFORCEMENT

Although both private and public enforcement serve the same ultimate purpose, the way in which they do so, as well as the motivations of their respective

25. This Article uses the term "private ordering" to refer to any free-market, negotiated solutions. These arrangements are often, but not always, reached in the shadow of a (presumably less desirable) statutory alternative.

enforcers, vary. The first Section below describes private rights of action as the defining feature of private enforcement, which it contrasts with public enforcement. The next Section discusses the conventional role of private enforcement decisionmaking and the interests that motivate it.

### A. STRUCTURE & OPERATION

Private enforcers operate in both the public and private law spheres. Although public laws are generally enforced by the state, some function under a hybrid enforcement scheme with both public and private enforcement mechanisms. The Fair Credit Reporting Act, for example, regulates the collection and use of consumer data by credit agencies while also affording affected individuals a private right of action with the possibility of actual, statutory, and punitive relief.[26] Lauren Henry Scholz has described the public and private enforcement that come together in a hybrid regime as complements, with the public piece legitimizing private enforcement and the private piece picking up the slack where the state lacks the will or resources to enforce.[27] A somewhat more recent development in the private enforcement of public laws involves a public law statute *without* a public enforcement option. Texas's S.B. 8—intended to discourage abortion in light of the state's recent ban—lacks a public enforcement mechanism altogether.[28] Instead, it delegates enforcement authority to private citizens to bring an action against anyone who "aids or abets the performance or inducement of an abortion."[29]

Private law, in contrast, is enforced by rights holders who are granted enforcement authority through a device known as a "private right of action."[30] Some private rights of action are explicitly laid out in the relevant statute. For example, the Americans with Disabilities Act specifies that "[t]he remedies and procedures set forth in [this Act] are . . . provide[d] to any person who is being subjected to discrimination on the basis of disability in violation of [this Act]."[31] Other private

26. *See* 15 U.S.C. §§ 1681, 1681s-2(b). For more examples of hybrid enforcement regimes, including discussion of *parens patriae* suits brought by governments against wrongdoers responsible for consumer-facing harms such as asbestos, tobacco, and firearms, see generally Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016) (arguing in favor of retaining redundancy in enforcement).

27. Lauren Henry Scholz, *Private Rights of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639, 1644, 1655, 1657 (2022). Like copyright, Scholz's subject—privacy law—features both a public and a private enforcement option where the latter sees most of the action, thereby picking up the slack for the former while also benefiting from its endorsement.

28. S.B. 8, TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021). For further discussion of the private enforcement of public law, see generally, e.g., Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483 (2022) (examining the role of private enforcement of public law in the democratic state); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (offering a constitutional analysis of the privatization of public enforcement).

29. *Id.* § 171.208(a).

30. For a historical exploration of private enforcement and private rights of action in the United States, see generally Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

31. 42 U.S.C. § 12188(a)(1).

rights of action are implied via case law. With implied private rights of action, "we are not dealing . . . with any private right created by the express language of [a statute]. . . . [Rather, w]e are dealing with a private cause of action which has been judicially found to exist."[32] Perhaps the best-known implied private right of action is the one recognized under Rule 10b-5 of the Securities and Exchange Act of 1934 (the 1934 Act).[33] Rule 10b-5 prohibits fraud "[i]n connection with the purchase or sale of a[] security."[34] In addition to the SEC's authority to bring a criminal enforcement action, the Supreme Court has determined that any private investor who purchases or sells a security has standing to bring a civil claim for fraud relating to that transaction under Rule 10b-5.[35]

### B. FUNCTION & DECISIONMAKING

Most private enforcement is conventionally understood to have a compensatory, deterrent, or efficiency role. In her work on private victims of civil wrongs, for example, Pamela Bucy describes the role of the private statutory cause of action as primarily compensatory, noting that "there is almost no mention of vindicating the public's rights, supplementing public regulatory efforts, or other similar expressions of serving the common good."[36]

Although this may be true as far as the *creation* of some private rights of action go, the *enforcement* (or lack of enforcement) of some rights often serves an important deterrence function as well.[37] In antitrust, for example, Robert Lande and Joshua Davis conclude that "private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program."[38] Similarly, in his work on the Clean Water Act, Robert Blomquist asserts that:

> [U]nlike a traditional tort action for compensatory damages, citizens [bringing suit under the Clean Water Act] do not seek to be made whole for property,

32. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748–49 (1975).

33. 17 C.F.R. § 240.10b-5 (2024).

34. *Id.* The implied private right of action under Rule 10b-5 has been repeatedly recognized and affirmed by the Supreme Court. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 230–31 (1988) (explaining that "[j]udicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) [of the 1934 Act] and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements"). For more on the debate around private securities litigation, see, e.g., Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 965–66 (1994) (arguing that the SEC could, and perhaps should, "disimply" these implied private rights). Unlike securities, the private enforcement of copyright is more intuitive and, therefore, not controversial.

35. *See Blue Chip Stamps*, 421 U.S. at 723.

36. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 15 (2002).

37. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997) (describing deterrence of unwanted behavior as "one of the principal social purposes of litigation"); *see also* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 5–6 (1974) (offering an analysis of enforcement's role as a deterrent).

38. Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 317 (2011).

> physical, or psychic injuries suffered by the wrongful acts of a polluter; instead, their purpose in pursuing "civil penalties" under the Clean Water Act is to punish defendants for past violations and to deter future violations.[39]

Finally, private enforcement can be explained by efficiency. Enforcement is costly, and we can hardly force private parties to spend time and resources litigating when they don't want to. Moreover, private rights of action delegate enforcement authority to the party with the most and best information as to whether and when the costs of enforcement are justified.[40] In his work on public regulation of private enforcement, Matthew Stephenson notes that "private parties—especially those who are directly affected by a potential defendant's conduct—often are better positioned than the public agency to monitor compliance and uncover violations of the law. Affected private parties may also sometimes be better at weighing the costs and benefits of bringing an enforcement action."[41]

It follows that private enforcement is not mandatory. In fact, when lawmakers or courts establish a private right of action, they set a default of nonenforcement. This means that a private rights holder must affirmatively act to enforce against an alleged infringer; otherwise, there is no legal consequence for the infringement. Consider, for example, a songwriter who holds a copyright on a musical composition. Among other things, § 106 of the Copyright Act gives the songwriter the exclusive right to copy and distribute the work, as well as create other works deriving from it,[42] while § 504 establishes a choice of remedies for infringement of any or all of those statutory rights.[43] If another musician uses the hook from the musical composition at issue in their own song without first obtaining permission or a license from the original songwriter, that musician has infringed the songwriter's copyright.[44] However, unless the original songwriter sends a demand letter seeking payment or brings a suit for copyright infringement, nothing happens. In other words, the statute merely gives the songwriter in this example the ability—but not the obligation—to enforce against a copyist.

As a result, in practice we see considerable variation in whether and how different rights holders elect to enforce, or not enforce, against different wrongdoers. Rather than viewing this selectivity as a bug, it is generally perceived as a feature leading to more robust and efficient enforcement.[45] The conventional wisdom

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39. Robert F. Blomquist, *Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 389 (1988).

40. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 108 (2005).

41. *Id.*

42. 17 U.S.C. § 106.

43. *Id.* § 504.

44. *See id.* § 501(a).

45. *See, e.g.*, Stephenson, *supra* note 40, at 107–09 (discussing the efficiency advantages of private enforcement, and noting that "[u]nder circumstances where higher levels of statutory enforcement are a public good, but one that is valued differently by different citizens, private enforcement enables those

assumes that private enforcers will opt to enforce when they've suffered an economic loss—that is, a loss whose pursual justifies the expenditure of resources required to bring a claim—and forbear from enforcing when they either haven't experienced an actionable loss or don't have the resources to pursue a claim. The next two Parts challenge these assumptions by presenting a number of alternate explanations, including opportunism, relationship building, reputation preservation, and convenience.

## II. THE COPYRIGHT CASE STUDY

Several features of copyright law make it well-suited to explore selectivity in private enforcement. First, like many private law subject areas, copyright is a private law crafted for the benefit of society more broadly. In addition, the propensity for rights consolidation in copyright makes it especially susceptible to selectivity. Furthermore, copyright owners rely heavily on statutory remedies because copyrighted works are often not physically excludable. Finally, copyright infringement, especially in the digital age, is particularly prone to lossless and beneficial wrongdoing. This Part addresses each of these characteristics in turn.

### A. A PRIVATE LAW WITH A PUBLIC ORIENTATION

This Article identifies copyright law as a form of private law that governs the relationship between private individuals and entities, but with a structure that resonates in public law and with a public-facing purpose—namely, the incentivization of private creation for the public benefit.[46] Although the Copyright Act also contemplates criminal copyright enforcement,[47] the practice is limited in scope[48] and infrequently invoked.[49] Instead, the primary form of redress for copyright

citizens who value the public good more highly to subsidize enforcement by bearing some of the monitoring and prosecution functions themselves. Thus, citizen-suit provisions might implement the functional equivalent of a more efficient tax system, in which citizens' tax rates vary in proportion to the value they place on the public good to be supplied.").

46. *See, e.g.*, Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1173–74 (2020) [hereinafter Balganesh, *Copyright*] (describing copyright as a "truly hybrid legal regime revealing a confluence of private law and public ideas and concepts in everyday operation").

47. *Id.* § 506(a).

48. *See* Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 320–21 (2014) (discussing the limited category of defendants against whom criminal copyright liability makes economic sense).

49. *See* Miriam Marcowitz-Bitton, Orit Fischman-Afori & Hillel Billauer, *The Future of Criminal Enforcement of Copyright: The Promise of Civil Enforcement*, 30 GEO. MASON L. REV. 463, 475 (2023) (stating in regard to the Copyright Act's criminal provisions that "their effectiveness is questionable, and their use remains low"). One of the most recent (and largest) criminal copyright cases was brought in 2012 against a criminal organization known as Megaupload. Along with charges of racketeering and conspiracy, the Justice Department also brought two charges of criminal copyright infringement under § 506. *See* Press Release, Dep't of Just., Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), https://www.justice.gov/opa/pr/justice-department-charges-leaders-megaupload-widespread-online-copyright-infringement [https://perma.cc/U9JN-3E4Y].

infringement is allocated to individual copyright owners via private rights of action.

Specifically, copyright law protects the owner[50] of an expressive work—e.g., a film, song, book, or painting—from unauthorized copying.[51] U.S. copyright law derives its authority from the so-called Intellectual Property Clause of the Constitution, which states that "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing . . . to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[52] In accordance with this power, the Copyright Act establishes a series of exclusive rights that vest in the owner of a copyrighted work.[53] These exclusive rights—including the rights of reproduction, distribution, and performance, among others—are intended to give creators a financial incentive to create works that can be sold, assigned, or licensed for use by the public.[54]

But the Copyright Act, as amended, goes far beyond merely establishing exclusive rights as a means of promoting a utilitarian goal. The statute also establishes a comprehensive set of statutory licenses that set a "market rate"[55] and dictates the terms under which certain copyrighted works can be used.[56] These statutory licenses effectively establish a series of liability rules for the use of certain copyrighted content.[57] In this way, they allow copyright owners to collect a predetermined royalty while also ensuring public access to that content.[58]

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50. Sometimes the creator of the work is the copyright owner; sometimes a work is created as a work-for-hire and held by a third party (usually an entity); still other times a copyright that initially vests in a creator is assigned away to a third party via contract. *See id.* §§ 201–205.

51. *Id.* § 106. Notably, U.S. law encourages, but does not require, registration to gain copyright protection. *Copyright in General*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-general.html [https://perma.cc/WG6Z-HVTW] (last visited Feb. 10, 2025).

52. U.S. CONST. art. I, § 8, cl. 8.

53. *Id.* § 106(1)–(6) lays out the exclusive rights afforded copyright owners: reproduction, derivative works, distribution, public performance (of audiovisual works and songs), and public display (for pictorial, graphic, and sculptural works).

54. *Id.* For more on copyright's efforts to balance incentivization with access, see, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 486 (1996) (discussing, among other things, the internal paradox presented by works that, as they increase in popularity, both require greater protection and call for greater dissemination).

55. For several of these licenses, there has never been a true "market" for the underlying work in any economically meaningful sense. For example, the establishment of the music publishing industry arose more or less simultaneously with the creation of collective rights organizations that administer the rights and set a royalty rate, thereby foreclosing the development of a free market for the licensing of musical compositions.

56. *See id.* §§ 111 (cable transmissions), 112 (ephemeral recordings), 114 (public performance of sound recordings), 115 (making and distributing phonorecords) (as amended by the Music Modernization Act), 119 (secondary transmissions for satellite carriers), and 122 (secondary transmissions by satellite carriers for local retransmissions).

57. For a foundational discussion of liability rules—which grant access without prior permission but require payment ex post—versus property rules—which require permission and payment terms to be negotiated ex ante—see generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

58. In some cases, statutory licenses serve to correct a market failure (in which no deal would ever be reached in the free market). *See, e.g.*, MARK COOPER, CONSUMER FED'N OF AM., COMMENTS OF THE CONSUMER FEDERATION OF AMERICA AND PUBLIC KNOWLEDGE ON MUSIC LICENSING STUDY 6–7 & n.13

Moreover, these statutory rates and terms are established by governmentally authorized entities. For example, in the case of the statutory license for digital performance rights—the license utilized by music streaming platforms—the statutory rate and terms are set and adjusted at five-year intervals by the Copyright Royalty Board, with input from interested parties.[59] The Copyright Royalty Board and its counterparts operate under the authority of the Copyright Office, a government agency charged with the registration and recordation of copyrights, the administration of certain statutory licenses and distribution of royalties thereunder, and the provision of advice to Congress on copyright policy.[60] The Register of Copyrights, an employee of the Library of Congress, which is part of the Legislative branch, is the principal advisor to Congress on domestic and international copyright issues and is tasked with recommending regulations and rulemakings concerning various facets of copyright law.[61] Structurally, these components all describe a public law orientation.

Normatively, copyright law also professes a public-facing purpose: it seeks not to incentivize creation for creation's sake but as a means of benefiting the public. As the Supreme Court wrote in *Mazer v. Stein*, "[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."[62] Put differently, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good."[63] This public-facing purpose has been repeatedly recognized both by the courts and in the literature. For instance, in his work on the changing perceptions and interpretations of copyright law, Shyamkrishna Balganesh ascribes to copyright an "overall collectivist goal" akin to that seen in tort and even contract law[64]—two classic exemplars of private law. Notably, copyright law also follows tort and contract law when it comes to the achievement of those public

(2014), https://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Consumer_Federation_of_Amercia_Public_Knowledge_MLS_2014.pdf [https://perma.cc/7AYK-Q9DF] (emphasizing the need for statutory licensing in part "to ensure the music market functions efficiently"). Alternatively, they might be used to provide access to works whose owners, if any, are not readily identifiable. For proposals to this effect, see David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 39–47 (2013).

59. *See* 17 U.S.C. §§ 801(b)(1), 804(b)(4). The Copyright Royalty Board is a body of three appointed judges who serve staggered, six-year terms. *See id.* § 802(c).

60. *See id.* §§ 701–702, 705.

61. *See, e.g.*, *id.* §§ 701 (vesting the Register of Copyrights, as Director of the Copyright Office, with the authority to make regulations), 1201(a)(1)(C) (vesting the Librarian of Congress and Register of Copyrights with rulemaking power under the Digital Millenium Copyright Act). For an example of a rulemaking, see *Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/rulemaking/mma-termination [https://perma.cc/LZ5L-D8HU] (last visited Feb. 10, 2025).

62. 347 U.S. 201, 219 (1954).

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

64. Balganesh, *Copyright*, *supra* note 46, at 1115–16.

aims; specifically, copyright aims to realize its public-facing purpose of encouraging the production of creative works primarily through private enforcement, thus furthering its appeal as a case study in private enforcement.

### B. RIGHTS CONSOLIDATION

Many of the players in copyright industries—record labels, movie studios, book publishers, and so forth—operate under either a work-for-hire model or an assignment model. In the work-for-hire model, an individual creator is engaged by an intermediary (often, but not always, as an employee) for the purpose of authoring a copyrightable work that will—by contract—belong to the intermediary *ab initio*.[65] In the assignment model, a creator authors a work, obtains a copyright, and then assigns that copyright—again, (usually) by contract—to an intermediary.[66] Both methods contribute to the copyright industries' propensity for copyright consolidation—that is, for a single entity to own many copyrights—because a majority of the copyrighted works released are owned by the entities.[67] When combined with a digital distribution model predicated on serving lots of content, as well as social media's reliance on user-uploaded content, the result is an area of law in which large intermediary rights holders can find themselves with many prospective claims. For example, one of Fleetwood Mac's record labels, Warner Records, controls the sound recordings of thousands of artists.[68] This makes copyright law fertile ground for studying when, how, and against whom private-rights holders decide to enforce (or not enforce) their rights.

### C. INTANGIBILITY & STATUTORY FENCING

The fact that most copyright owners rely exclusively on statutory remedies makes private enforcement singularly important in copyright law. Although copyrights—along with patents, trademarks, trade secrets, and rights of publicity—are referred to as intellectual "property," they differ meaningfully from what we conventionally think of as property—namely, land, structures, and chattels.[69] One important distinction is that, unlike conventional property, many copyrighted

65. *See* 17 U.S.C. § 201(b). The initial granting of a copyright to an intermediary is a uniquely American creation. Many European Union countries, in contrast, only vest a copyright initially in an individual, who can then assign it to an intermediary. *See, e.g.*, Code de la propriété intellectuelle [Intellectual Property Code], arts. L121-1–L123-12 (Fr.) (describing the distinction between moral and economic rights in a work).

66. *See* 17 U.S.C. § 201(d). The significance of assigning a copyright, as opposed to authoring a work-for-hire, is that the former can potentially be reclaimed in the future, while the latter cannot. *See id.* § 203(a).

67. The prominent use of work-for-hire agreements in the U.S. film industry owes in part to the complex nature of film production and in part to the Copyright Act's specification of "a motion picture or other audiovisual work" as one of the special categories of work entitled to work-for-hire protection. *See id.* § 101.

68. *See Artists*, WARNER RECS., https://press.warnerrecords.com [https://perma.cc/5S4U-H899] (last visited Feb. 10, 2025).

