

**WEAPONIZING COPYRIGHT**

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ABSTRACT

Copyright grants authors exclusive rights in their works in order to encourage creation and dissemination of socially valuable works. It permits copyright owners to assert their copyright against violations of those rights when necessary to protect their market exclusivity and economic interests. Increasingly, however, copyright is being used by individuals to achieve other objectives. This Article examines the increasingly widespread phenomenon of individuals using copyright to vindicate noncopyright interests, which this Article refers to as “weaponizing copyright.” In some cases, copyright is weaponized to silence criticism and legitimate speech. In other instances, the objective is to erase facts and make information disappear. Some assertions of copyright are intended to punish or retaliate for some perceived wrongdoing. Other assertions of copyright involve attempts to protect the reputation and dignity of copyright owners. Another objective is to protect privacy in personal and intimate information. In none of these scenarios are copyright owners seeking to protect their legitimate market or economic interests in their copyrighted works, the intended purpose of copyright.

Through exploring recent and high-profile instances of copyright weaponization involving Harvey Weinstein and Ronan Farrow, Pepe the Frog and InfoWars, Success Kid and Steve King, Navy SEALs and the Associated Press, PewDiePie, Dr. Drew, the McCloskeys, Netflix Films, Jehovah’s Witnesses, and others, this Article exposes the increasingly widespread practice of copyright weaponization. It explains how copyright became the weapon par excellence for indi-

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viduals to punish, erase, suppress, protect, and vindicate noncopyright interests, and why individuals choose to weaponize copyright instead of pursuing claims under other laws. It reviews commonly proposed solutions to dealing with copyright weaponization, and examines the drawbacks of each solution. It also challenges the presumption that weaponizing copyright is always harmful and must be discouraged by exploring the power dynamics and blurry lines between weaponization by aggressors to punish, erase, and suppress, and weaponization by the vulnerable to protect, preserve, and defend. Ultimately, this Article attempts to resolve two important questions: whether copyright should serve to protect some noncopyright interests but not others, and whether there is a fair and just way to manage the increasingly pervasive practice of copyright weaponization.

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## I. INTRODUCTION

Copyright grants authors exclusive rights in their works in order to encourage creation and dissemination of socially valuable works. It

permits copyright owners to assert their copyright against violations of those rights when necessary to protect their market exclusivity and economic interests. Increasingly, however, copyright is being used by individuals to achieve other objectives. For instance, Harvey Weinstein's team threatened Ronan Farrow with copyright infringement to try to stop him from publishing information about Weinstein's sexual misconducts. Dr. Drew filed copyright notices to take down a video compilation featuring dismissive statements he made about COVID-19. Slade Neighbors sued his ex-girlfriend for copyright infringement for disseminating his abusive text messages and emails. Netflix asserted copyright to remove negative comments about its controversial new film. Jehovah's Witnesses sued Faith Leaks for copyright infringement for leaking the organization's religious videos. Campo Santo copyright struck PewDiePie's Twitch channel to punish him for yelling a racist slur in a streaming video. Police officers played copyrighted music to complicate the ability of observers to record police conduct and share those recordings online. Pepe the Frog creator Matt Furie targeted alt-right or racist uses of Pepe with cease and desist letters and copyright infringement suits. Musicians threatened Donald Trump with copyright to stop him from using their music at campaign rallies. The photographer of the infamous image of the McCloskeys pointing their guns at Black Lives Matter protesters sent the McCloskeys a copyright demand for their use of that photograph on greeting cards. Women asserted copyright in their nude selfies to get their intimate photographs removed from revenge porn websites. All these stories have one thing in common: they all involve copyright owners using copyright to advance noncopyright interests. This Article refers to these actions as "weaponizing copyright."