69. *See Intellectual Property*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intellectual_property [https://perma.cc/UGP6-KJBQ] (last visited Feb. 10, 2025).

works are nonexcludable.[70] This means they are often not amenable to traditional self-help methods. For example, the owner of a copyright on a song cannot build a fence around it to keep others away.[71] Once the song is uploaded to a streaming service, there is no way for its owner to physically prevent others from recording, distributing, or publicly performing it.[72] Instead, most copyrighted works rely exclusively on statutory exclusion mechanisms—namely, licensing[73] and infringement.[74] This makes the private right of action afforded to copyright owners singularly important.

### D. ENFORCEMENT DECISIONS

Like other forms of private law, copyright owners enjoy private rights of action afforded to them by the Copyright Act—namely (1) the right to exclude[75] and (2) the right to a remedy (statutory or otherwise) when an exclusive right is infringed.[76] These private rights of action present copyright owners with four distinct but interrelated decisions. The first of these is whether to expend the time and resources required to detect the infringement in the first place. The detection of copyright infringement in the digital era is notoriously difficult and costly. For this reason, we increasingly see copyright owners take a collective and/or algorithmic approach to detection.[77]

Even where use of a copyrighted work is detected, a copyright owner may not be able to make out a claim for infringement. This is because the Copyright Act contemplates several exceptions to copyright owners' right to exclude. The most prominent (and convoluted) is the doctrine of fair use, which lays out a four-part test to permit certain uses of copyrighted works without the permission of, or

70. *See* Marcowitz-Bitton et al., *supra* note 49, at 465.

71. *See, e.g.*, Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 38 (2005) ("In the world of tangible property, there are fences and boundary lines that *physically* exclude non-owners. . . . There is no natural exclusion of intellectual property entitlements. [Intellectual property] can be copied willy-nilly without taking the original physical product away from the inventor or author.").

72. Early efforts to establish a physical exclusion analog for intellectual property, such as digital rights management (DRM), were ultimately ineffective and have largely fallen out of favor. For example, Apple dropped its DRM program "FairPlay" in 2009, citing, among other things, inefficacy, DRM-free competition, and user experience as driving the decision to eliminate the program. *See* Mike Ingram, *Behind Apple's Decision to Drop Anti-Copying Measures in iTunes*, WORLD SOCIALIST WEB SITE (Jan. 19, 2009), https://www.wsws.org/en/articles/2009/01/appl-j19.html [http://perma.cc/5WX7-C7YH].

73. *See Copyright Licensing: Granting Permission for Others to Use Your Work*, EMERSON THOMSON BENNETT (May 15, 2024), https://www.etblaw.com/guide-to-copyright-licensing [https://perma.cc/PFE2-XPRS] (identifying licensing as one way for copyright owners to "protect [their] creation[s] from being used without [their] permission").

74. *See* Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305, 326–27 (2015) (outlining how copyright owners can bring a suit for copyright infringement to protect their exclusive rights under the Copyright Act).

75. *See* 17 U.S.C. § 106(1)–(6). An unexcused violation of one or more of § 106's exclusive rights constitutes copyright infringement. *Id.* § 501.

76. *Id.* § 504.

77. *See infra* Section III.A.3 for a discussion of algorithmic enforcement.

payment to, the respective copyright owner(s).[78] The statute also codifies a number of additional exceptions: § 108 allows libraries to make copies of copyrighted texts in specific circumstances;[79] § 109 allows the owner of a legally acquired copyrighted work to sell their physical copy (commonly known as the "first sale" doctrine);[80] and § 110 lays out some exceptions for the use of copyrighted material in face-to-face teaching.[81] Finally, § 1201 allows for exceptions to the prohibition against circumvention of technical measures[82]—for example, allowing the modification of some copyrighted works to permit their consumption by blind and/or deaf persons.[83]

Secondly, once an unexcused infringement has been detected, a copyright owner must decide whether to do anything about it—that is, whether to enforce their private right to a remedy. Notably, Fleetwood Mac opted not to enforce with respect to Apodaca's TikTok video.[84] Copyright infringement is a strict liability tort.[85] Among other things, this means that a wrongdoer's liability does not hinge on their intent or state of mind.[86] One can accidentally infringe on a copyrighted work and still be held liable.[87] Conversely, recent work has shown that one can

78. Section 107 of the Copyright Act lays out the following four factors: (1) the purpose and character of the use (transformativeness); (2) the nature of the work (e.g., published or unpublished); (3) the substantiality and amount used; and (4) the effect on the market (commerciality). *See id.* § 107. The Supreme Court's most recent jurisprudence in this area, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, arguably worked to rein in the longstanding emphasis on transformativeness and to reinforce the import of the commerciality factor. *See* 598 U.S. 508, 531, 541 (2023).

79. *Id.* § 108.

80. *Id.* § 109.

81. *Id.* § 110.

82. *Id.* § 1201.

83. *See, e.g.*, 37 C.F.R. § 201 (granting "blind, visually impaired, [and] print-disabled" individuals continued access to literary and musical works equipped with assistive technologies). Another prominent exception along the same lines can be found in § 121, often referred to as the Chafee Amendment. *The Chafee Amendment: 17 U.S.C. 121 & 121A*, NLS, https://www.loc.gov/nls/who-we-are/laws-regulations/copyright-law-amendment-1996-pl-104-197 [https://perma.cc/W7SA-REHY] (last visited Feb. 26, 2025). It explicitly allows nonprofits or government organizations to adapt copyrighted works to make them more accessible to people with different reading abilities. 17 U.S.C. § 121.

84. *See* Smith, *supra* note 2.

85. *See* Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1682 (2012) [hereinafter Balganesh, *Obligatory*] (concluding that in the case of copyright infringement, it "makes little difference for liability whether the copying was intentional, negligent, or a genuine mistake"); Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 356 (2002) (Infringement in copyright does not require "scienter, intent, knowledge, negligence, or similar culpable mental state. On the contrary, liability for civil copyright infringement is strict."). Although copyright infringement's status as a strict liability cause of action represents the conventional wisdom and current state of the law, it is not incontrovertible. For an argument questioning the conventional view, see generally Goold, *supra* note 74.

86. NB: A showing of willfulness can enhance statutory damages, but a lack of willfulness does not eliminate fault. *See* 17 U.S.C. § 504(c). It would appear that willfulness is not easy to demonstrate: despite plaintiffs alleging willful infringement in 81% of copyright-infringement suits brought, courts find willfulness in only 2% of cases. Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. 400, 407 (2019).

87. *See* Depoorter, *supra* note 86, at 411.

intentionally infringe a copyrighted work and not be held liable.[88] This is because a finding of liability for copyright infringement first requires a rights holder to affirmatively enforce against an alleged infringer, and—as the next Part of this Article will show—the decision whether to enforce does not necessarily correspond with whether an infringement has taken place. Bringing a claim for copyright infringement is also costly and time-consuming, and not all infringements justify the expense and resources.[89] Moreover, the pronounced subjectivity and variability of copyright's substantial similarity analysis—which is central to an infringement claim—adds uncertainty to the decisionmaking process.[90] As discussed further herein, some copyright owners actually benefit from infringement, such that nonenforcement is the more rational and efficient choice.[91]

Third, once a decision to enforce against an alleged infringer is made, the copyright owner must elect which remedy, or remedies, to seek. As an initial matter, a rights holder can generally seek an injunction to restrain further infringement.[92] As for damages, the owner of a registered copyright may elect, at any point prior to verdict, to recover either (1) actual damages and profits or (2) statutory damages.[93] To recover actual damages and profits, the plaintiff must show actual damages suffered as a result of the infringement, any profits of the infringer attributable to the alleged infringement, or both.[94] Although actual damages and profits require a showing of harm, statutory damages do not.[95] Notably, statutory damage awards can be quite steep, even in cases of unintentional infringement.[96] It should come as little surprise, then, that plaintiffs in copyright

88. For a plethora of examples, see Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 283–303 (2020).

89. This is especially true for two contrasting groups of copyright owners. On one end of the spectrum are owners of music copyrights, for whose infringement claims expert testimony is effectively required to succeed at trial. *See generally* Joseph P. Fishman & Kristelia García, *Authoring Prior Art*, 75 VAND. L. REV. 1159 (2022) (describing the underappreciated role of forensic musicologists in making or breaking music copyright-infringement claims). On the other end of the spectrum are small creators whose losses, even when proven, do not exceed the cost required to bring suit. This fact led to the creation of a Copyright Claims Board, an entity designed specifically to increase access to an adversary process for small creators without the resources to pursue costly litigation. For more details, see COPYRIGHT CLAIMS BOARD (CCB), https://www.ccb.gov (last visited Feb. 10, 2025).

90. For a detailed overview of the courts' treatment of substantial similarity in the United States, see generally Clark D. Asay, *An Empirical Study of Copyright's Substantial Similarity Test*, 13 U.C. IRVINE L. REV. 35 (2022) (describing the courts' treatment of the analysis as heterogenous).

91. *See infra* Section III.C.

92. 17 U.S.C. § 502.

93. *Id.* § 504. In order to recover statutory damages, the copyright in question must be registered with the Copyright Office, and liability will only accrue from the date of issuance of a registration. *See id.* § 412.

94. *See id.* § 504(b).

95. Depoorter, *supra* note 86, at 409; *see id.* § 504(c).

96. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) ("Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive."); *see also* Depoorter, *supra* note 86, at 407–08 (concluding that "remedy overclaiming in copyright"—e.g., requesting statutory damages—"serves strategic purposes").

infringement litigation requests statutory damages ninety percent of the time.[97] In addition, statutory damages may be augmented upon a showing of willfulness.[98] Finally, a successful rights holder can seek costs and attorney's fees as well.[99] Alternately, a copyright owner can forego statutory remedies altogether and instead seek to negotiate a retroactive license, another type of settlement, or even an alternate remedy vis-à-vis the alleged infringer.[100]

Finally, a copyright owner must also decide *when* to bring a suit for infringement. Section 507 of the Copyright Act calls for all civil actions for copyright infringement to be brought within three years of their accrual.[101] However, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Supreme Court held that laches would not bar a delayed suit for *ongoing* copyright infringement,[102] such as when a television show is still in syndication twenty years after its initial release. Then, in *Warner Chappell Music, Inc. v. Nealy*, the Court made two additional findings that are relevant here: first, it assumed that an action accrues upon discovery of the alleged infringement, and second, it clarified that damages for copyright infringement are not time-limited but instead are available for any timely claim.[103]

Like all private rights of action, the exclusive rights afforded to copyright owners allow them to take any one of several approaches in response to infringement: (1) they can elect to enforce the remedy provided for in the statute or common law;[104] (2) they can forbear from enforcing altogether, as Fleetwood Mac did; or, (3) in some (but not all) cases, they may be able to enforce a remedy other than the statutorily dictated one (i.e., they may privately negotiate a resolution that circumvents the statutory prescription).[105] And, like all holders of private rights of action, copyright owners are not required to explain their decision to bring (or not to bring) suit, nor do they have to explain any delay (if there is one) in bringing suit. Combined with the fact that statutory damages for copyright infringement do not require a showing of harm, it is not uncommon in copyright suits to have statutory wrongs without economic loss, as the next Section details.

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97. Depoorter, *supra* note 86, at 407.

98. *See* 17 U.S.C. § 504(c)(2).

99. *Id.* § 505.

100. Given the potential for very large statutory damage awards, settlements in copyright infringement suits are not uncommon. For a description of the threat statutory damages can present and the settlement they can induce, see Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1120 (2015) ("Statutory damages play a significant role in the profitability of copyright trolling. Without statutory damages, defendants might decide that their infringements are so trivial that the plaintiff will not bother to pursue them. They might decide to wait it out and take the risk. . . . The credible threat of damages as high as $150,000 makes any real risk of being found liable for copyright infringement intolerable for anyone who is not completely insolvent or staggeringly wealthy.").

101. *Id.* § 507(b).

102. *See* 572 U.S. 663, 668, 672 (2014).

103. *See* 601 U.S. 366, 371–72 (2024).

104. Because they were previously unprotected by federal law, sound recordings made before February 15, 1972 remain under state law protection rather than federal copyright protection. *See* U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTIONS FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 5 (2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf [https://perma.cc/A96U-22CL].

105. *See infra* Section III.A.3 for a discussion of how YouTube's Content ID supplants the statutory takedown-and-notice remedy for infringing material posted online.

### E. THE "WRONG OF COPYING"

Further recommending copyright as a case study in selective enforcement is the frequent exposure of copyright owners to wrongdoing that does not result in an economic loss. The next Part will discuss, among other examples, a copyright owner threatening to sue a politician with whose views they disagree for using their song even where its use has no impact on the owner's earnings.[106] In cases such as this, enforcement serves a purpose other than making the rights holder whole.

#### 1. Wrongs & Losses

The exclusive rights granted to copyright owners by the Copyright Act necessarily imply a correlative "duty not to copy" for everyone external to the copyright owner.[107] In this framing, the specific private right of action afforded to copyright owners is a prohibition on unauthorized copying (and subsequent distribution, display, performance, etc.) that establishes the "wrong of copying."[108] Any unmitigated act[109] that contravenes a copyright owner's exclusive rights constitutes copyright infringement.[110] In his commentary on Blackstone, Peter Birks described "Blackstone's scheme"—that is, our common law regime—as following a specific sequence: "[A] person . . . has certain rights. Those rights may be violated, so that he thereby suffers a wrong. If he suffers a wrong, the law will grant him an action, which will be the instrument by which he will obtain his remedy."[111] This description suggests that a wrong results from the violation of a right.

It's tempting to conflate wrongdoing with loss, especially in the copyright context. After all, copyright infringement is a strict liability action, and the unauthorized use of "Dreams" by Apodaca and TikTok most likely infringes Fleetwood Mac's copyright by committing the "wrong of copying." But infringement constitutes only *wrongdoing* on the part of Apodaca and TikTok and does not necessarily imply a corresponding *loss* for Fleetwood Mac. To the contrary, Fleetwood Mac arguably benefited from the infringement.[112]

Absent an observable decision to enforce on the part of the rights holder, it is further tempting to assume that there has been no infringement—that is, no wrongdoing—when in fact nonenforcement may be explained in any number of

106. *See infra* Section III.B.

107. The notion of correlative duties is well-documented in private law. In the tort context, for example, "[t]he defendant cannot be thought of as liable without reference to a plaintiff in whose favor such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's correlative obligation." Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 116 (2001).

108. Balganesh describes copyright as not only endowing copyright owners with exclusive rights but also, and more importantly, establishing a "duty not to copy" directed at potential infringers. *See* Balganesh, *Obligatory*, *supra* note 85, at 1666. He refers to this as the "wrong of copying," and I adopt that language here. *See id.* at 1666, 1671 (discussing copyright's "duty-imposing dimension" as essential to understanding its structure).

109. Possible mitigating factors include fair use, first sale, and other statutory or contractual exceptions to copyright infringement. *See supra* notes 81–84 and accompanying text.

110. 17 U.S.C. §§ 106, 501.

111. Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 5 (2000).

112. *See supra* notes 1, 5–10 and accompanying text.

ways: a lack of economic loss resulting from the wrong, *de minimis* infringement, a weak case, a likely fair use, or a lack of resources or know-how, among others. In other words, any unexcused violation of a copyright owner's statutory rights is a wrong, but not all of those wrongs are necessarily accompanied by loss or enforcement. In contrast, all losses stem from, and correspond to, wrongs. Thus, there can be a wrong without economic loss (or even with a benefit), but not a loss—be it economic or dignitary—without a wrong.

This Article proposes that while wrongdoing is determined by statute, a loss, in contrast, is determined *by the wronged party*. A rights holder who suffers an economic loss, especially a substantial one, may be more likely to enforce their rights and seek a remedy, but they don't have to. This is important because it means that a rights holder's decision to forbear from enforcing does not mean that a wrong wasn't committed—or even that an economic loss wasn't suffered; rather, it means only that a remedy was not pursued. In other words, the pursuit of a remedy stems from wrongdoing (and, potentially, from loss), but the nonpursuit of a remedy does not imply no wrongdoing (or an absence of loss).

If a songwriter declines to enforce against a musician who copied their hook without permission, it is still true that the copying musician committed copyright infringement—the "wrong of copying." Nathan Apodaca, for instance, committed the wrong of copying regardless of Fleetwood Mac's decision not to enforce. A wrong that is not enforced against an infringer is still a wrong, and we should not interpret nonenforcement as implying otherwise. Likewise, we can imagine a circumstance in which a songwriter loses licensing royalties to an infringer—i.e., suffers an economic loss—but at the same time lacks the resources, know-how, or both to pursue a claim for infringement. In that case, there would be both a wrong and an economic loss, regardless of whether a remedy is sought, and should not suggest otherwise.

But economic losses are not the only form of harm that an infringed rights holder may suffer. In an effort to discipline our terminology and to acknowledge a broader repertoire of injuries for which the law may provide a remedy, Birks introduced the concept of a "not-wrong" to refer to noneconomic loss: "When the cause of action is a not-wrong, the court is not being asked to remedy a wrong but to realize a primary right."[113] In other words, Birks shifts the focus from correction of a wrongful act on the part of the wrongdoer to recognition of an individual's primary right to not be wronged. The next Section identifies this primary right as dignitary and explores two not-wrongs exemplified in the copyright context: lossless wrongdoing and beneficial wrongdoing.

### 2. Lossless and Beneficial Wrongdoing

For reasons discussed herein, copyright owners are particularly susceptible to what I call "lossless wrongdoing" and "beneficial wrongdoing." For these purposes, lossless wrongdoing describes a situation in which a right is violated, but

113. Birks, *supra* note 111, at 25.

the rights holder does not suffer an economic loss; beneficial wrongdoing, meanwhile, describes a situation in which a right is violated, and the rights holder benefits in some way from the transgression. To be sure, the qualifier "lossless" here refers to the copyright owner; there may yet be a loss experienced by society at large, if, for example, it is deprived of prospective works that were disincentivized by the infringer's actions and so never come to be. As discussed, even in the case of economic loss, some copyright owners won't enforce for various reasons, including, among others, a lack of resources.[114] Since copyright owners are not required to explain their decisions to enforce or forbear, nonenforcement should be read only as "not seeking a remedy" and *not* as either "no wrong" or "no loss."

Some copyright owners may elect not to bring a claim—as the copyright owners in the Fleetwood Mac example did—not because they haven't suffered a wrong (recall copyright infringement is always a wrong, whether or not enforced against) but because they didn't suffer an economic loss (or at least, an actionable loss). Birks would say, then, that they have suffered a "not-wrong." This Article identifies "beneficial wrongdoing" as one type of not-wrong; in the copyright context specifically, we refer to a "beneficial infringement." In an instance of beneficial infringement, a copyright owner may elect not to enforce because whatever loss there is (if any)—for example, the lack of a licensing fee for Apodaca's sampling of "Dreams" as well as a streaming royalty from TikTok—is overshadowed by the benefit incurred by the rights holder. In this example, the benefit constituted the royalties owed to Fleetwood Mac on the millions of Spotify streams stemming directly from the viral popularity of Apodaca's video.[115] To be clear, copyright owners who experience a benefit as the result of infringement of their statutory rights have still been wronged. Their exclusive rights have still been infringed; it's just that the wrong suffered is of the dignitary—that is, the "not-wrong"—variety, as opposed to the standard economic wrong.

Several factors make copyright particularly susceptible to lossless and beneficial wrongdoing. First, in contrast to private rights holders who may hold multiple claims in other fields of law—for example, a pharmaceutical company with hundreds of patents—copyright owners often hold claims that, in the digital age, are not remunerative in nature. For example, the high school student who posts their friends dancing to a popular song on TikTok does not compete in the market with the song's owner nor meaningfully impact the owner's earnings. As described herein, the copying performed by the high school student is no less a wrong for its nonremunerative nature, but it hasn't deprived the song's owner of any commercial benefit either. Thus, it's a lossless wrong. Second, most copyrighted works enjoy something known as "network effects." A network effect refers to the increased value to a consumer that derives from other consumers enjoying the

114. *See supra* notes 85–92 and accompanying text.

115. For more examples of beneficial infringement, see generally García, *supra* note 88 and Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

same product or service.[116] Consumers are more likely to join the music streaming platform that their friends use, for example, so that they can exchange playlists and recommendations. Here, the network effect of other high schoolers seeing the TikTok video actually benefits the song's owner. In other words, it's a beneficial wrong.

The notions of lossless and beneficial wrongdoing in copyright are made possible by the fact that in the United States, copyrights are a creation of law as opposed to a natural right.[117] It follows that copyright infringement is *malum prohibitum*—that is, wrong because it is prohibited—and not *malum in se*—that is, morally or intrinsically wrong. This framing comports with what Balganesh has labeled the positivist view—namely, that copying is wrong not necessarily because it results in tangible loss, but "because it interferes with an individual's interest that is important enough to merit legal protection."[118] This is significant because it means that unlawful copying is always a wrong under the law, regardless of whether the act causes an actual loss to the rights holder, and regardless of whether the rights holder decides to enforce against the wrongdoer.[119] In other words, the unauthorized copyist is always a wrongdoer, but they are not always a loss-causer; the commission of a wrong is independent of the experience of a loss. Indeed, although private rights of action set a default assumption of no loss, this does not necessarily imply a concomitant assumption of no wrong, as the taxonomy in the next Part demonstrates.

## III. SELECTIVE ENFORCEMENT IN COPYRIGHT: A TAXONOMY

An especially complicated statute, together with a propensity for lossless and beneficial wrongdoing, the high cost of both detection and enforcement, and the pronounced uncertainty of infringement litigation, can lead wronged copyright

116. For more on the unique impact of network effects in the digital music context, see generally Matthew J. Salganik & Duncan J. Watts, *Leading the Herd Astray: An Experimental Study of Self-Fulfilling Prophecies in an Artificial Cultural Market*, 71 SOC. PSYCH. Q. 338 (2008) (empirically demonstrating network effects in music); Freda B. Lynn et al., *Is Popular More Likeable? Choice Status by Intrinsic Appeal in an Experimental Music Market*, 79 SOC. PSYCH. Q. 168 (2016) (finding that song popularity boosts the appeal of "low" quality songs); Giovanni Luca Ciampaglia et al., *How Algorithmic Popularity Bias Hinders or Promotes Quality*, 8 SCI. REPS. 1 (2018) (testing popularity bias in algorithms); and Duncan J. Watts & Peter Sheridan Dodds, *Influentials, Networks, and Public Opinion Formation*, 34 J. CONSUMER RSCH. 441 (2007) (exploring the impact of influencers in marketing).

117. *See* Balganesh, *Obligatory*, *supra* note 85, at 1664–65 (discussing the normativity of copyright law). Balganesh explains that copyright law's "exclusive rights framework functions almost entirely through its creation of an obligation not to copy original expression" and that "copyright can usefully be reconceptualized as revolving around the 'wrong of copying,' which originates in the right-duty structure that copyright creates." *Id.* at 1665. This conceptualization of copyright allows for both lossless and beneficial wrongdoing.

118. *Id.* at 1680.

119. Birks referred to causes of action without harmful effect as "not-wrongs." Birks, *supra* note 111, at 25. Instead of generating remedies as wrongs do, these not-wrongs were said to generate rights. *See id.* In hopes of streamlining the argument, I do not adopt Birks' distinction here, but note that the notion of a not-wrong aligns with my argument that lossless and beneficial harm—two categories that would arguably be classified as such—correlate to an author's right of autonomy regardless of harm. *See id.* at 27–37.

owners to make particularly varied enforcement decisions. The enforcement decision is generally made on a case-by-case basis,[120] thus rendering it necessarily selective.

The decision to enforce may be motivated by harm—be it economic or dignitary—stemming from an infringement or else by considerations largely or wholly unrelated to an infringement, such as the desire of a copyright owner to disassociate from a particular use of their work or the temptation of a quick settlement. In some cases, a copyright owner, or group of similarly situated copyright owners, has a change of heart or experiences a change in the market that leads them to enforce against an infringer or class of infringers where they had previously elected not to. When a sufficient time period of nonenforcement has passed, this delayed enforcement may face unique challenges, as detailed herein. Other copyright owners decline to enforce against infringements which bring more benefit than cost. Still other copyright owners take advantage of copyright's convoluted rules and potentially very steep damages[121] to manipulate prospective users into paying for uses that might otherwise be gratuitous under the statute.

There are likewise a number of reasons why a rights holder might *not* enforce. For one, enforcement is not costless. The cost of litigation can be significant, even prohibitive.[122] In some cases, there may be a relational explanation for nonenforcement, such as when a more popular, or "superstar," artist copies from a lesser-known one. In such a case, the lesser-known artist might decline to pursue an infringement claim against the superstar artist in hopes of currying favor with someone who might help their career in the future or because the use of their work in the superstar artist's work proves to be great (and free) promotion for the lesser-known artist. In other cases, a copyright owner may fail to enforce because allowing the infringement is the lesser of two evils,[123] enforcement would run counter to relevant norms and customs,[124] or they simply aren't aware of the infringement. The litigation over Andy Warhol's "Orange Prince" is a good

120. *But see infra* Section III.A.3's discussion of algorithmic enforcement, in which the enforcement decision is made by default instead.

121. *See supra* notes 94–98 and accompanying text.

122. *See supra* note 89 and accompanying text.

123. *See infra* Section III.C.1.

124. For example, until relatively recently, celebrity tattoo artists traditionally engaged in wholesale waiver of their rights (such as they were) vis-à-vis video game developers. This state of affairs was first challenged unsuccessfully in a 2012 suit brought by an Arizona-based tattoo artist named Carlos Escobedo against video game developer THQ, maker of the UFC Undisputed series, for its unlicensed depiction of a lion tattoo that he inked on UFC Welterweight Champion Carlos Condit. *See* Escobedo v. THQ Inc., No. 12CV2470, 2013 WL 11089002, at *1 (D. Ariz. Dec. 11, 2013); Compl. at *2–4, Escobedo v. THQ Inc., No. 12CV02470, 2012 WL 5815742 (D. Ariz. Nov. 16, 2012). A handful of similar cases has followed, with varying (and uniformly unimpressive) outcomes. *See, e.g.*, Hayden v. 2K Games, Inc., No. 17CV2635, 2024 WL 4336945 at *1, *7 (N.D. Ohio Aug. 22, 2024) (finding video game defendants have an implied license to depict plaintiff's tattoos in games). It remains to be seen how courts will find on the additional defenses of *de minimis* use and fair use. One thing is clear, however: the tattoo industry's long-standing norm of not enforcing its copyrights (if it has any) is not easily undone.

example of the third scenario. According to court filings in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, Warhol created "Orange Prince" as one of thirteen silkscreens based on Lynn Goldsmith's photograph of the artist Prince in or around 1984.[125] Goldsmith did not learn about the existence of "Orange Prince" until she saw it on a Vanity Fair magazine cover in 2016, at which time she notified the Andy Warhol Foundation that it had infringed her copyright.[126] Prior to that time, Goldsmith could be said to have engaged in "non-enforcement by default" owing to information costs.

The taxonomy presented here offers a nonexhaustive account of three distinct categories of copyright enforcement decisions: (1) strategic enforcement, which includes copyright owners enforcing their rights if and when the benefits outweigh the costs, or when a quick settlement is likely; (2) dignitary enforcement, which encompasses lossless wrongdoing; and (3) beneficial nonenforcement, which accounts for beneficial wrongdoing. In short, this Part demonstrates that, contrary to received wisdom, private enforcement decisions in copyright do not necessarily correlate to economic loss at all.

### A. STRATEGIC ENFORCEMENT

As with other private rights holders, copyright owners are generally strategic when it comes to enforcement.[127] This means that they are more likely to pursue claims with a higher likelihood of success and less likely to pursue claims with lower odds of success or against counterparties with whom they have a symbiotic —or prospectively symbiotic—relationship. By that same token, they are less likely to enforce smaller-value claims and more likely to enforce larger-value claims. This Section presents examples of three types of strategic enforcement: manipulative, delayed, and algorithmic.

#### 1. Manipulative Enforcement

Copyright law is complicated and convoluted. For one thing, copyright infringement is determined using a highly subjective "substantial similarity" test.[128] In addition, the affirmative defense of fair use is determined under a highly subjective four-part test.[129] Moreover, the range of statutory damages for copyright infringement

125. 598 U.S. 508, 516–18 (2023).

126. *Id.* at 518–19, 522.

127. For an overview of strategic enforcement decisionmaking more broadly, see generally Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010) (describing different examples of strategic enforcement and considering its appropriateness in different situations).

128. *See*, *e.g.*, Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1162–65 (9th Cir. 1977) (describing the Ninth Circuit's approach to determining substantial similarity, which differs from that of other circuits). For a discussion of the challenges associated with analyzing substantial similarity, see Asay, *supra* note 90, at 46–48.

129. *See supra* note 78 and accompanying text.

is incredibly large and unpredictable.[130] All of these factors combine to make the threat of copyright enforcement a powerful one and a risk that many prospective users can't afford to take. Copyright owners understand this, and some use it to manipulate alleged infringers into financial compliance, behavioral compliance, or both.

One example that hits close to home for this author involves a copyright licensing entity called Copyright Clearance Center (CCC). CCC was created at the same time that the current Copyright Act was passed and has been helping small businesses and individuals navigate the tricky path of copyright licensing since January 1, 1978.[131] However, in addition to licensing copyrighted works to businesses and filmmakers, among others, CCC markets its services to individuals and institutions in academia.[132] On its website, CCC advertises an annual license for higher education, an annual license for K-12, an annual license for student assessments, and pay-per-use licenses for educators.[133] This would seem to suggest that a license is required for educators who want to utilize copyrighted materials in their classrooms. But that proposition is not necessarily true. The Copyright Act provides two exceptions related to education, the first of which is § 110. Sections 110(1) and 110(2) allow educators to show images and excerpts and to play video and audio from copyrighted works in their classrooms without permission or payment.[134] The second is fair use, which provides broader exceptions—the making and distribution of copies, for example—for criticism and comment,[135] two common academic uses of copyrighted works. Notably, CCC's marketing materials do not mention either of these exceptions,[136] potentially leading risk-averse teachers and institutions to license materials that they are entitled by statute to use for free.

Another example of manipulative enforcement—more proactive than CCC's failure to disclose—involves museums claiming copyright in photos they've taken of artworks in the public domain.[137] Some museums have taken the position that their photographs of public domain works are themselves copyrighted, such

130. *See* Samuelson & Wheatland, *supra* note 96, at 441.

131. *See* COPYRIGHT CLEARANCE CENTER, INC., WRITTEN COMMENTS CONCERNING STRATEGIC PLAN FOR RECORDATION OF DOCUMENTS 1–2 (2014), https://www.copyright.gov/docs/recordation/comments/79fr2696/CCC.pdf [https://perma.cc/883B-FBHJ].

132. *Id.* at 2.

133. *Solutions for Academia*, COPYRIGHT CLEARANCE CTR., https://www.copyright.com/markets-academia [https://perma.cc/5H7Y-L9PT] (last visited Feb. 11, 2025).

134. 17 U.S.C. § 110(1)–(2).

135. *Id.* § 107.

136. *See Solutions for Academia*, *supra* note 133.

137. Grischka Petri, *The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art*, J. CONSERVATION & MUSEUM STUD., Aug. 2014, at 1, 1. For the avoidance of doubt, works in the public domain are free to use by all. The photos referenced here are flat, artless photos intended to identify a particular artwork and are often referred to as "slavish copies." *See, e.g.*, *id.* at 7 (defining slavish copies as "reproductive photographs of two-dimensional works of art [that] are meant to be exact or identical"). The situation might be different if the photographs of public domain works were themselves "artistic" in some way. *See id.* at 6.

that if others wish to use those photographs, they must obtain a license.[138] And those licensing fees can be hefty—sometimes prohibitive.[139] In addition to countering copyright's goal of benefiting the public (by effectively pulling images of artworks out of the public domain), this practice directly conflicts with the holding in a 1998 decision by the District Court for the Southern District of New York. In *Bridgeman Art Library, Ltd. v. Corel Corp.*, the court held that the Bridgeman Art Library's photographs of two-dimensional public domain works were not sufficiently original to obtain copyright protection.[140] This has not stopped even prominent collections such as The Frick Collection from seeking to license their "slavish copies" of public domain works.[141]

2. Delayed Enforcement

Sometimes a copyright owner will decide to enforce after a lengthy period of nonenforcement because changed circumstances suddenly make the benefits outweigh the costs—for example, upon the development of a newly lucrative market or upon removal of a regulatory barrier. Unsurprisingly, such a change of heart frequently encounters friction in a market that has grown accustomed to a different approach to enforcement. In the case of a prolonged period of nonenforcement, a norm can form whereby parties operating within an industry come to understand, or expect, that a particular practice or behavior will not be enforced against. As the example presented herein demonstrates, when a copyright owner

138. *See* Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 795, 831 (2015) (making the case that museums who encumber photographic images of original art in their collections with license restrictions overstep copyright protection in doing so).

139. *See* Bernard Starr, *Must You Pay to Use Photos of Public Domain Artworks? No, Says a Legal Expert*, HUFFPOST (Nov. 12, 2012), https://www.huffpost.com/entry/museum-paintings-copyright_b_1867076 [https://perma.cc/5C38-Y6JG] ("To pay licensing fees – many of which are sometimes exorbitant – can be prohibitive, and may even result in authors deciding not to use images.").

140. 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998). In determining copyrightability of the photographs, the court in this case applied UK copyright law, which (like U.S. copyright law) has a low originality threshold. *See* Miryam Boston, *Originality in the UK Means "the Author's Own Intellectual Creation" Including for Software Generated Works – the Debate Is Over (. . .for Now)*, FIELDFISHER (May 14, 2024), https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/originality-in-the-uk-means-the-author-s-own- intellectual-creation-including-for-software-generated-works-%20the-debate-is-over-for-now.

141. For a list of The Frick Collection's licensing types and fees, see *Terms and Conditions for Reproduction of Images and Objects*, FRICK COLLECTION, https://www.frick.org/about/copyright/terms [https://perma.cc/Z7HV-QRLK] (last visited Feb. 11, 2025). For more on how museums might handle this differently, see Sophia Cianfrani, *Museums' Right to License Images in the Public Domain,* N.Y.U. PROC. (Oct. 4, 2023), https://proceedings.nyumootcourt.org/2023/10/museums-right-to-license-images-in-the-public-domain [https://perma.cc/3XHE-3C4U]. Relatedly, the music industry practice of extending "interpolation credits" to an artist whose music may ostensibly have influenced the music of another artist (but was not actually copied by the latter) to prevent an infringement claim is an example of a coordinated response to manipulative enforcement by artists who subtly or not so subtly signal a threat of infringement, regardless of merit. For more on this practice, see Kristelia García, *The Emperor's New Copyright*, 103 B.U. L. REV. 837, 869–72 (2023) (discussing the rise in interpolation credits) and Mark A. Lemley, *Authoring While Dead*, COLUM. J.L. & ARTS (forthcoming) (on file with author) (same).

has a change of heart and decides to enforce in contradiction to the status quo, they may have to do so through the courts.[142]

A (very) brief primer on music copyright is helpful in understanding this example. In music, all songs enjoy the protection of two distinct copyrights: one on the music you hear (the sound recording)[143] and one on the underlying musical composition (the written notation).[144] For both of these copyrights, there is a concomitant "performance right" that gives a licensee the right to perform—i.e., to play—a song publicly.[145] Performance rights can be further broken down into terrestrial and digital.[146] The latter—digital performance rights—are invoked for audio streams on platforms such as Spotify and Pandora.[147] When it comes to musical content, then, streaming platforms pay one royalty to the owner of the copyright on the sound recording (usually a record label) and another to the owner of the copyright on the musical composition (usually a publishing company). These owners are typically distinct. In music, public performance royalties for musical compositions are consolidated and licensed, as well as collected by, performance rights organizations (PROs).[148]

In addition to music, many streaming platforms such as Spotify and Pandora offer subscribers so-called "spoken word content," including podcasts and stand-up comedy. Like music, this content typically encompasses both an aural and a written component. Furthermore, jokes performed in stand-up routines are likewise protected by two distinct copyrights: one on the recorded audio of the stand-up routine, and one on the written jokes performed in the routine. Unlike music,

142. That some copyright owners are able to engage in (significantly) delayed enforcement at all may seem counterintuitive given statutes of limitation. However, as discussed in detail *infra* Section IV.B.1, the courts have determined that the statute of limitations for copyright infringement does not begin to toll while infringement is ongoing.

143. 17 U.S.C. § 102(a)(7).

144. *Id.* § 102(a)(2). Colloquially referred to as "sheet music," a musical composition can range from a formally notated work to an informal transcription or approximation of a musical work. *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES: CHAPTER 1600: PREREGISTRATION § 1603.3 (3d ed. 2021), https://www.copyright.gov/comp3/chap1600/ch1600-preregistration.pdf [https://perma.cc/J3MV-VE24]. The latter is known as a "lead sheet." *See Lead Sheets: 4 Elements of a Lead Sheet*, MASTERCLASS (Apr. 14, 2022), https://www.masterclass.com/articles/lead-sheets. Both are "musical compositions."