This Article examines the widespread phenomenon of copyright weaponization. By granting authors exclusive rights in their works, copyright allows authors to realize financial and economic gains for their works. This is supposed to incentivize authors to create more works, which benefits society and increases dissemination of knowledge and information. This means that, in copyright's standard use, copyright owners assert their copyright against unauthorized uses of their works when necessary to preserve their market exclusivity and economic interests.<sup>1</sup> But that is not always the case, and it appears increasingly that copyright is being used to achieve other objectives. These other objectives do not fit within the traditional economic framings of copyright, and are unrelated to the economic incentives that copyright confers in order to incentivize creation. In some of these

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1. See Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2435 (2016).

stories, copyright is weaponized to silence criticism and speech. In other instances, the objective is to hide and bury information. Some assertions of copyright are intended to punish or retaliate. Other assertions of copyright involve attempts to protect the copyright owner's personal reputation or dignitary rights. Another objective is to protect privacy in personal and intimate information. In none of these stories are individuals asserting copyright to protect their market exclusivity or economic interests — the intended purposes of copyright.

Through examining instances of copyright weaponization, this Article seeks to accomplish three goals. First, it exposes the widespread use of copyright for noncopyright purposes. It identifies five common noncopyright objectives that copyright owners seek to achieve through weaponization: to silence and erase facts, suppress criticism and speech, punish and retaliate, protect reputation and moral rights, and preserve privacy. Second, this Article explains how copyright became the weapon *par excellence* to serve these noncopyright goals, why individuals weaponize copyright instead of pursuing claims under other laws, and what the prevalence of this practice reveals about copyright's role in society today. Third, this Article attempts to challenge the presumption that weaponizing copyright is always harmful and must be discouraged, and then attempts to rely on moral intuition to judge the good weaponization from the bad weaponization. It does so by exploring the power dynamics and blurry lines between weaponization by aggressors to punish, erase, and suppress, and weaponization by the vulnerable to preserve, defend, and protect personal interests. Ultimately, this Article attempts to resolve two important questions: whether copyright should serve certain noncopyright objectives but not others, and whether there is a fair and just way to manage the increasingly pervasive practice of weaponizing copyright.

At this point, it is important to clarify two points. The first is that not all weaponized or noncopyright uses of copyright are bad, and the second is that not all typical copyright uses are good. This Article's use of the term weaponizing copyright is not intended to imply that all noncopyright uses of copyright are unjustified or in bad faith. As explored below, a weapon can be in the hand of an aggressor to cause harm and further disempower the powerless, or it can be in the hand of the vulnerable to even the playing field, upend traditional power structures, and provide safety, shelter, and resistance. In some of the noncopyright objectives explored below, copyright is weaponized by individuals in a more powerful position to silence, suppress, and further subjugate. In others, this power dynamic shifts when copyright is weaponized by the vulnerable or traditionally defenseless to protect themselves from harm. Therefore, for the purpose of this Article, weaponizing copyright refers to uses of copyright to achieve noncopy-

right objectives, regardless of whether the reasons for those uses may seem justified. Furthermore, there is no denying that there are many other problematic and abusive uses of copyright, such as overreaching copyright claims, copyright trolling, anticompetitive uses of copyright, or even abusive claims of copyright over employee creations.<sup>2</sup> However, these uses of copyright are ultimately driven by preserving market exclusivity and economic interests. Therefore, even though these uses can be problematic, harmful, or abusive, they are nevertheless excluded from this Article's analysis because they are not advanced for noncopyright purposes.

This Article proceeds as follows. Part II defines weaponizing copyright, identifies recent or older high-profile instances of this behavior, and briefly touches on the harms posed by copyright weaponization. It categorizes instances of copyright weaponization based on the noncopyright objectives that individuals seek to achieve, and explores the five common objectives that copyright owners pursue in weaponizing copyright: to silence and erase facts, to suppress and censor criticism and speech, to punish and retaliate, to protect reputation and dignity, and to preserve privacy. Part III explains why, in all the described instances of copyright weaponization, individuals rely on copyright instead of pursuing other legal claims to achieve their objectives. This includes acknowledging copyright's expansive role in society today, and explaining why copyright is superior to other legal solutions for achieving noncopyright objectives. Part IV surveys three common approaches to handling assertions of copyright for noncopyright purposes. It critically examines the benefits and concerns with each approach, and highlights the difficulties in creating a fair and just legal framework to discourage copyright weaponization without inadvertently foreclosing the ability of vulnerable members of society to defend themselves from harm. Finally, Part V highlights the complications with attempting to categorize copyright weaponization based on overlapping objectives or motives. This Part uses examples from Part II to demonstrate the difficulties with drawing clear lines between

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2. See, e.g., John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 278–80 (2015) (describing assertions of copyright by Universal, Prince, Warner Bros. as “ill advised,” but nevertheless motivated by maximizing profits and protecting the economic market for the copyrighted works); Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 565–75 (2015) (describing assertions of copyright to protect the owner's market beyond the copyright and examples of copyright trolling); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 800–03 (2015) (describing overbroad employment agreements assigning copyright, including copyright to ideas conceived by an employee, to their employer). See generally Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2014) (describing anticompetitive behavior in terms and provisions in copyright licensing agreements).

different forms of copyright weaponization, and the problems with attempting to map legal frameworks onto blurry and uncertain moral intuitions.