145. Section 106(4) of the Copyright Act covers performances of musical compositions, while § 106(6) covers performances of sound recordings. *Id.* §§ 106(4), 106(6).

146. Section 106(6) of the Copyright Act establishes a performance right for digital sound recording performances only. *Id.* § 106(6). Terrestrial performances of sound recordings (e.g., on AM/FM radio) are not royalty bearing.

147. *See id.* § 114(d).

148. *See What Is a Performing Rights Organization (PRO)?*, SESAC (May 5, 2022), https://www.sesac.com/what-is-a-performing-rights-organization-pro [https://perma.cc/9GUM-TAYF]. The two largest of these PROs are ASCAP and BMI. *See* Henry Schoonmaker, *A Guide to Key Pay Sources in the United States: ASCAP, BMI, GMR, HFA, SESAC, the MLC*, SONGTRUST: BLOG (Dec. 11, 2023), https://blog.songtrust.com/guide-to-usa-pros [https://perma.cc/PE6E-72N6]. Both operate under consent decree. *See* Jen Aswad, *Justice Department Leaves Music Industry Consent Decrees Unchanged*, VARIETY (Jan. 15, 2021, 12:23 PM), https://variety.com/2021/music/news/justice-department-music-consent-decrees-unchanged-1234886620 [https://perma.cc/PMG5-SWEJ]. SESAC and GMR are significantly smaller and operating under an invite-only business model. *See* Schoonmaker, *supra*.

however, when it comes to comedic content—at least for the last decade or so, since audio streaming services debuted in the United States and began offering stand-up routines to subscribers—streaming platforms have only ever paid a royalty to the owner of the copyright on the recorded audio of stand-up routines. No royalty has ever been paid—and, notably, no royalty has ever been sought—for the underlying literary work (in this case, the written jokes). In other words, the owners of the copyrights in written jokes have opted, up until recently, not to enforce their right to command a royalty payment for the use of their copyrighted works by streaming platforms or to sue for copyright infringement. Instead, they have engaged in a private waiver of those rights vis-à-vis all content streaming services.[149]

Why? Although it's true that comedic writers have traditionally not been as well advised as musicians and that comedy has (until very recently) lacked the collective licensing entities that exist in music,[150] the simplest and most convincing explanation is that there simply wasn't much money in it before now. Streaming took a while to take off in the U.S. market, and even when it did, the focus was on recorded music. Today, however, the exponential growth in the number of streaming subscribers, combined with the growing popularity of comedy, has changed the calculus.[151] Because there was previously little to nothing to gain from costly infringement litigation, comedic rights holders never sought royalties from the use of, or damages for the infringement of, written comedic works, and the streaming services never paid for their use of those works.

This all changed in early 2022 when, after more than a decade of nonenforcement, some of these comedic rights holders collectively decided to enforce their statutory right to a licensing royalty against the streaming platforms. Negotiations between Spoken Giants and Word Collections—two newly formed collective licensing entities geared specifically toward comedy—and the streaming platforms ensued.[152] When those talks ultimately proved unsuccessful, the streaming platforms responded by

149. *See* Defendant and Counterclaimant Pandora Media, LLC's Counterclaims to Plaintiff's Amended Consolidated Complaint Against All Plaintiffs/Counterclaimant Defendants at 1–2, *In re* Pandora Media, LLC, No. 22CV00809, 2022 WL 19299126 (C.D. Cal. Oct. 26, 2022) [hereinafter Pandora's Counterclaims] ("No comedian ever sought to raise the price to Pandora by separately licensing or charging an additional royalty for any rights in the 'literary works'—*i.e.*, jokes—underlying the licensed recordings. . . . Comedians were clearly satisfied with this long-standing custom and practice—one that predates Pandora by many decades—as demonstrated by the fact that they and their representatives regularly reached out to Pandora in order to secure more plays of their recordings.")

150. *See* Daniel Kreps, *Comedy Albums by John Mulaney, Patton Oswalt Removed from Spotify Amid Royalties Battle*, ROLLING STONE (Dec. 4, 2021), https://www.rollingstone.com/culture/culture-news/comedians-spotify-removal-royalties-1267048 [https://perma.cc/89L5-47JP] (quoting Spoken Giants' CEO Jon King as saying, "There wasn't much to collect before. Now it's a completely different world where a Gaffigan or a Mulaney have billions of performances across these platforms. It now makes sense for a collective licensing business.").

151. *See, e.g.*, Elahe Izadi, *How TikTok and Instagram Supercharged Stand-Up Comedy*, WASH. POST (Jan. 5, 2024, 6:00 AM), https://www.washingtonpost.com/entertainment/2024/01/05/tiktok-comedy-instagram-stand-up (discussing social media's boon for comedians).

152. *See* Dan Reilly, *Inside the Extremely Unfunny War Between Comedians and Spotify*, VULTURE (Dec. 7, 2021), https://www.vulture.com/2021/12/comedians-spotify-dispute-spoken-giants.html.

promptly removing hundreds of prominent comedians' content from their platforms.[153] This predictably led to the filing of a series of lawsuits, ultimately consolidated, by popular comedians (or their estates) alleging copyright infringement by the streaming platform Pandora.[154]

Pandora responded with an antitrust counterclaim.[155] As of this writing, the litigation is ongoing. It's safe to say that the plaintiffs' decision to change course and begin enforcing a private right of action that they had always previously waived has not been smooth. To the contrary, the comedians' delayed enforcement decision has so far required the establishment of a new royalty collection infrastructure as well as litigation—both very costly endeavors.

3. Algorithmic Enforcement

Some copyright owners who hold rights to lots of different works—for example, music labels who hold the copyright on many thousands of sound recordings—act strategically in outsourcing enforcement that might otherwise be too costly or too futile to an algorithm. This typically entails establishing a set of criteria, or parameters, for when the algorithm should enforce and when it shouldn't, resulting in a presumably uniform, if wholly opaque, enforcement decision vis-à-vis an entire category of alleged infringers. For companies that deal with a large volume of prospective infringers, voluminous instances of infringement across a large catalog of copyrighted works, or both, algorithmic enforcement can be a cost-effective means of dealing with a previously unmanageable task—namely, playing notice-and-takedown "whack-a-mole" with users who upload infringing content to streaming platforms. The example described herein features a class of copyright owners who not only engage in algorithmic enforcement but also meaningfully change what their remedy looks like by replacing the statutory remedy with a private one.

When it comes to remedies for copyright infringement, the Copyright Act gives rights holders the option of seeking—in addition to an injunction, where

153. *See* Kreps, *supra* note 150 (discussing the takedowns as a result of failed negotiations).

154. *See* Consolidated Complaint for Copyright Infringement at 32–33, *In re* Pandora Media, LLC, No. 22CV00809, 2022 WL 19299126 (C.D. Cal. Oct. 26, 2022) (making a claim for copyright infringement on behalf of multiple comedians and/or their estates).

155. Pandora's Counterclaims, *supra* note 149, at 16–17. Plaintiffs responded to the counterclaim with both a motion to dismiss and a Rule 11 motion for sanctions stemming from Pandora's alleged "fundamental misrepresentations" and "frivolous legal contentions." Counterclaim Defendant Spoken Giants, LLC's Notice of Motion and Motion to Dismiss Pandora Media, LLC's Counterclaims and for Judicial Notice: Memorandum of Points and Authorities in Support Thereof at 2, *In re* Pandora Media, LLC, No. 22CV00809, 2022 WL 19299126; Rule 11 Motion for Sanctions at 7, 11, *In re* Pandora Media, LLC, No. 22CV00809, 2022 WL 19299126. A district court judge for the Central District of California granted the motion to dismiss the counterclaim on April 5, 2023, though he did not impose sanctions on Pandora. Order re: Counterclaim Defendant Spoken Giants, LLC's Motion to Dismiss Counterclaim Plaintiff Pandora Media, LLC's Counterclaims; Counterclaim Defendant Word Collection, Inc.'s Motion to Dismiss Counterclaim Plaintiff. Pandora Media, LLC's Counterclaims; Counterclaim Defendants' Motion for Sanctions Against Counterclaim Plaintiff Pandora Media, LLC; Counterclaim Defendants' Motions for Joinder at 26, 28, *In re* Pandora Media, LLC, No. 22CV00809, 2022 WL 19299126.

appropriate—either actual damages and/or profits or statutory damages.[156] With statutory damages ranging from $750 per infringement for accidental infringement to $150,000 per infringement for willful infringement,[157] the consequences of being found to have committed copyright infringement—a strict liability offense—can be quite steep.[158] Platforms such as YouTube that allow user-generated content (UGC) to be uploaded to their sites invariably host significant amounts of infringing content and so potentially face significant secondary liability for copyright infringement.[159] For their part, copyright owners face equally significant challenges in trying to counter an incredibly large volume of potentially infringing content stemming from a particularly diffuse set of potential infringers. As the internet has continued to grow, so too have these challenges.

In 1998, Congress amended the Copyright Act to include an infringement safe harbor[160] designed to do two things: first, to allow platforms such as YouTube that host UGC to operate without the constant threat of crippling copyright infringement liability;[161] and second, to streamline the process of reporting infringement for copyright owners.[162] In order to take advantage of the safe harbor, a platform has to establish a system for accepting notices of infringement from copyright owners as well as a process by which they promptly take that content down.[163] YouTube dutifully did so, only to find itself inundated with takedown notices.[164] Of course, even the army of employees hired by YouTube to respond to all of the takedown notices couldn't actually *keep* the content down. Many users simply re-posted removed content, and some even posted additional infringing content for good measure.[165] In short, enforcement under the statutory

156. *See supra* notes 93–94 and accompanying text.

157. 17 U.S.C. § 504(b)–(c).

158. *See supra* notes 96, 130 and accompanying text.

159. Although the Copyright Act doesn't expressly contemplate secondary liability for infringement, the case law has made clear that copyright owners may pursue a claim of secondary liability as a way to enforce their exclusive rights. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) ("[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individual accountable for the actions of another.").

160. 17 U.S.C. § 512.

161. *See, e.g.*, S. REP. NO. 105–190, at 2 (1998) (citing, among other aims, Congress's intent "to make digital networks safe places to disseminate and exploit copyrighted materials").

162. *See* 17 U.S.C. § 512(c)(2)–(3).

163. *See id.* §§ 512(c)(1)(A)(iii), 512(c)(2).

164. The latest transparency report released by Google, YouTube's parent company, offers a running tally of takedown notices received, a number exceeding ten billion as of this writing. *Content Delistings Due to Copyright*, GOOGLE: TRANSPARENCY REP., https://transparencyreport.google.com/copyright/overview [https://perma.cc/X7VV-MA42] (last visited Feb. 11, 2025). This number includes Content ID claims. *See id.*

165. *See* U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 81, 96–97 (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf [https://perma.cc/935G-HFQD] [hereinafter SECTION 512]. Recent upgrades to YouTube's platform allow content owners who have filed a takedown notice to see a record of how many times users have tried to repost the flagged video. *See Prevent Reuploads of Removed Videos*, YOUTUBE HELP, https://support.google.com/youtube/answer/10298392?hl=en [https://perma.cc/EQ9L-N67S] (last visited Mar. 22, 2025).

safe harbor is not only time-consuming and expensive, but also not particularly efficient.[166]

Eventually, YouTube and the (understandably very unhappy) major copyright owners—companies such as Universal Music, Paramount Pictures, and the like—reached a private agreement in which the content owners would outsource copyright infringement enforcement to a bot developed by YouTube.[167] Under this agreement, select copyright owners upload their copyrighted content to a bot that continually crawls the YouTube website looking for matches between the officially uploaded content and user-uploaded content.[168] This private arrangement is called "Content ID" and it—not the statutory safe harbor—governs the relationship between YouTube and major copyright owners today.[169]

When Content ID's bot makes a match, a copyright owner is initially presented with the same enforcement decision that it faces under the § 512(c) statutory scheme: it can opt to have the allegedly infringing video taken down, or not.[170] If that were the end of the story, the bot would be little more than an infringement identification tool—helpful, perhaps, but not especially so. Under the statutory scheme, the content owner still has to evaluate each identified video to determine whether it infringes and, importantly, to decide whether they want to enforce a takedown. And this is where the first of Content ID's real innovations comes in: it saves copyright owners a lot of time and money by allowing them to make one default enforcement decision up front and apply it across the board. In other words, under Content ID, a copyright owner doesn't need to make a discrete determination regarding whether to expend the time and effort required to identify potentially infringing videos on a case-by-case basis (nor, indeed, to conduct an analysis to determine whether an identified video actually infringes or possibly qualifies for some statutory exception such as fair use).[171] The copyright owner

166. For more about the arguments in favor of and against § 512's notice-and-takedown procedure, see SECTION 512, *supra* note 165, at 1 (reporting both online service providers' insistence that the safe harbor is "a success" and rights holders' frustration with the whack-a-mole problem before concluding that the system's "intended balance ha[d] been tilted askew").

167. For more on the history leading up to the development of Content ID, see Geraldine Fabrikant & Saul Hansell, *Viacom Asks YouTube to Remove Clips*, N.Y. TIMES (Feb. 2, 2007), https://www.nytimes.com/2007/02/02/technology/02cnd-tube.html (noting, among other things, Viacom's "militant and public" demand that YouTube remove hundreds of thousands of infringing videos).

168. *See How Content ID Works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl=en [https://perma.cc/92DD-CBYB] (last visited Feb. 11, 2025).

169. Meta, the parent company of Facebook and Instagram, has built a comparable matching algorithm that it calls Rights Manager. *See Rights Manager*, META, https://rightsmanager.fb.com [https://perma.cc/DED2-JY95] (last visited Feb. 11, 2025). The two programs work sufficiently similarly that this Section will focus only on Content ID for simplicity's sake, but the analysis provided here is equally applicable in the context of Rights Manager.

170. *See* 17 U.S.C. § 512(c)(3).

171. For the avoidance of doubt, Content ID signatories—namely, YouTube and the major content owners—forego the statutory safe harbor and so are not beholden to its requirements. One of those requirements is that a content owner must conduct a fair use analysis before issuing a takedown notice. *See* Lenz v. Universal Music Corp., 815 F.3d 1145, 1148 (9th Cir. 2016) (holding that "the statute requires copyrights holders to consider fair use before sending a takedown notification"). This requirement ensures that platforms aren't removing content that doesn't actually infringe (since fair use

can simply tell the algorithm, for example, to automatically take down all matches. In this way, the determination of whether there is anything to enforce against in the first place is outsourced to the algorithm, and the validity of that determination turns on the accuracy of the algorithm (which in turn depends on the parameters it is programmed with).[172]

Content ID's other significant innovation is its introduction of a private remedy that replaces the statutory one. Whereas the statutory safe harbor gives copyright owners a binary choice of remedies—to take the content down or leave it up (i.e., to enforce or not enforce)—Content ID introduces a third option: to leave the video up and claim all of the advertising revenues earned on its page.[173] Unsurprisingly, the overwhelming majority of participating copyright owners have opted for the latter as a matter of default.[174] Why expend precious resources playing whack-a-mole when you can make money with the checking of a box?

### B. DIGNITARY ENFORCEMENT

Sometimes a rights holder's decision to enforce stems from dignitary, as opposed to economic, harm. Some copyright owners utilize enforcement (or the threat of enforcement) to express something about themselves or others notwithstanding a lack of economic loss. In such a case, the decision to enforce (or at least to appear to enforce) can serve a predominantly performative function. These copyright owners are motivated by public perception and reputational interests, and seek not to be made whole, but rather to make a statement or reinforce their right to a remedy notwithstanding the absence of economic loss.

From Bruce Springsteen[175] to Dr. Dre[176] to Aerosmith,[177] musicians have long wielded their copyrights against politicians with whose political views they

is a statutory exception to copyright infringement). But because Content ID participants—beneficiaries of YouTube's partial waiver of the safe harbor—have circumvented the statute, they aren't bound by this requirement. As a result, they regularly and continually earn revenues on claimed videos that don't actually infringe because they are fair use. *See Frequently Asked Questions About Fair Use*, YOUTUBE HELP, https://support.google.com/youtube/answer/6396261?hl=en#zippy=%2Chow-does-content-id-work-with-fair-use [https://perma.cc/UCV4-LDX7] (last visited Mar. 23, 2025).

172. For a discussion of Content ID's "false positives" problem, see generally Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51 (2017).

173. *See How Content ID Works*, *supra* note 168.

174. Jacca-RouteNote, *YouTube Content ID Blew Up in 2023, and It's Great for Artists*, ROUTENOTE BLOG (Mar. 4, 2024), https://routenote.com/blog/youtube-content-id-blew-up-in-2023-and-its-great-for-artists [https://perma.cc/VL8X-V4YK] (observing that "[n]early 1 billion claims were made in the first half of 2023, with rightsholders choosing to monetize more than 90% of all Content ID claims on YouTube").

175. Springsteen objected to Ronald Reagan's use of "Born in the U.S.A." during his 1984 reelection campaign. *See* Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians over Their Music*, ROLLING STONE (July 8, 2015), https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611 [http://perma.cc/F4J8-N87C]; Kurt Loder, *The Rolling Stone Interview: Bruce Springsteen on 'Born in the U.S.A.'*, ROLLING STONE (Dec. 7, 1984), https://www.rollingstone.com/music/music-news/the-rolling-stone-interview-bruce-springsteen-on-born-in-the-u-s-a-184690 [https://perma.cc/67BM-WNXT].

176. Dr. Dre issued both a cease-and-desist letter and a copyright takedown request to Twitter (now known as X) when Marjorie Taylor Greene used his song "Still D.R.E." *See* Isaiah Poritz, *Dr. Dre,*

disagree.[178] Politicians on the campaign trail frequently play music during their rallies and speeches. Because this can give the impression that the musician endorses, approves of, or is somehow otherwise affiliated with the candidate or their message, it is not uncommon for musicians to send an offending politician a cease-and-desist letter demanding they stop using the music "or else." The argument is typically based on either copyright law—i.e., "you don't have the legal right to publicly perform my song"[179]—or trademark law—i.e., "by using my song, you are giving the public an illegally false impression of my endorsement," or both.[180]

In some cases, the targeted campaign respects the demand and stops playing the song.[181] In other cases, the campaign ignores the request or argues that it has the right to play the song under some preexisting license.[182] Conventionally, at least from the perspective of copyright law, this has often proved true. Venues with the capacity to host a political rally, such as a sports arena, are likely to possess a blanket performance rights license allowing the music to be performed in the venue.[183] Some campaigns are even able to secure blanket licenses for themselves to perform music at various venues.[184] In either case, this means that many political campaigns' use of recorded music is legal, even if disfavored.

In the last decade, however, the divisive nature of contemporary politics, combined with politicians' proclivity for using music at public events, has prompted an important change to the status quo in which standard blanket licenses cover political events. As of this writing, the nation's two largest PROs—ASCAP and BMI[185]—have each instituted proprietary versions of a blanket license specific to political campaigns and other political uses that individual songwriter-members

*Greene Feud over Music Copyright in Politics: Explained*, BLOOMBERG L. (Jan. 11, 2023, 5:05 AM), https://news.bloomberglaw.com/ip-law/dr-dre-greene-feud-over-music-copyright-in-politics-explained.

177. Aerosmith frontman Steven Tyler sent multiple cease-and-desist letters ordering Donald Trump to stop playing the band's music during his rallies. *See, e.g.*, Daniel Kreps, *Steven Tyler Sends Trump Cease-and-Desist Letter for Playing Aerosmith*, ROLLING STONE (Aug. 22, 2018), https://www.rollingstone.com/music/music-news/steven-tyler-sends-trump-cease-and-desist-letter-for-playing-aerosmith-at-rally-714395 [https://perma.cc/ABM7-NX7Q].

178. *See generally* Chao, *supra* note 175.

179. *See* 17 U.S.C. § 106(6).

180. *See* Lanham Act, 15 U.S.C. § 1125.

181. For example, when Bobby Ferrin asked George H.W. Bush to stop using "Don't Worry, Be Happy," the campaign obliged. Chao, *supra* note 175.

182. For example, when the Foo Fighters condemned John McCain over his campaign's use of "My Hero," his campaign insisted they had complied with copyright law and obtained all the appropriate licenses. Chao, *supra* note 175.

183. For more on the various types of licenses venues can obtain through a licensing collective, see *ASCAP Music Licensing*, ASCAP, https://www.ascap.com/help/ascap-licensing/why-ascap-licenses-bars-restaurants-music-venues [https://perma.cc/RJ7F-SLJS] (last visited Feb. 11, 2025).

184. *See, e.g.*, *Music Licensing for Political Entities or Organizations*, BMI, https://www.bmi.com/licensing/entry/political [https://perma.cc/AS9D-34YR] (last visited Feb. 11, 2025).

185. *See What Is a Performing Rights Organization (PRO)?*, *supra* note 148.

can opt out of.[186] These licenses allow members to notify the PRO of the songs they seek to withdraw from political uses, at which point the PRO notifies the campaign of those songs' exclusion.[187] It is unclear whether the cost of the political license varies with the number of opt-outs (which itself may vary depending on the campaign).

There is currently no definitive empirical evidence of economic loss suffered by objecting musicians stemming from the use of their music by unsavory political candidates.[188] Instead, copyright owners engaged in performative enforcement believe it is important to publicly decry any perceived association with a disfavored politician to protect their reputations;[189] their loss, such as it were, is strictly dignitary. Where a copyright owner perceives a reputational boost, in contrast, from association with certain persons or causes, they may elect not to enforce vis-à-vis that infringer. For example, when Barack Obama spontaneously sang a line of Al Green's song "Let's Stay Together" at a fundraiser in 2012, Green's response was "I think he nailed it . . . I was thrilled that the President even mentioned my name."[190] Because it's highly likely that the venue at which Obama spoke was licensed,[191] the public nonenforcement was strictly performative.

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186. BMI, MUSIC LICENSE FOR POLITICAL ENTITIES OR ORGANIZATIONS § 2(A), https://deadline.com/wp-content/uploads/2020/06/political-entities_pol1.2019.pdf [https://perma.cc/53C2-BMH3] (last visited Mar. 23, 2025); *see* ASCAP, POLITICAL CAMPAIGN LICENSING FAQ 2, https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf [https://perma.cc/JB2U-L4MQ] (last visited Mar. 23, 2025.

187. *See* sources cited *supra* note 186. It is possible that these political opt-outs violate the terms of the consent decrees under which ASCAP and BMI operate, but as of this writing, the practice has not been formally challenged. *See* Leah Scholnick, *Licensed to Rock the Campaign Trail: Are the ASCAP and BMI Political Campaign Licenses Violating Their Antitrust Consent Decrees?*, 43 CARDOZO L. REV. 1243, 1246 (2022).

188. Jake Linford & Aaron Perzanowksi, *Calculating the Harms of Political Use of Popular Music*, 75 U.C. L.J. 293, 293–94, 344–45, 349 (2024) (finding inconclusive evidence regarding a reduction in consumption as a result of music being used by the Trump campaign, and some evidence that consumers don't necessarily infer endorsement when a campaign uses a song).

189. *See, e.g.*, Rihanna (@rihanna), X (Nov. 4, 2018, 7:26 PM), https://x.com/rihanna/status/1059240423091245056 [https://perma.cc/9YL9-2K6C] (publicly rebuking Trump's use of Rihanna's music and stating that "me nor my people would ever be at or around one of those tragic rallies").

190. Andy Lewis, *Obama's Al Green 'Let's Stay Together' Video Goes Viral (Video)*, HOLLYWOOD REP. (Jan. 20, 2012, 8:29 PM), https://www.hollywoodreporter.com/news/politics-news/obama-sings-al-green-lets-stay-together-283748/ [https://perma.cc/6CEY-Z4KE]. Obama's performance was almost certainly fair use, making it non-infringing in any case, but Green's endorsement of it stands in stark contrast to his repudiation of the song's use in other, similar contexts. For example, when Republican senator Mitt Romney used a clip of Obama's performance of "Let's Stay Together" in a 2008 advertisement, Green went after Romney for copyright infringement. *See* Marc Hogan, *Romney Ad Mocks Obama's Al Green Cover, Gets Hit with Takedown Notice*, SPIN (July 17, 2012, 8:43 PM), https://www.spin.com/2012/07/romney-ad-mocks-obamas-al-green-cover-gets-hit-takedown-notice/ [https://perma.cc/HP73-4THB].

191. Nearly all public-facing theaters and entertainment venues—including the Apollo Theater in Harlem where the fundraiser was held—have blanket licenses with both ASCAP and BMI, because to do otherwise would expose them to infringement litigation. *See* Robert M. Brecht, *Event Music: Music Licensing Facts*, TSE ENT., https://tseentertainment.com/event-music-music-licensing-facts [https://perma.cc/F2MM-ENVS] (last visited Feb. 11, 2025).

### C. BENEFICIAL NONENFORCEMENT

Sometimes a copyright owner declines to enforce against a wrongdoer because the rights holder benefits in some way from the infringement. This Section offers examples of two types of beneficial nonenforcement: remedial and promotional.

#### 1. Remedial Nonenforcement

Sometimes enforcement forbearance is utilized to mitigate a problem unrelated to copyright. One example of this arises in the video game industry and involves the reselling of "keys" used to download video games from online platforms.[192] Gray market resellers often obtain keys for resale by purchasing or otherwise securing keys that were originally sent out promotionally by the video game developers themselves (to social media influencers, for example), or else through the use of stolen credit cards.[193]

One of the most notorious gray market resellers is a company called G2A, which describes itself as "the world's largest marketplace for digital entertainment."[194] In addition to costing them potential sales, gray market keys such as those sold by G2A cost video game developers a significant amount of time and money in customer service and other remedial efforts. In an arguably surprising, but inarguably rational, response, some of the most popular gaming companies have decided to cut their losses by encouraging would-be gray market key purchasers to simply pirate their games instead.[195] Mike Rose, founder of the video game developer No More Robots, pleaded with would-be buyers of gray market keys: "Please, if you're going to buy a game [key] from G2A, just pirate it instead! Genuinely! Dev[eloper]s don't see a penny either way, so we'd much rather G2A didn't see money either."[196] In a similar tweet storm, video game developer Vlambeer's co-founder Rami Ismail agreed: "If you can't afford or don't want to buy our games full-price, please pirate them rather than buying them from a key reseller. These sites cost us so much potential dev[elopment] time in customer service, investigating fake key requests, figuring out credit card chargebacks, and more."[197] Squid Games's co-founder likewise joined the sentiment: "Please torrent our games instead of buying them on G2A."[198]

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192. *See* STEAM, STEAM SUBSCRIBER AGREEMENT, https://store.steampowered.com/subscriber_agreement [https://perma.cc/LH2R-DCER] (last visited Feb. 11, 2025). These keys function as digital licenses allowing users to access (and/or download) video games from different online platforms and are required to activate each game.

193. *See* Matthew DeCarlo, *Are Gray Market Game Key Sites Legit?*, TECHSPOT (Apr. 6, 2021), https://www.techspot.com/article/2225-gray-market-game-keys [https://perma.cc/4PES-763V] (last visited Feb. 11, 2025).

194. *Marketplace*, G2A, https://www.g2a.co/marketplace [https://perma.cc/KP2E-ML6S] (last visited Feb. 11, 2025).

195. *See* Fraser Brown, *Developers Tell People to Pirate Their Games Instead of Using G2A*, PC GAMER (July 1, 2019), https://www.pcgamer.com/developers-tell-people-to-pirate-their-games-instead-of-using-g2a [https://perma.cc/2JAR-HBER].

196. *Id.*

197. *Id.*

198. *Id.*

In other words, if they're not going to make any money either way, these rights holders would prefer to at least not incur additional expense and hassle. One way to do this is to make gray market keys less attractive by offering enforcement-free piracy as a free, no-hassle alternative. After all, a gamer who spends money on what they think is a legitimate game key from a company such as G2A will likely feel entitled to complain to the video game developer if and when the key doesn't work or the game goes wonky. Pirates, on the other hand, are notoriously low maintenance.[199]

2. Promotional Nonenforcement

Other copyright owners forego enforcement because doing so affords them a promotional benefit not otherwise readily attainable. In some cases, these copyright owners have few resources such that they may not otherwise be able to afford the marketing that certain types of infringement bring. Others have plentiful resources, but benefit from a unique type of promotion that money can't buy.

One example of this is the so-called "fan video"—an unlicensed, do-it-yourself music video created by a fan and posted to a streaming platform such as YouTube. In some cases, copyright owners enforce against these unlicensed videos by having them removed either under the statutory notice-and-takedown system or via private agreement such as YouTube's Content ID algorithm.[200] In the latter case, a copyright owner may alternately opt to leave the video up while claiming the advertising revenues earned on it.[201] In other cases, copyright owners do nothing—that is, they decline to enforce—often for a lack of resources or know-how but sometimes owing to a lack of harm or simply because they like the video. Still, in other cases—which are the focus of this Section—rights holders do nothing because the popularity of the fan video—its "virality"—benefits them.

For example, several years ago a rapper named Khalid praised and retweeted a fan video of "lovely" by him and singer Billie Eilish.[202] The unlicensed video had been created and posted to YouTube by two members of the Chinese boy group WayV.[203] Not only did the fan-creators in that case not face any consequences, but Khalid's retweet earned them over 50,000 likes and 50,000 retweets.[204] In exchange, Khalid and his label got free and effective promotion for the track

199. *Cf.* Rahaf Harfoush, *The Sharks Versus the Pirates: Grey Markets in Gaming*, L'ATELIER (Nov. 25, 2020), https://atelier.net/insights/the-sharks-versus-the-pirates-grey-markets-in-gaming [https://perma.cc/T2C3-SHXW] (noting that "the arguments against piracy are more nuanced" as compared to those against gray market keys).

200. *See supra* Section III.A.3 for more detail on both the statutory safe harbor and YouTube's Content ID arrangement.

201. *See supra* notes 170–172 and accompanying text.

202. *See* TripleSThankKyu, *Khalid Praises Ten and Winwin from WayV (and NCT) for Their Amazing Contemporary Dance Performance Video of 'Lovely'*, ALLKPOP (Apr. 8, 2019), https://www.allkpop.com/article/2019/04/khalid-praises-ten-and-winwin-from-wayv-and-nct-for-their-amaz ing-contemporary-dance-performance-video-of-lovely [https://perma.cc/B9CM-2RHJ].

203. WayV, [Rainbow V] TEN X WINWIN Choreography: lovely (Billie Eilish, Khalid) (Ring and Portrait Remix), YOUTUBE (Apr. 8, 2019), https://www.youtube.com/watch?v=8ovHSQwp1n0.

204. WayV (@WayV_official), X (Apr. 8, 2019, 7:00 AM), https://x.com/WayV_official/status/1115207764349841409 [https://perma.cc/74GC-PL9Q].

while also saving the expense of litigation, not to mention the bad press likely to accompany a lawsuit against fans.

In some cases, beneficial infringement is actively encouraged. During the pandemic lockdown, the musician Grimes attempted to connect with isolated fans by inviting them to "collaborate" with her by finishing a music video for one of her songs.[205] In addition to posting the video assets, Grimes also provided fans with links to cheap editing software to help them get started.[206] Fans were then urged to share their videos with the artist by uploading them to YouTube and sharing the links through Instagram and Twitter.[207]

Other Hollywood rights holders have likewise declined to enforce against infringement where it serves promotional purposes. When the immensely popular torrent site Megaupload was shut down by the U.S. Department of Justice in 2012,[208] worldwide box office receipts for smaller-budget films dropped, suggesting that for films without a large marketing budget, file sharing may be "the most economical method of advertising and market research available."[209] Smaller budget films rely heavily on word-of-mouth promotion,[210] and one way to get people talking is to get the films in front of lots of people—something torrent sites do very well.

Nonenforcement against television piracy has become so mainstream, in fact, that Netflix routinely looks to the performance of shows on torrent sites when deciding which shows to buy for streaming on its platform.[211] For this reason, aspiring shows often work to get their pirating numbers up to increase their chances of getting picked up by one of the country's largest subscription streaming services.[212] One surefire way to encourage piracy is to publicly not enforce against it.

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205. *See Grimes Music Video*, WONDERLAND (Apr. 2, 2020), https://www.wonderlandmagazine.com/2020/04/02/grimes-isolation-fans-music-video [https://perma.cc/9WKG-5CYY].

206. *Id.*

207. *Id.*

208. *See* Eriq Gardner, *U.S. Authorities Shut Down Megaupload for Piracy*, HOLLYWOOD REP. (Jan. 19, 2012, 2:49 PM), https://www.hollywoodreporter.com/business/business-news/megaupload-shut-down-piracy-283397 [https://perma.cc/B6YG-KT6Z].

209. Jake Rossen, *How Hollywood Can Capitalize on Piracy*, MIT TECH. REV. (Oct. 17, 2013), https://www.technologyreview.com/2013/10/17/112815/how-hollywood-can-capitalize-on-piracy [https://perma.cc/7MXK-3RR9].

210. *See, e.g.*, Sara Soderstrom et al., *The Science Behind Word-of-Mouth Recommendations*, KELLOGG INSIGHT (Nov. 2, 2017), https://insight.kellogg.northwestern.edu/article/why-we-share-opinions-and-word-of-mouth-marketing [https://perma.cc/8GF4-VS4U] (discussing the importance of word-of-mouth marketing).

211. Todd Spangler, *How Netflix Uses Piracy to Pick Its Programming*, VARIETY (Sept. 14, 2013, 9:54 AM), https://variety.com/2013/digital/news/how-netflix-uses-piracy-to-pick-its-programming-1200611539 [https://perma.cc/FE25-TW6W] (quoting Netflix Vice President of Content Acquisition Kelly Merryman as saying: "[W]e look at what does well on piracy sites").

212. *See* David Curry, *Video Streaming App Revenue and Usage Statistics (2025)*, BUS. OF APPS (Jan. 22, 2025), https://www.businessofapps.com/data/video-streaming-app-market [https://perma.cc/AH5P-HRCL] (reporting that Netflix has the second-largest market share among streaming services in the United States, just behind Amazon Prime).

## IV. AGAINST MANDATORY ENFORCEMENT

As illustrated in the examples in Part III, selective enforcement shares many of the same potential concerns raised by private ordering in other contexts. Section IV.A breaks these potential concerns into five broad categories: anticompetitive behavior, bias, lack of transparency and accountability, confusion and contra-statutory norm setting, and a divergence of public and private interests. Of course, all of these concerns can be resolved by simply mandating enforcement. Section IV.B, however, suggests that mandating enforcement brings its own challenges and instead proposes two narrower but promising interventions: temporal limits and remedies.

### A. POTENTIAL CONCERNS

As with many other forms of private ordering, selective enforcement is prone to a variety of problems, including anticompetitive behavior, bias, a lack of transparency and accountability, and inconsistency that can lead to confusion and contra-statutory norms. In addition, selective enforcement in copyright may suffer from a divergence between the public interest—namely, greater distribution of content—and the private interest—namely, greater control over access to content. These concerns are discussed in turn below.

#### 1. Anticompetitive Behavior

One of the more prominent concerns raised by nonenforcement is that it can be utilized to reinforce a dominant market position. We might say that a popular artist—take Grimes, for example, whose latest album topped the Billboard dance charts[213]—can afford to invite fans to produce potentially competing fan videos.[214] We might not say the same of a developing artist who finds themself losing advertising revenue to an unauthorized upload of their official music video to YouTube. Yet Grimes—via her position as a major label recording artist—can participate in Content ID, while the developing artist is left to suffer under the suboptimal statutory safe harbor.[215]

Similarly, HBO's "Game of Thrones," a television series that earned $2.2 billion over eight seasons,[216] might be well-positioned to enjoy its unconventional distinction as the world's "most pirated TV show."[217] The same would probably *not* be said of an indie filmmaker who finds themself unable to compete with

213. Gordon Murray, *Grimes Earns First No. 1 on Top Dance/Electronic Albums Chart with 'Miss Anthropocene*,' BILLBOARD (Mar. 5, 2020), https://www.billboard.com/pro/grimes-first-no-1-top-dance-electronic-albums-chart-miss-anthropocene.

214. *See supra* notes 205–207 and accompanying text.

215. For more on the statutory safe habor, see *supra* Section III.A.3.

216. Entertainment Strategy Guy, *How 'Game of Thrones' Generated $2.2 Billion Worth of Profit for HBO*, DECIDER (May 21, 2019, 12:00 PM), https://decider.com/2019/05/21/game-of-thrones-hbo-profits [https://perma.cc/GSB8-HW9V].