## II. WEAPONIZING COPYRIGHT

Copyright encourages the creation and dissemination of socially valuable works to “promote the Progress of Science and useful Arts.”<sup>3</sup> It does so by promising a copyright owner market exclusivity in their creative works.<sup>4</sup> Therefore, when we envision a typical copyright infringement dispute it might involve, for instance, a copyright owner asserting their copyright against an infringer who reproduces a copyrighted work without authorization or an infringer who incorporates a song without obtaining a license. Because every unauthorized copy an infringer makes, sells, or uses is one less copy someone will buy or license from the copyright owner, the copyright owner asserts their copyright to prevent these infringing uses from supplanting their market in their works. In other words, under copyright’s standard rationale, a copyright owner’s objective in asserting copyright is to ensure their market exclusivity in their work and to protect their economic interests.<sup>5</sup>

Copyright owners, however, do not always assert copyright to protect their market exclusivity or economic interest in their copyrighted works. In 1988, Judge Leval, writing for the Southern District of New York, warned that copyright has the ability to be used “as an aggressive weapon to prevent the publication of embarrassing revelations and to obstruct criticism.”<sup>6</sup> We have become more aware of individuals using copyright for other reasons, and copyright owners today “often pursue IP disputes for reasons having little to do with revenue streams, creativity, or intellectual labor.”<sup>7</sup> For instance, dur-

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3. U.S. CONST. art. I, § 8, cl. 8.

4. *See id.* The Supreme Court has explained that “[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 through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

5. *See, e.g.,* Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257, 259 (2006) (“Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives.”).

6. *New Era Publ’ns Int’l. ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1502 (S.D.N.Y. 1988).

7. Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 73 (2018). *See generally* Buccafusco & Fagundes, *supra* note 1; Fromer, *supra* note 2; Shyamkrishna Balganesh, *Privative Copyright*, 73 VAND. L. REV. 1 (2020); Eric Goldman

ing the election season, a number of musicians asserted copyright to stop the Trump campaign's unauthorized use of their copyrighted songs at his political campaign rallies.<sup>8</sup> These musicians asserted their copyright not because the Trump campaign failed to pay them a licensing fee to use their songs, but because they did not want their songs associated with Trump or his polarizing politics.<sup>9</sup> Women have asserted copyright to take down intimate photos of themselves that their ex-partners shared online without their consent.<sup>10</sup> These women did not assert their copyright because they were motivated to protect their own exclusive right to market those photographs; instead, they asserted copyright to prevent the dissemination of their private and intimate images.<sup>11</sup> The copyright threats Harvey Weinstein's team orchestrated against journalist Ronan Farrow were not based on a market or financial interest in the copyrighted material that Farrow was supplanting, but were an attempt to silence Weinstein's victims and suppress Farrow's publication and dissemination of Weinstein's sexual misconduct.<sup>12</sup> All of those uses of copyright are attempts to achieve objectives other than protection of the market exclusivity and economic interests in a copyrighted work. In other words, these are uses of copyright to vindicate noncopyright interests. This Article identifies these uses, and other assertions of copyright to protect personal rather than economic interests, as weaponizing copyright.

The following sections highlight the different ways copyright is weaponized to vindicate interests that have nothing to do with protecting the market exclusivity or economic interests in copyrighted works, and briefly explains the harms posed by copyright weaponization. In order to demonstrate the widespread expansiveness of this practice, the sections below describe both recent and older high-profile examples of copyright weaponization, and categorize these instances based on the objectives that copyright weaponizers seek to achieve. The practice is likely more expansive than this Article can capture, especially considering the many disputes that are quietly settled when content is voluntarily taken down, or when content is quickly removed by online platforms in response to copyright takedown requests. In each

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& Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929 (2019); Tehranian, *supra* note 2.