217. Ryan Northrup, *Game of Thrones Is Still the Most Pirated TV Show Even in 2022*, SCREENRANT (July 18, 2022), https://screenrant.com/game-thrones-most-pirated-tv-show-2022 [https://perma.cc/87NS-4NZF].

pirated copies of their film found on torrent sites.[218] In this way, nonenforcement can be viewed as yet another option available only to those who are already in a competitively privileged position.

With algorithmic enforcement, we've seen that an algorithm is only as accurate as its programming.[219] In the case of Content ID, for example, false positives are a predictable result of a programming decision to flag matches of any duration and without regard to the context of the use.[220] Notwithstanding these shortcomings—or perhaps because of them—copyright owners have embraced Content ID's monetization option as superior to the statute's takedown-and-notice alternative. Not only have over 90% of participating copyright owners opted for monetization over takedown,[221] but non-participating copyright owners have sued YouTube for denying them access to Content ID,[222] explaining that in being obliged to operate under the statutory safe harbor they are left with "vastly inferior and time-consuming manual means" of dealing with infringement.[223] This affords YouTube—already the world's largest streaming service by many magnitudes[224]—an even stronger competitive advantage over prospective competitors who don't have an extra $100 million[225] lying around to build their own version

218. *But see supra* notes 211–212 and accompanying text (discussing indie television producers who may rely on torrenting numbers to attract attention from Netflix).

219. *See supra* Section III.A.3.

220. *See supra* notes 171–172 and accompanying text.

221. *See, e.g.*, Jacca-RouteNote, *supra* note 174 (discussing how YouTube's Content ID system resolves the vast majority of copyright claims related to the use of sound recordings through monetization).

222. Schneider v. YouTube, LLC, No. 20CV04423, 2022 WL 3031212, at *1 (N.D. Cal. Aug. 1, 2022).

223. Bill Donahue, *YouTube Can't Shake Class Action Claiming Indies Get 'Vastly Inferior' Anti-Piracy Tools*, BILLBOARD (Aug. 3, 2022), https://www.billboard.com/pro/youtube-class-action-anti-piracy-tools-major-labels (discussing the district court judge's denial of YouTube's motion to dismiss the lawsuit). The statutory notice-and-takedown procedure is also prone to misuse. *See generally, e.g.*, Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 339 (2018) (using empirical evidence to show that notice-and-takedown procedures have been extensively utilized to remove non-infringing materials).

224. *See, e.g.*, Hugh McIntyre, *Report: YouTube Is the Most Popular Site for On-Demand Music Streaming*, FORBES (Sept. 27, 2017, 8:45 AM), https://www.forbes.com/sites/hughmcintyre/2017/09/27/the-numbers-prove-it-the-world-is-listening-to-the-music-it-loves-on-youtube/?sh=2348f24d1614 ("[I]t is clear that despite huge advancements in the on-demand streaming industry, YouTube is still the preferred choice for millions (or billions) of people, and that lead isn't going to disappear anytime soon."). Interestingly, YouTube also pays the least amount of royalties of any streaming service. *See* The Trichodist Editor, *Updated! Streaming Price Bible w/2016 Rates: Spotify, Apple Music, YouTube, Tidal, Amazon, Pandora, Etc.*, TRICHORDIST (Jan. 16, 2017), https://thetrichordist.com/2017/01/16/updated-streaming-price-bible-w-2016-rates-spotify-apple-music-youtube-tidal-amazon-pandora-etc [https://perma.cc/DF6A-48ZA] ("[YouTube] generate[s] over 21% of all licensed audio streams, but less than 4% of revenue! By comparison Apple Music generates 7% of all streams and 13% of revenue."). For more on how YouTube came to enjoy this position, see Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 233–237 (2019) [hereinafter García, *Copyright Arbitrage*].

225. *See* Paul Sawers, *YouTube: We've Invested $100 million in Content ID and Paid over $3 Billion to Rightsholders*, VENTUREBEAT (Nov. 7, 2018, 3:48 AM), https://venturebeat.com/mobile/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders [https://perma.cc/QEX7-JT4W].

of Content ID, the standard now expected by major content owners. In this example, therefore, we see that anticompetitive concerns are raised on the part of both rights holders *and* platforms.

To the extent that selective enforcement can be utilized by more powerful rights holders to set consumer expectations for an entire industry, those enforcement decisions can end up binding unwilling (or powerless) competitors. For example, gamers may come to understand that piracy of video games is acceptable because several of the largest game developers have said so, even if dozens of smaller developers—developers who can't afford to lose sales or whose games don't feature in-game purchase options with which to make up the difference—disagree.[226] A small developer with a video game that doesn't feature in-game purchases could find itself losing sales to piracy with no prospective upside and without the resources to effectively enforce against a diffuse group of infringers. This leaves larger, more powerful game developers engaged in intentional nonenforcement while smaller, less powerful companies end up not enforcing by default. Under this framing, selective nonenforcement may worsen existing disparities between competitors.

On the other hand, selective nonenforcement might be viewed as a sort of equalizer. For example, a developing artist without the budget to make a music video might encourage their followers to make their own videos and share them on social media. Or an aspiring television series might attract the attention of Netflix by encouraging piracy of its episodes as a means of demonstrating viewership.[227] Because the distributional effects of selective nonenforcement run in both directions, lawmakers would be well-advised to keep this in mind when amending statutes or introducing legislation that might impact the practice.

2. Bias

Another potential consequence of selective enforcement is that allowing differential treatment of counterparties opens the door to bias, both implicit and explicit. When a copyright owner publicly "allows" a politician with whose views they agree to use their music, while threatening to sue a politician with whose views they disagree for using the same music,[228] they inarguably demonstrate bias in their enforcement decisions, even if the ability to do so comports with their authorial autonomy. This concern is lessened somewhat where a copyright owner makes their enforcement decision ex ante since, in such a case, the copyright owner typically forbears from enforcing against all potential infringers in a particular class. For example, video game developers hoping to avoid the hassle of dealing with gray market resellers have announced their intent not to enforce

226. *See, e.g.*, @AstridMie, *Being an Indie Game Dev; When People Openly Want to Pirate Your Game and Let You Starve*, REDDIT R/INDIEGAMING, https://www.reddit.com/r/IndieGaming/comments/xcichw/being_an_indie_game_dev_when_people_openly_want (last visited Feb. 11, 2025).

227. *See supra* notes 211–212 and accompanying text.

228. *See supra* Section III.B.

against all gamers who pirate their games, regardless of their demographics or personal beliefs.[229]

Kristen Altenburger and Daniel Ho offer an example of the importation of private bias into algorithmic enforcement in the context of food safety regulation. In order to guide its efforts in deciding which restaurants to investigate, New York City's health department utilizes a combination of public complaints received through its 311 helpline and Yelp reviews to develop a predictive algorithm that identifies suspicious terms (such as "vomit" and "food poisoning") and flags those restaurants for investigation.[230] Using health department data and complaints logged over a seven-year span, Altenburger and Ho found that New York's enforcement algorithm disproportionately flags Asian establishments.[231]

Algorithmic enforcement can reinforce, and even magnify, human bias. In her work on algorithmic accountability, Ifeoma Ajunwa describes a paradox whereby algorithms may simultaneously "prevent unlawful discrimination" while also "reproduc[ing] inequalities at scale."[232] The field of criminal law enforcement was an early adopter of algorithms to assist in enforcement decisions, with devastating results.[233] Adding to the concern is society's tendency to view algorithms as neutral, or at least indifferent, and unaffected by petty human biases. In their work on predictive algorithms used in policing, Danielle Citron and Frank Pasquale observe that algorithms are frequently touted as fair because they "remov[e] . . . human beings and their flaws from the assessment process" but counter that "this account is misleading[:] [b]ecause human beings program predictive algorithms, their biases and values are embedded into the software's instructions. . ."[234] As a result, algorithms' datasets may contain "inaccurate and biased information provided by people."[235] To make matters worse, "[n]o one can challenge the [algorithm's] process of scoring and the results because the algorithms are zealously guarded trade secrets."[236]

229. *See supra* Section III.C.1.

230. *See* Kristen M. Altenburger & Daniel E. Ho, *When Algorithms Import Private Bias into Public Enforcement: The Promise and Limitations of Statistical Debiasing Solutions*, 175 J. INSTITUTIONAL & THEORETICAL ECON. 98, 101 (2019).

231. *Id.* at 104, 107–09 (citing, by way of example, reviews stating that "[t]he staff was also pretty friendly for an Asian restaurant," and "I had been looking for a place that served 1. Americanizedish Chinese food and 2. didn't make me feel sick").

232. Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1673 (2020).

233. *See, e.g.*, Michelle Chen, *Defund the Police Algorithms*, NATION (Aug. 25, 2022), https://www.thenation.com/article/society/police-algorithms-artificial-intelligence [https://perma.cc/M8FF-KS9A] *See generally* Eldar Haber, *Racial Recognition*, 43 CARDOZO L. REV. 71 (2021).

234. Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. U. L. REV. 1, 4 (2014).

235. *Id.* In other work, Citron has noted that the trouble posed by automation isn't limited to a propensity for bias, but also includes human programmers' preference for binary decisions as well as their lack of knowledge about policy and the law. *See* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1260–63 (2008).

236. Citron & Pasquale, *supra* note 234, at 5.

The same tendency toward bias is observed in the context of content detection. Solon Barocas and Andrew Selbst, for instance, describe the bias seen in data mining as embedded in a process that is precisely intended to distinguish between one thing or person and another.[237] They point to the phenomenon of "garbage in, garbage out" to explain that when inputs used to train the algorithm are themselves flawed—because they contain, for example, public domain works—those flaws will invariably be reflected (and perhaps exacerbated) in the algorithm's results.[238]

3. Transparency & Accountability

Even if we could isolate and ameliorate bias, selective enforcement still presents issues of transparency and accountability. An important feature of private rights of action is that a decision not to enforce results in no legal consequence for wrongdoers.[239] This can mislead users into assuming they will enjoy (or suffer) the same treatment as similarly situated counterparties, and may result in perceived unfairness where, for example, an independent filmmaker declines to enter into a licensing agreement for the use of a particular song in their opening credits because a colleague didn't—and "got away with it"—only to find themselves in court facing steep statutory damages.[240]

Alternatively, some users may enter into a licensing agreement where none is needed out of fear of liability.[241] Without insight into the criteria that copyright owners (or their designated bots) use to make the decision whether to enforce, it is difficult to hold them to account for observably differential treatment. For this reason, parties that are illegally discriminated against as a result of selective enforcement may not even have a clear cause of action for the unequal treatment suffered.

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237. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 677 (2016) ("By definition, data mining is *always* a form of statistical (and therefore seemingly rational) discrimination."). David Lehr and Paul Ohm have expanded on this line of research to show that data mining is only one (early) stage of machine learning and that subsequent stages, such as data cleaning and model training, may have an even greater impact on the results generated by an algorithm. David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 664–67 (2017).

238. *See* Barocas & Selbst, *supra* note 237, at 683–84. For an example of rights holders trying to claim public domain works, see vlogbrothers, *We Have Destroyed Copyright Law*, YOUTUBE, at 04:50 (Feb. 01, 2019), https://www.youtube.com/watch?v=BL829Uf2lzI.

239. *See supra* Section I.B.

240. For more on how "clearance culture" impacts creators, see generally PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), https://cmsimpact.org/wp-content/uploads/2016/01/UNTOLDSTORIES_Report.pdf [https://perma.cc/7LFG-38GX].

241. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (citing doctrinal confusion and risk aversion as contributing to copyright overreach); *see also* Paul J. Heald, *It's Not the Press's Fault (Much)!*, STAN. UNIV. PRESS BLOG (Jan. 27, 2021), https://stanfordpress.typepad.com/blog/2021/01/its-not-the-presss-fault-much-.html [https://perma.cc/33XK-2XFM] (complaining that his risk-averse publisher refused to allow use of copyrighted material in his book despite it being fair use).

Of course, selective enforcement in public law can present the same issues. The difference is that in the case of public nonenforcement, there is arguably more transparency—a prosecutor may have to explain her decision to decline to prosecute, for example—and accountability—she may be voted out as a result of an enforcement decision. Some jurisdictions may also require public disclosure of data regarding how many cases are being brought, against whom, etc.[242] Unfortunately, we don't have any such transparency or accountability in the context of private enforcement. As with other forms of private ordering, the efficiency gains wrought by selective enforcement in copyright law are countered, in part, by their propensity for opacity.

Indeed, a lack of transparency into not only *when* rights holders enforce, but also *why*, is one of the greatest challenges posed by private rights of action. As Bert Huang notes in his work on "shallow signals," this kind of "private permission" can mislead:

> You see one of today's hit songs being played in dozens of homemade videos posted on YouTube. Feeling confident that there is little risk of copyright enforcement, you decide to use a different hit song in your own video. What you don't realize, however, is that the first hit song happened to be covered by a blanket license arranged by YouTube itself with that specific record label.[243]

And to the extent that algorithmic enforcement essentially amounts to delegation of the enforcement decision to a bot, accountability and transparency concerns are only exacerbated.[244] In their work on algorithmic accountability in copyright, Maayan Perel and Niva Elkin-Koren summarize the problem:

> Algorithmic enforcement mechanisms are non-transparent in the way they exercise discretion over determining copyright infringement and fair use; they afford insufficient opportunities to challenge the decisions they make while failing to adequately secure due process; and they curtail the possibility of correcting errors in individual determinations of copyright infringement by impeding the opportunity for public oversight.[245]

In some cases, the lack of transparency stemming from algorithmic enforcement is incidental and simply owes to the mechanized nature of the technology. Other times, though, it may serve to promote an unstated private policy goal. For example, Google's private anti-piracy policy pushes copyright infringers down in

242. *See, e.g.*, An Act Increasing Fairness and Transparency in the Criminal Justice System, S.B. 880, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019) (calling for the collection and reporting of prosecutorial data).

243. Bert Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2241 (2013).

244. *See generally* Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016) (detailing the various accountability issues raised by algorithmic copyright enforcement).

245. *Id.* at 478.

the search rankings.[246] But who counts as an infringer? The dangers of hiding policy in algorithms are well-documented, and include "opacity, arbitrary results, and [a] disparate impact on women and minorities."[247] For example, in a recent investigation of algorithms used by county child welfare departments, the ACLU found that Allegheny County's algorithm labeled 33% of Black households "high risk," compared to only 20% of nonBlack households.[248] The ACLU cautioned, however, that because "an algorithm may sound neutral," when data is "reborn through an algorithm, people are liable to interpret [any] disparities as hard truths because, well, a mathematical equation told [them] so."[249]

In the public enforcement context, challenges to state and federal governments' use of algorithms have largely succeeded, when they do, on procedural due process grounds. For example, public school teachers in Houston, Texas recently argued successfully that a lack of transparency as to how the state's algorithm for evaluating public teacher performance reached its decisions constituted a due process violation.[250] Unfortunately, no such due process angle exists in the private enforcement context, thus allowing the problem to continue unabated.

Another conventionally effective mechanism for establishing and ensuring accountability is reputation.[251] Typically, the fact that counterparties may be held to account for their respective representations and actions—both in current and future interactions—disciplines their behavior. However, the absence of any such direct relationship between an algorithm and prospective counterparties erodes accountability because there is arguably less at stake reputation-wise. Relatedly, algorithmic enforcement also eliminates the potential for repeat interactions—indeed, any interaction—between the accuser and the accused. Although the literature on the value of repeat players in the law is mixed,[252] one noted advantage is

246. GOOGLE, HOW GOOGLE FIGHTS PIRACY 34–37 (2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf [https://perma.cc/EHU5-87XS].

247. Citron & Pasquale, *supra* note 234, at 10.

248. Marissa Gerchick et al., *How Policy Hidden in an Algorithm Is Threatening Families in this Pennsylvania County*, ACLU: NEWS & COMMENTARY (Mar. 14, 2023), https://www.aclu.org/news/womens-rights/how-policy-hidden-in-an-algorithm-is-threatening-families-in-this-pennsylvania-c ounty [https://perma.cc/JCQ4-KQTQ].

249. *Id.*

250. Hous. Fed'n of Tchrs., Loc. 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1179 (S.D. Tex. 2017) ("[W]ithout access to [the algorithm's] proprietary information—the value-added equations, computer source codes, decision rules, and assumptions—[teacher evaluation] scores will remain a mysterious 'black box,' impervious to challenge."). For more on efforts to challenge the use of public enforcement algorithms, see generally RASHIDA RICHARDSON, JASON M. SCHULTZ & VINCENT M. SOUTHERLAND, AI NOW INST., LITIGATING ALGORITHMS 2019 US REPORT: NEW CHALLENGES TO GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS (2019), https://ainowinstitute.org/wp-content/uploads/2023/04/litigatingalgorithms-2019-us.pdf [https://perma.cc/W35M-8YVA].

251. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 36 (2005) (listing reputation—both peer and public—among the various mechanisms that influence accountability in the global political context).

252. *Compare* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 95 (2015) (noting that "repeat players and aspiring repeat players have rational economic incentives to protect their reputations and develop reciprocal relationships"), *with* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL

the propensity for repeat players to encourage parties to behave, lest they suffer mistreatment in a future interaction.[253] Without this incentive, algorithmic enforcement is unchecked by either reputational or repeat-player concerns.

Finally, selective enforcement may allow for legislative shirking or political performativity whereby lawmakers can make a show of passing a law despite knowing that in practice it may not be enforced. Optically, lawmakers can be seen as having "done something," even when in reality, nothing actually changes. The § 512 safe harbor can be viewed in this light: In practice, the notice-and-takedown procedure provided in § 512(c) has proven ineffective,[254] so much so that private arrangements such as Content ID and Rights Manager have now largely displaced it.[255] Congress can still point to the measure, however, in response to copyright owners' pleas for help with online piracy.

4. Confusion & Contra-Statutory Norm Setting

Social norms play a significant role in whether and how parties act (or don't act) in accordance with applicable laws and regulations. Laws that comport with social norms are "much more likely to be enacted than laws that offend such norms."[256] They are also more likely to be adhered to.[257] Social norms set expectations as to both behavior and outcomes. When those expectations aren't met, it can lead to confusion and unpredictability in the relevant market. For example, a music fan who is encouraged by Grimes to create and post a fan video to YouTube may (reasonably) come to understand that creating fan videos is not only acceptable, but even encouraged.[258] Contravention of that expectation—when, for example, the same fan later receives a takedown notice from a different musician—can lead to confusion. Are fan videos okay or aren't they?

In this way, the inconsistency wrought by selective enforcement in copyright deprives prospective users of predictability. In addition to sowing confusion, this lack of predictability may sow legal discord. For instance, when comedians decided to begin enforcing their copyrights after decades of nonenforcement, a social norm of nonenforcement was contravened, and the predictable response from streaming platforms was litigation.[259] To make matters worse, private rights

L. REV. 1445 (2017) (discussing the potential for repeat players in the multidistrict litigation context to unduly influence the law and legal results).

253. *See* Burch & Williams, *supra* note 252, at 1523–25.

254. *See, e.g.*, SECTION 512, *supra* note 165, at 1 (noting "grave concerns with the ability of individual creators to meaningfully use the section 512 system to address copyright infringement and the 'whack-a-mole' problem of infringing content reappearing after being taken down," leading to the conclusion that "Congress' original intended balance has been tilted askew").

255. *See supra* Section III.A.3.

256. David E. DePianto, *Sticky Compliance: An Endowment Account of Expressive Law*, 2014 UTAH L. REV. 327, 338 (2014) (quoting Amitai Etzioni, *Special Norms: Internalization, Persuasion, and History*, 34 L. & SOC'Y REV. 157, 159 (2000)).

257. Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAV. ECON. AND THE L. 241, 245–46 (Eyal Zamir & Doron Teichman eds., 2014).

258. *See supra* text accompanying notes 205–207.

259. *See supra* Section III.A.2.

of action are often enforced (or not enforced) on an individual basis, invariably resulting in different signals from different rights holders, which may in turn reduce the effectiveness of the underlying statute. In the museum context,[260] we see that some museums sue for use of their images of public domain works,[261] while others have made their images of public domain works free to use.[262] Can you use a slavish reproduction of an artwork in the public domain or can't you? (The answer is yes, you can, but it might cost you if you're unlucky enough to be among the few enforced against.) When enforcement is sporadic or varied, it can be difficult for the relevant law to do what it's supposed to—which in copyright's case, is to incentivize creation.

Lastly, where algorithmic enforcement actually replaces a statutory scheme, the algorithmic enforcement scheme may come to dominate. This has certainly been the case with Content ID vis-à-vis § 512.[263] Where the dominant replacement runs counter to the statute, as it does in the Content ID context—recall, for instance, that the algorithm fails to account for fair use, a statutorily contemplated exception[264]—a counter-statutory norm is set in contravention of the legislature's intent.

5. Public–Private Interest Divergence

Finally, because the decision as to whether to enforce is made by private parties acting in their own interests, it is not unusual to observe a divergence from the public interest.[265] Perhaps the most glaring example of the disconnect between private and public interest is seen in algorithmic enforcement. As described above, Content ID is widely considered a coup for participating content owners as it allows them to engage in maximum enforcement at minimal cost and effort.[266] It does so, however, at the expense of fair use,[267] and to the arguable

260. *See supra* notes 137–141and accompanying text.

261. *See, e.g.*, Benjamin Sutton, *Museum Sues Wikimedia for Hosting Copyrighted Photos of Its Public-Domain Artworks*, HYPERALLERGIC (Dec. 8, 2015), https://hyperallergic.com/259382/museum-sues-wikimedia-for-hosting-copyrighted-photos-of-its-public-domain-artworks [https://perma.cc/ZPE7-X5V2].

262. *See, e.g.*, Press Release, Met, The Met Makes Its Images of Public-Domain Artworks Freely Available Through New Open Access Policy (Feb. 7, 2017), https://www.metmuseum.org/press/news/2017/open-access [https://perma.cc/L7T5-F4M3].

263. *See supra* notes 173–174 and accompanying text.

264. *See supra* note 171 and accompanying text.

265. Notably, we sometimes also see a different strain of divergence: one between a creator and an intermediary. In his work on the limits of copyright law, Blake Reid highlights this trend in the context of AI, where publishers may be willing to forego enforcement even though creators would elect to enforce. *See* Blake Reid, *What Copyright Can't Do*, PEPP. L. REV. (forthcoming 2025) ("[A]s publishers have arrived on the scene, litigation has given way to public-private divergence, where publishers can sell their employees out by turning away from litigation and licensing the content their employees created. By doing so, they fuel the development of new AI tools that bend the economics against both paying human creators and against smaller competitors who can't or won't pursue infringement." (citations omitted)).

266. *See supra* Section III.A.3.

267. *See supra* note 171and accompanying text.

detriment of the public interest (since fair use is intended to encourage creation for public consumption).

The manipulative enforcement examples[268] also show the potential for divergence between private and public interests. When cash-strapped school districts and over-burdened teachers are asked to pay for the use of materials that lawmakers have determined they can use for free, it is copyright owners alone who benefit.[269] In contrast, the public—teachers, students, school districts, and broader society—are potentially harmed: Faced with a lack of funds, teachers may forego use of the content altogether, thereby denying students the opportunity to learn from it. Likewise, museums' attempts to extract licensing fees for use of their slavish reproductions of public domain works may be in the best interest of the museums' bottom lines, but defeats the entire purpose behind establishing a public domain in the first place.[270] And by that same token, the remedial nonenforcement engaged in by select video game developers benefits only them (and, perhaps, the users who get a "free" game).[271] To the extent that the counter-statutory norm of piracy is established and smaller developers are forced to exit the market, the public loses both innovation and competition in the video game space.

### B. PROSPECTIVE INTERVENTIONS

Many of the conventional solutions to the potential concerns raised by selective enforcement run counter to the purpose and function of private rights of action. For example, the conventional solution to the problem of bias—requiring like treatment of all similarly situated counterparties—could diminish, if not eliminate, selective enforcement's efficiency advantages. Likewise, mandatory enforcement—for instance, through the introduction of a trademark-style "duty to enforce"—would inarguably increase predictability and decrease bias, but would likely carry the same risk of overenforcement and bullying.[272] This Section suggests that a better approach to ameliorating some of the more serious concerns wrought by selective enforcement is a two-pronged focus on (1) temporal limits and (2) remedies.

#### 1. Temporal Limits

This subsection suggests two possible temporal limitations designed to mitigate some of the potential concerns described in the previous Section: a time limit for collecting damages and an abandonment doctrine.

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268. *See supra* Section III.A.1.

269. *See supra* notes 131–135 and accompanying text.

270. *See supra* notes 137–141 and accompanying text.

271. *See supra* Section III.C.1.

272. *See, e.g.*, Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions,* 37 COLUM. J.L. & ARTS 211, 211 (2014) [hereinafter Kiser, *To Bully*] (defining "trademark bully" as "a large company that uses aggressive intimidation tactics and threats of prolonged trademark infringement litigation to stop small businesses and individuals from using their own trademarks where the stated claims of infringement are likely spurious or nonexistent").

The establishment and enforcement of reasonable statutes of limitation is an important first step toward mitigating the harm wrought by excessive delay in private enforcement. Many private rights of action have a statutorily prescribed time period for bringing a claim, after which the right expires and a claim can no longer be brought. These statutory time limits vary by jurisdiction and by offense. In the case of copyright infringement, a federal cause of action, the statute of limitations is three years.[273] Although this limitation would ordinarily prevent delayed enforcement altogether, the Supreme Court's holding in *Petrella*—namely, that where copyright infringement is ongoing, the statute of limitations does not toll—arguably reduces its utility since ongoing infringement is typically an easy case to make.[274] In this way, *Petrella* arguably allows for the delayed enforcement we observed in Section III.A.2, while *Warner*'s holding that damages are not time-limited[275] makes such enforcement potentially more profitable. To the extent that laches can work to mitigate the impact of delayed enforcement in copyright, lawmakers could codify a statutory limitation on damages—restricting them to actual damages only, for example—in the case of infringement claims brought beyond the three-year statute of limitations.

Another temporal limitation that could be utilized in copyright law is the doctrine of abandonment. In property law, abandonment is the "relinquish[ment] of a right or interest with the intention of never reclaiming it."[276] Unlike laches, which bars the pursuit of an in personam remedy (i.e., vis-à-vis a particular party),[277] abandonment bars pursuit of an in rem remedy (i.e., as against all parties, known and unknown).[278] Both patent law and trademark law recognize actual and constructive abandonment doctrines, as detailed below.

In trademark law, a mark can be deemed abandoned in either of two circumstances: (1) when its use is discontinued with intent not to resume the use, or (2) when the actions of a mark owner cause the mark to become generic such that it no longer functions as a mark.[279] The resulting "duty to police" observed in trademark law seeks to do two closely related things: first, to avoid genericide—that is, the phenomenon of losing trademark rights where a mark becomes appropriated by the relevant public as the name of a product[280] —and second, to maintain

273. 17 U.S.C. § 507(b).

274. *See supra* note 102 and accompanying text.

275. *See supra* note 103 and accompanying text.

276. *Abandonment*, BLACK'S LAW DICTIONARY (12th ed. 2024); *cf.* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 199–200 (2010) (discussing how property law's abandonment doctrine conflicts with the common-law prohibition on abandonment, and the trouble it causes).

277. *Laches*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining laches as "[u]nreasonable delay in pursuing a right or claim . . . in a way that prejudices *the party* against whom relief is sought" (emphasis added)).

278. *Cf. Trademark*, BLACK'S LAW DICTIONARY (12th ed. 2024) (explaining that "[t]he owner of an abandoned [trade]mark has no . . . rights to exclude *others* from using it" (emphasis added)).

279. 15 U.S.C. § 1127.

280. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12.1 (5th ed. 2024).

a mark's strength as source indicating.[281] The prospect of unintentional abandonment resulting from a failure to police has driven many trademark owners to adopt an aggressive enforcement policy.[282] Critics have lamented the tendency for this to lead to overenforcement and "trademark bullying."[283]

In patent law, a patent application is considered abandoned either when (1) a required reply is not timely filed[284] or (2) an express declaration of abandonment is filed.[285] Trade secret law also observes an abandonment doctrine, although "forfeiture" is probably a more accurate description.[286] "Since secrecy is a requisite element of a trade secret, it follows that unprotected disclosure of the secret will terminate that element and, at least prospectively, forfeit the trade secret status" (footnote omitted).[287]

The doctrine of abandonment is less well-developed in copyright law.[288] This owes to a number of factors. First, and perhaps most importantly, the Copyright Act is silent on the matter.[289] It makes no mention of abandoning copyrights, much less how to do so. On top of that, the Copyright Office, charged with registering copyrights and recording transactions relating to those works, offers only nominal guidance. In its most recent Compendium—the Copyright Office's public-facing guide to its policies and legal interpretations—the Copyright Office says that it "may record an affidavit, declaration, statement, or any other document purporting to abandon a claim to copyright" and "will record an abandonment as a document pertaining to copyright without offering any opinion as to the

281. This is trademark law's purported *raison d'être*. *See, e.g.*, Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d. 1423, 1429 (7th Cir. 1985) ("Trademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs. Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market. A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality.")

282. *See, e.g.*, Jessica M. Kiser, *Brandright*, 70 ARK. L. REV. 489, 537 (2017) (noting that the threat of unintentional abandonment has "spawned a 'duty to police' third-party trademark usage that is now considered a bedrock principle of trademark law" (footnote omitted)). An alternative to this is "naked licensing," in which a mark owner fails to exercise adequate control over its licensees' use of a mark such that it is effectively abandoned. *See, e.g.*, FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 512 (9th Cir. 2010) (finding licensor–mark owner to have "engaged in naked licensing and thereby abandoned its trademarks").

283. *See, e.g.*, Kiser, *To Bully*, *supra* note 272, at 211.

284. 37 C.F.R. § 1.135(a) (1997).

285. 37 C.F.R. § 1.138(a) (2013).

286. Eduardo Peñalver describes the distinction between abandonment and forfeiture as follows: "[A]bandonment operates as a legal power enjoyed by owners, whereas forfeitures operate as a limitation on the owner's authority to use the property as she sees fit." Peñalver, *supra* note 276, at 199 (citation omitted).

287. 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.05 (2024).

288. *See generally* Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487 (2020) (lamenting the under-theorization of copyright abandonment and attempting a rectification thereof).

289. There is no mention of abandonment in the statute. *See generally* 17 U.S.C. §§ 101–1511.

legal effect of the document."[290] In addition, the Office notes that it will create and maintain an online public record of works for which it has received an abandonment document, but that it will not cross-reference this record with the public registration record.[291] The Compendium further requires that the abandonment document be filed in hard copy (there is no electronic filing option) as well as payment of the same filing fee needed for recording any other document relating to a copyrighted work: $125.[292]

Given the effort and expense required to formally abandon, it's no surprise that most copyright owners abandon their copyrights informally.[293] The problem of "orphan works"— works whose owners cannot be readily identified[294]—is a predictable result of this informality. The Google Books Project, in which Google sought to scan and index all of the world's books,[295] shined a light on the problems caused by orphan works—namely, that such works[296] are effectively "locked away" behind copyright and can't be utilized without the permission of unknown (and unidentifiable) authors, thereby hindering public knowledge and learning.

The introduction of a trademark-style duty to enforce in copyright would inarguably increase predictability, but would likely carry a similar risk of overenforcement and its concomitant inefficiency.[297] Similarly, penalizing rights holders who may opt to enforce against some types of uses and not others would not only be less efficient but also deprive lawmakers of valuable information regarding what rights holders care about. As a narrowly crafted compromise measure, lawmakers could instead establish an infringer- and infringement-specific

290. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES: CHAPTER 2300: RECORDATION § 2311 (3d ed. 2021), https://copyright.gov/comp3/chap2300/ch2300-recordation.pdf [https://perma.cc/QX8G-ZLC8].

291. *Id.*

292. *See* Fees for Registration, Recordation, and Related Services, Special Services, and Services Performed by the Licensing Section and the Copyright Claims Board, 37 C.F.R. § 201.3(22) (2023).

293. In their work on copyright abandonment, Fagundes and Perzanowski reviewed Copyright Office records between 1978 and 2018 and counted a mere 190 notices of abandonment. *See* Fagundes & Perzanowski, *supra* note 288, at 532. Rights holders who wish to "donate" their work to the public domain without the rigamarole of filing with the Copyright Office can effectively do so via Creative Common license CC0, but there is no public record of such "donations." *See About CC Licenses,* CREATIVE COMMONS, https://creativecommons.org/share-your-work/cclicenses [https://perma.cc/ZY6T-AD86] (last visited Feb. 11, 2025) ("CC0 (aka CC Zero) is a public dedication tool, which enables creators to give up their copyright and put their works into the worldwide public domain.").

294. U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 9 (2015), https://www.copyright.gov/orphan/reports/orphan-works2015.pdf [https://perma.cc/29QS-A2LQ].

295. *See Google Books: Background*, STAN. UNIV., https://cs.stanford.edu/people/eroberts/courses/cs181/projects/2010-11/GoogleBooks/background.html [https://perma.cc/C4UM-6J7J] (last visited Feb. 11, 2025). The Google Books Project provoked multiple lawsuits brought by authors' associations against Google; although the parties eventually reached a settlement agreement, it was rejected by a federal judge, leaving the future of the Google Books Project in limbo. *Id.*

296. For more on the intended fate of orphan works in the settlement agreement, see Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 482–83 (2011) (describing the settlement as accomplishing something Congress has so far failed to do—namely, dealing with the ophan rights problem by "giv[ing] Google a compulsory license to commercialize millions of out-of-print books, including those that are 'orphans'").

297. *See supra* notes 282–283 and accompanying text.

time period—for consistency's sake, let's say three years—from the date of first infringement, after which a copyright owner's private right of action as to that infringement by that infringer is deemed abandoned.

By way of demonstration, let's apply this restriction to the comedian example in Section III.A.2. Assuming that Pandora's first use of the comedians' written jokes without payment was in 2011,[298] the clock would begin to toll at that point. By 2014, if no infringement claim had been made by the comedians against Pandora, their private rights of action against Pandora for the specific use at issue would be considered abandoned, and they could no longer bring that specific claim against that specific defendant. Notably, this would not prevent the comedians from going after other streaming services which may have begun the unauthorized use of their works more recently, or even from bringing infringement claims against Pandora vis-à-vis future infringing uses (just not of the same material, used in the same way). This measure also wouldn't protect Pandora from claims that may be brought by other comedians whose work they began using more recently.

2. Remedies

Given the import of authorial autonomy to copyright's policy goals, as well as copyright infringement's status as a strict liability action, eliminating damages for even innocent infringement is not a viable option; doing so would substantively change the contours of infringement liability. A better path to reducing the harm wrought by selective enforcement is to establish limits on the type and magnitude of remedies available for claims asserting noneconomic loss.[299]

In their work on statutory damages, Pamela Samuelson and Tara Wheatland urge courts to award the minimum statutory damages in cases where "the plaintiff lost no profits and the defendant made no profits from the infringement, or when damages and profits are nominal or minimal."[300] Codification of this guidance could cut back on some types of selective enforcement, especially in the intimidation context, wherein the underlying threat of astronomical statutory damages does most of the work.[301]

298. *See* Damien Scott, *Pandora Begins Streaming Stand-Up Comedy Acts*, COMPLEX (May 4, 2011), https://www.complex.com/pop-culture/a/damien-scott/pandora-begins-streaming-stand-up-comedy-acts [https://perma.cc/X8U5-TLUK].

299. There is precedent for this type of limitation. In tort law, for example, the judicially created "zone of danger" limits the ability of plaintiffs to recover for negligent infliction of emotional distress to instances in which the defendant's negligence placed them in immediate risk of physical harm and they were frightened by that risk of harm. *See, e.g.*, Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 548 (1994).

300. Samuelson & Wheatland, *supra* note 96, at 501.

301. *See, e.g.*, Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 573 (2018) (noting that in the trolling context, "[e]ven when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to $150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling").

Similar proposals have been made in the patent law context. "Patent assertion entities" (PAEs), or "patent trolls," are "businesses that acquire patents from third parties and seek to generate revenue by asserting them against alleged infringers."[302] PAEs monetize their patents "primarily through licensing negotiations with alleged infringers, infringement litigation, or both."[303] In his work on unpracticed patents, Oskar Liivak suggests that "a nominal reasonable royalty is proper where the patentee has not undertaken any efforts to commercialize the invention and the patent is asserted against an independent inventor."[304] Adoption of a comparable approach in the copyright context could discourage some trolling activity. Any restriction along these lines should be limited to nonauthor copyright owners in order to maintain copyright's ex ante incentive to create.[305]

## V. THE ROLE OF SELECTIVITY

The analysis herein suggests that not all private enforcement decisions serve only the conventional purposes of compensation, deterrence, or efficiency. Instead, the Article identifies three valuable and underappreciated roles for selectivity in private law. First, selectivity highlights the heterogeneity of rights holders as a class and identifies the inherent conflict that arises with one-size-fits-all legislation. Second, it recognizes dignitary harm as actionable, thereby reinforcing rights holder autonomy. Third, it results in the public production of private information that lawmakers can use to improve the relevant law. These contributions are discussed in turn below.