8. Cathay Y. N. Smith, *Political Fair Use*, 62 WM. & MARY L. REV. 2003, 2028–29 (2021).

9. *Id.*

10. *See, e.g.*, Gilden, *supra* note 7, at 82–87. *See generally* Amanda Levendowski, Note, *Using Copyright To Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422 (2014).

11. *See infra* Section II.E.

12. *See* RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS 234 (2019).

of the instances described below, individuals use copyright to attempt to achieve noncopyright objectives. These objectives include punishment and retaliation, erasing facts and burying information, suppressing speech and censoring criticism, protecting reputation and dignitary interests, and preserving privacy.

#### *A. Weaponizing Copyright to Punish and Retaliate*

The expansion and growth of the internet for social content has made it easier to weaponize copyright, including for the purpose of punishing, retaliating, or harming another party's interests. Copyright owners have asserted DMCA takedown notices, commonly known as "copyright strikes," against YouTubers to punish them for using racist or sexist language; asserted infringement actions to punish parties for exercising their legal rights; and filed claims against rivals out of spite. In each of these instances, copyright is weaponized to punish and retaliate. Similar to spite cases in real property law,<sup>13</sup> the primary objectives the property rightsholders seek to achieve in these scenarios are to punish, retaliate, or harm another party or their interests. Recent or high-profile instances of this behavior include gaming company Campo Santo and fellow Twitch gamer Alinity copyright striking PewDiePie for making racist and sexist comments, Sony Music suing musicians who exercise their copyright termination rights against Sony, TD Bank enjoining its former "rock star" president's new book out of vindictiveness, and Hustler publisher Larry Flynt filing a retaliatory copyright claim against Reverend Jerry Falwell.

PewDiePie, whose real name is Felix Kjellberg,<sup>14</sup> is a popular Internet celebrity who became famous for streaming videos of himself playing video games and commenting on other people's gameplay on YouTube and Twitch, a livestreaming video service.<sup>15</sup> On a number of occasions, PewDiePie has made anti-Semitic, racist, or sexist comments and jokes on camera in his streams,<sup>16</sup> a tendency that has

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13. See generally Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013).

14. Robert Moran, *Who is PewDiePie, YouTube's Record-Setting Personality?*, THE SYDNEY MORNING HERALD (Aug. 27, 2019), <https://www.smh.com.au/entertainment/celebrity/who-is-pewdiepie-youtube-s-record-setting-personality-20190827-p52l7a.html> [https://perma.cc/Q4H2-YNNW]. As of October 2020, PewDiePie's YouTube channel had over 100 million subscribers. PewDiePie, YOUTUBE, <https://www.youtube.com/user/PewDiePie> [https://perma.cc/8VMK-MTDW].

15. Tobey Grumet, *AOC Garners over 5 Million Views Playing 'Among Us' on Twitch*, DECIDER (Oct. 23, 2020, 12:26 PM), <https://decider.com/2020/10/23/aoc-among-us-twitch/> [https://perma.cc/KJQ2-TC8X]. These livestreams often capture the player, their facial expressions and verbal comments, and the video games they are playing.

16. Rolfe Winkler, Jack Nicas & Ben Fritz, *Disney Severs Ties With YouTube Star PewDiePie After Anti-Semitic Posts*, WALL ST. J. (Feb. 14, 2017, 12:28 AM),

earned him multiple copyright strikes on YouTube.<sup>17</sup> In one instance, while playing the video game PlayerUnknown's Battlegrounds in a livestream, PewDiePie shouted an offensive and vicious racist slur.<sup>18</sup> In response, Campo Santo, the producer of another game called Firewatch, filed a copyright strike against PewDiePie to take down all of the videos featuring PewDiePie playing Firewatch.<sup>19</sup> Campo Santo is not the producer of PlayerUnknown's Battleground, and there was no evidence that PewDiePie used any racist language while playing any of Campo Santo's games. Nevertheless, in a series of tweets, Campo Santo's co-founder Sean Vanaman justified the copyright strike: "I am sick of this child getting more and more chances to make money off of what we make . . . He's worse than a closeted racist: he's a propagator of despicable garbage that does real damage to the culture around this industry."<sup>20</sup> Notably, Campo Santo sacrificed its own financial interest to punish "a very rich man who yells casual racist insults in front of millions of people."<sup>21</sup>