### A. RIGHTS HOLDER HETEROGENEITY

Private law necessarily dictates rules and regulations that govern the conduct of a diverse group of rights holders. Property law, for example, makes the fundamental assumption that property owners desire, first and foremost, to exclude others from their property.[306] To that end, legislators give property owners

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302. FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY 1 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf [https://perma.cc/68VM-WLT2]. For our purposes, PAEs are distinct from "non-practicing entities" (NPEs)—entities that own and license patents that they themselves do not use. *See id.* at A-2. The former are pejoratively referred to as "trolls"; the latter can include individuals and companies who simply don't have the need or know-how to utilize the patent(s) at issue. *See id.* at 26 n.96.

303. *Id.* at 1.

304. Oskar Liivak, *When Nominal Is Reasonable: Damages for the Unpracticed Patent*, 56 B.C. L. REV. 1031, 1034 (2015); *see also* Daniel Harris Brean, *Ending Unreasonable Royalties: Why Nominal Damages Are Adequate to Compensate Patent Assertion Entities for Infringement*, 39 VT. L. REV. 867, 872 (2015) (making a comparable argument). Not all scholars, however, think all patent trolls are necessarily bad. *See generally* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117 (2013) (proposing that patent trolls are not a homogenous group and so the issues some present cannot necessarily be extrapolated to them all).

305. *Cf.* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 776–77 (2013) [hereinafter Balganesh, *Uneasy Case*] (asserting, in the context of a standing proposal, that any such rule should operate only on "noninitial" copyright owners).

306. William Blackstone perhaps captured this sentiment best when he wrote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external

various tools: self-help measures such as fencing,[307] strict liability trespass laws,[308] onerous adverse possession standards,[309] and even self-settled spendthrift trusts.[310]

When confronted with a property owner, or set of property owners, who do not share this prioritization of exclusion, courts have struggled. This kind of problem commonly arises in the context of Native American property disputes, where many tribes' worldview frequently conceives of property in a more communal fashion. For this reason, many such cases are brought before tribal courts in hopes of a more suitable outcome.[311]

As the taxonomy in Part III illustrates, copyright law too makes an assumption of all rights holders—namely, that they are inevitably harmed by infringement—that does not always hold. This is because copyright owners, like property owners, are not homogenous. Instead, they each face different circumstances and limitations, and have different priorities. As a result, they each experience infringement differently. Selective enforcement can be seen as the manifestation of this diversity, affording lawmakers a valuable reminder to consider a broader swath of values.

### B. RECOGNITION OF DIGNITARY HARM & RIGHTS HOLDER AUTONOMY

As the examples in Part III demonstrate, selective enforcement routinely recognizes dignitary harm—that is, noneconomic loss—alongside, or exclusive of, economic loss. In this way, selective enforcement establishes and defends the

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things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

307. Land owners can use reasonable self-help measures, such as fencing and locks, but not deadly force (at least if the intrusion is onto unoccupied land or buildings). *See, e.g.*, Katko v. Briney, 183 N. W.2d 657, 657, 659–62 (Iowa 1971) (finding that building owner could not use a spring gun to defend an unoccupied building against trespassers).

308. Any intentional intrusion onto another's land, even if temporary, is considered a trespass. *See* RESTATEMENT (FOURTH) OF PROPERTY § 1.1 (AM. L. INST., Tentative Draft No. 2, 2021).

309. Although the precise language varies from jurisdiction to jurisdiction, in order to acquire land by adverse possession, the adverse possessor must provide clear and convincing evidence that their possession was actual; hostile; open, notorious and visible; continuous and uninterrupted (for anywhere from ten to thirty years on average); and exclusive. *See, e.g.*, White v. Pines Cmty. Improvement Ass'n, 917 A.2d 1129, 1149 (Md. Ct. Spec. App. 2007) (holding that adverse possession in Maryland requires such possession to be "actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted").

310. Conventionally, spendthrift trusts—trusts whose corpora could not be accessed by the beneficiaries' creditors until dispersed—were intended to provide financial support for persons unable to manage their own financial affairs. As an apparent result of competition in the trust-drafting business, some states have enacted statutes allowing for self-settled "asset protection trusts." *See, e.g.*, Qualified Dispositions in Trust Act. DEL. CODE ANN. tit. 12, §§ 3570–3576 (as amended by H.B. No. 356) (Supp. 1998). The drafters of this amendment were clear in their intent to maintain Delaware's status as "the most favored domestic jurisdiction for the establishment of trusts." Qualified Dispositions in Trust Act, Synopsis, 71 Del. Laws 108 (1997). For more on this unsavory trend, see generally Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

311. *See, e.g.*, Smith v. James, 2 Am. Tribal Law 319, 323 (Hopi Ct. App. 1999) (applying Hopi law to a dispute over land descendancy).

fundamental value of rights holder autonomy: the right to not be wronged. This is especially true in the context of beneficial wrongdoing.[312]

In the copyright context, we see private rights of action accommodate lossless and beneficial wrongdoing by setting up a "statutory fence" that recognizes the wrong inherent in infringement independent of economic loss. Even where an infringed copyright owner elects not to enforce, the very existence of a private right of action (and therefore the existence of a threat of infringement litigation) plays an important role in recognizing the copyright owner's autonomy and others' concomitant duty not to violate it.

In this way, private rights of action "uniquely speak to the dignity of the citizen by putting power to contest wrongs in her hands and allowing the individual to construct claims as entitlements."[313] The legal empowerment of rights holders intentionally "transfer[s] power from the usual gatekeepers of the law—lawyers, judges, police, and state officials[—]to ordinary people . . . and thus make law meaningful for people's lives."[314] This transfer of power bolsters individual dignity, not only vis-à-vis other private parties but also vis-à-vis the state, which generally cannot enforce a private remedy against the will of a rights holder.[315]

Notably, selective enforcement's recognition of rights holder autonomy holds even in the face of explicit conflict with the public interest. For example, the decision by a subset of video game companies not to enforce runs counter to the social norm of "no piracy";[316] this, in turn, may lead to a loss of innovation and competition in the space, which is detrimental to the public. However, notwithstanding the divergence between those video game companies' private interest in avoiding remedial costs and the public's interest in having more and better entertainment options, selective enforcement holds the line by leaving the enforcement decision with the rights holder.

The recognition of rights holder autonomy despite the potential for conflict with the public interest is consistent with a number of copyright doctrines. For instance, moral rights, albeit relatively limited in the United States,[317] require attribution of authorship and provide some level of protection for the integrity of qualified works, regardless of whether a particular use constitutes an actionable wrongdoing.[318] In addition, the derivative work right affords a copyright owner exclusive rights over new works derived from their own—think films made from

312. *See* Section II.E.2.

313. Scholz, *supra* note 27, at 1664.

314. Anuradha Joshi, *Legal Empowerment and Social Accountability: Complementary Strategies Toward Rights-Based Development in Health?*, 99 WORLD DEV. 160, 162–63 (2017).

315. *See* Zipursky, *supra* note 13, at 651 ("[P]rivate rights of action are entitlements of the victim, not of the state.").

316. *See supra* Section III.C.1.

317. *See, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES xvi (2010) (noting that "[i]n contrast to the United States, many countries maintain authors' rights protections that enable authors to safeguard the integrity of their texts far more readily than authors in this country" and that therefore "the United States is out of step with global norms by not recognizing more substantial authors' rights.").

318. *See* The Visual Artists Rights Act (VARA), 17 U.S.C. § 106A; *see also id.* § 113(d).

novels or translations of books—by establishing a property rule requiring a prospective user to first obtain the permission of the owner of the underlying work.[319] Importantly, there is no requirement that the copyright owner grant such permission. Indeed, a novelist who doesn't want their book made into a film—regardless of the fact that the film would be a new creation in service of the public interest—can simply refuse to grant permission, thereby ending the project (at least until the book falls into the public domain). Even the fact that copyright law doesn't require publication to secure statutory protection[320] points to recognition of an author's absolute dominion over their work, regardless of whether their actions best serve the public. Finally, termination rights that allow a creator to "reclaim" previously assigned copyrights[321] are intended to benefit creators by allowing them to enjoy any post-assignment increase in value. This opportunity comes at the arguable expense of the public, since the terminating creator can then withdraw those works from the market altogether (resulting in less content) or else price them such that further development of the works is ultimately prohibitive.

### C. INFORMATION PRODUCTION & PRIVATE POLICYMAKING

Selective enforcement also serves a valuable information-producing function. As a form of private policymaking, observation of whether and when private rights holders enforce can provide important feedback to lawmakers as to what does and doesn't move the needle for those rights holders, as well as whether and how a statutory regime is working in the relevant market. As with many other areas of private law, copyright is no stranger to this brand of private ordering. Examples abound of parties (lawfully) circumventing various sections of the Copyright Act to effect a better deal for themselves, sometimes to the detriment of nonparties.[322] A common theme amongst the myriad instances of private ordering in copyright is the information revealed by the very existence of the statutory circumvention.[323]

Take, for example, the analysis of musicians engaged in performative enforcement against certain politicians.[324] There, we noted that the two largest (private) publishing collectives, ASCAP and BMI, have established separate and distinct licenses for the use of music in political campaigns.[325] These so-called "political licenses" allow individual members to withdraw their music if they object to the

319. *See id.* § 106(2).

320. *See, e.g.*, *Copyright in General*, U.S. COPYRIGHT OFF.: FREQUENTLY ASKED QUESTIONS, https://www.copyright.gov/help/faq/faq-general.html [https://perma.cc/CW65-8YN8] (last visited Feb. 11, 2025) ("Do[es an author] have to register with the Copyright Office to be protected? No. In general, registration is voluntary. Copyright exists from the moment the work is created. [An author] will have to register, however, if [they] wish to bring a lawsuit for infringement of a U.S. work.").

321. *Id.* § 203.

322. *See, e.g.*, Kristelia A. García, *Private Copyright Reform*, 20 MICH. TELECOMMS. & TECH. L. REV. 1, 18–24 (2013) (discussing the example of Taylor Swift's private negotiation of a terrestrial performance royalty that circumvented a statutory payment for session musicians).

323. For more on how private deals can inform lawmakers in the copyright space, see generally, e.g., García, *Copyright Arbitrage*, *supra* note 224.

324. *See supra* Section III.B.

325. *See supra* notes 185–187 and accompanying text.

intended use by a particular candidate.[326] The existence and utilization of these political licenses suggest significant interest from copyright owners in controlling not just access to their work, but also how it is used and by whom. As previously noted, both ASCAP and BMI currently operate under consent decrees that require the collectives to license all content under the same terms to all comers.[327] To the extent that the consent decrees do not allow for a partial opt-out,[328] the rate court[329] may be prompted to consider either amending the decrees to explicitly establish a political exception or clarifying that there either is not (or should not be) one.

Both of the manipulation examples—CCC's academic campaign and museums claiming copyright in slavish reproductions of works in the public domain[330]—readily suggest a need for legislative reform to lower the perceived risk of infringement liability for prospective users. Ben Depoorter has offered two possible approaches: (1) a revision of § 505 that would allow courts to strip the benefit of fee shifting from plaintiffs that overstate a damages claim, and/or (2) an amendment allowing courts to impose sanctions on prevailing plaintiffs that engage in overclaiming.[331] Samuelson and Wheatland have proposed, among other things, encouraging courts to award the statutory minimum in cases where damages, if any, are nominal, or where the plaintiff has unclean hands.[332]

In yet another approach, Balganesh has proposed a heightened rule of standing for "nonauthor plaintiffs" that would make statutory damages dependent upon a showing of compensable financial harm.[333] Analysis of the enforcement decision made by performative plaintiffs calls for any, or some combination of, these options to better reflect market realities and to better align the law—in this case, copyright—with its goal of incentivization.[334] Another approach would be to reduce the amount of statutory damages awardable. This could involve amending § 504(c) to add a reasonable cap for statutory damages, particularly in the digital context where the statute's "per infringement" language can cause damages to add up quickly given the inherent connectivity and network effects that tend to accompany digital content consumption.[335]

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326. *See id.*

327. *See supra* note 148; *What Are Music Industry Consent Decrees?*, EXPL. GRP.: COPYRIGHT ADMIN., https://exploration.io/what-are-music-industry-consent-decrees [https://perma.cc/V838-4MFM] (last visited Feb. 13, 2025).

328. *See* Scholnick, *supra* note 187, at 1263–66 (comparing withdrawal from a political license to the partial withdrawal of digital rights that had been previously found by the Second Circuit to violate the consent decrees). For a full description and history of the litigation leading to the Second Circuit's holding, see generally Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183 (2016).

329. The governing consent decrees designate the U.S. District Court for the Southern District of New York as a specialized "rate court" for resolving disputes arising from rate-setting under the decrees. *See, e.g.*, United States v. ASCAP, No. 41-1395, 2001 WL 1589999, § IX (S.D.N.Y. June 11, 2001).

330. *See supra* Section III.A.1.

331. *See* Depoorter, *supra* note 86, at 441–43.

332. *See* Samuelson & Wheatland, *supra* note 96, at 501–05.

333. Balganesh, *Uneasy Case*, *supra* note 305, at 774–80.

334. *See supra* text accompanying note 46.

335. *See supra* notes 96–98, 157–58 and accompanying text.

The delayed enforcement illustrated by the comedian lawsuits against Pandora[336] lends support to the call for the establishment of PROs to handle the licensing of comedic works. In order to prevent the PROs from engaging in the anticompetitive behavior alleged in Pandora's unsuccessful counterclaim,[337] the FTC could consider implementing a consent decree comparable to that governing ASCAP and BMI.[338] This could help to both resolve current litigation and avoid future litigation while simultaneously lending predictability and consistency to the comedy licensing process.

Finally, selective enforcement's information-revealing function is particularly evident in cases such as Content ID, where a group of similarly situated private rights holders work in tandem with a platform to adopt a replacement of the relevant statute.[339] The wholesale rejection of the statutory safe harbor in favor of Content ID, coupled with the lawsuits brought by copyright owners who've been excluded, offers lawmakers a blueprint for drafting a better statute. In this way, selective enforcement can be an efficient means for Congress and regulators to extract information that they could not otherwise readily obtain from both rights holders and the market.

## CONCLUSION

Through the analysis of a series of enforcement decisions made by different copyright owners under different circumstances, this Article makes several contributions that are applicable across numerous areas of private law. First, it lends strong support to the oft-overlooked fact that not all rights holders share the same values, nor are motivated by the same forces, such that the relevant market might be better served by less homogenous regulation. For example, the conventional understanding is that the exclusive rights granted under copyright law are essential for works that cannot be physically "fenced off." Grimes's encouragement of fan videos and video game developers' encouragement of piracy, however, suggest that there are limits on the utility of this exclusivity and that in some contexts, copyright owners might be willing to compromise exclusivity for other values, such as promotion and resource conservation. Regulators would be well-served to consider these values as well.

Second, in highlighting copyright's propensity for lossless and beneficial wrongdoing, this Article identifies the important role that private rights of action play both in recognizing dignitary harm and reinforcing rights holder autonomy as a fundamental value in private enforcement. For example, the selective enforcement engaged in by musicians against certain politicians in the absence of economic loss—and despite the probable existence of a license—is not (solely) intended to compensate, nor based (solely) on any cost–benefit analysis. Instead, the performative enforcement engaged in by those rights holders is intended to assert and reinforce their authorial autonomy.

336. *See supra* Section III.A.2.
337. *See supra* note 155 and accompanying text.
338. *See supra* note 148; *What Are Music Industry Consent Decrees?*, *supra* note 327.
339. *See supra* Section III.A.3.

Finally, this Article demonstrates how a copyright owner's decision to either enforce against an infringer or not, as well as when and how to enforce, reveals valuable information to lawmakers and suggests that without sufficient attention on the enforcement decision itself, we are left with an impoverished account of the work that the relevant law is (and isn't) doing in different markets and contexts. For example, we understand copyright law's goal to be the incentivization of private creation for public consumption. Yet that is not what we see in performative enforcement. Politicians' use of copyrighted songs at rallies is precisely for public consumption, yet some copyright owners in this context utilize copyright law to control use, not access, an end that courts have repeatedly held to constitute overreach.[340] Selective enforcement allows lawmakers to see this dynamic more clearly.

Similarly, we intend mechanisms such as fair use and the public domain to serve as a check on unrestricted copyright protection, so as to allow for the free flow of information and flourishing of culture. A world in which YouTube, the world's largest content streaming service, consistently acknowledges neither limitation arguably contravenes this intention and leaves us with an unbalanced system. A legislative solution focused on monetization while introducing transparency and accountability could correct this.

As compared to public enforcement, relatively little scholarly attention has been paid to private enforcement.[341] The same is true of copyright law, where the literature tends to focus more on remedies and liability than on enforcement decisionmaking.[342] This Article attempts to remedy this imbalance by identifying an expanded role for selective enforcement in private law—one that reveals the underappreciated role that private parties play in policymaking, and suggests that private enforcement is an area ripe for further study.

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340. *See, e.g.*, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (discussing the balance Congress intended to strike between monopoly protection for copyright owners and access for the public).

341. When private enforcement does come up in the literature, it typically pertains to a critique of the interplay between public and private enforcement in the hybrid context. *See generally*, *e.g.*, Anna A. Mance, *How Private Enforcement Exacerbates Climate Change*, 44 CARDOZO L. REV. 1493 (2023) (arguing that the private side of environmental law's hybrid enforcement regime hampers the law's ability to slow climate change).

342. The most notable exception to this is the literature on copyright trolling, which is robust. *See generally, e.g.*, Sag, *supra* note 100 (presenting empirical evidence of the rapid growth of multi-defendant copyright litigation); Balganesh, *Uneasy Case*, *supra* note 305 (arguing that trolls are problematic notwithstanding their formal compliance with copyright's rules). For examples of research on other topics relating to copyright enforcement, see generally Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010) (describing the turn to private ordering and tech-driven enforcement solutions as a departure from copyright industry norms); Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L. J. 1 (2006) (considering the strategy of distributing copyright enforcement functions across multiple parties); William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUT. & HIGH TECH. L.J. 453 (2012) (discussing the prevalence of settlement as a means of enforcing IP rights). Notably, none of this work focuses on the enforcement decision itself.