In addition to Campo Santo, another Twitch personality named Alinity also called for a copyright strike after PewDiePie called her and other female Twitch celebrities "stupid Twitch thots" in a stream featuring one of her Twitch videos.<sup>22</sup> Alinity publicly called for the "copy strike" of PewDiePie's video, explaining<sup>23</sup>:

The reason I reacted the way I did is because frankly  
I am so frustrated and tired of the rampant sexism in

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<https://www.wsj.com/articles/disney-severs-ties-with-youtube-star-pewdiepie-after-anti-semitic-posts-1487034533> [<https://perma.cc/C9QA-QLFX>]; Kevin Roose, *What Does PewDiePie Really Believe?*, N.Y. TIMES MAG. (Oct. 9, 2019), <https://www.nytimes.com/interactive/2019/10/09/magazine/PewDiePie-interview.html> [<https://perma.cc/EBM8-KYGN>].

17. See *Copyright Strike Basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000?hl=en> [<https://perma.cc/DJ7V-AFGQ>] (explaining what a copyright strike is).

18. Adi Robertson, *Why Was It so Easy to Weaponize Copyright Against PewDiePie?*, VERGE (Sept. 12, 2017, 8:20 AM), <https://www.theverge.com/2017/9/12/16287688/pewdiepie-racism-firewatch-campo-santo-dmca-copyright-ban> [<https://perma.cc/56LC-XKT2>].

19. Timothy B. Lee, *Here's What the Law Says About PewDiePie's Fight with Campo Santo*, ARS TECHNICA (Sept. 12, 2017, 8:30 AM), <https://arstechnica.com/gaming/2017/09/heres-what-the-law-says-about-pewdiepies-fight-with-campo-santo/> [<https://perma.cc/3L2B-JYXY>].

20. Owen S. Good, *Firewatch Creator Vows DMCA Retaliation Against PewDiePie for Racist Slur Used in Stream*, POLYGON (Sept. 10, 2017, 7:43 PM), <https://www.polygon.com/2017/9/10/16285188/pewdie-pie-racist-slur-firewatch-retaliation-dmca> [<https://perma.cc/9Y3Q-2U5B>].

21. Robertson, *supra* note 18.

22. Steve Asarch, *Pewdiepie and Alinity Drama Explained: What's a Copyright Strike?*, NEWSWEEK (May 23, 2018, 6:01 PM), <https://www.newsweek.com/pewdiepie-alinity-twitch-copy-strike-youtube-drama-reddit-941546> [<https://perma.cc/R98Z-AD8J>].

23. *Id.*

online communities. I take issue with someone like [PewDiePie] degrading and minimizing women to what is largely a very young audience. That kind of nonsense spills over and ends up on my stream where I end up being harassed for 6 hours.<sup>24</sup>

Both Campo Santo and Alinity were explicit about their intentions, and neither asserted copyright against PewDiePie to protect the market exclusivity or economic interests in their works. Instead, the primary objective of their copyright strikes was to punish PewDiePie for his racist and sexist comments.

In 2019, the long-standing “vindictive” copyright infringement claim TD Bank filed against its former founder and president Vernon Hill was finally resolved.<sup>25</sup> Vernon Hill founded Commerce Bank (“Commerce”), which was later acquired by TD Bank.<sup>26</sup> Hill was once described as “the closest thing that the staid banking industry has to a rock star.”<sup>27</sup> During Hill’s time as CEO of Commerce, from 2006 to 2007, he wrote a book manuscript about his business philosophy and his tenure at Commerce.<sup>28</sup> He assigned his copyright in the manuscript to Commerce.<sup>29</sup> Before the book was published, however, the relationship between Hill and the bank soured, leading Commerce to terminate Hill’s employment and cancel its plans to continue pursuing publication of Hill’s manuscript.<sup>30</sup> After leaving Commerce, Hill founded Metro Bank UK and decided to write and publish another book called *FANS! Not Customers: How to Create Growth Companies in a No-Growth World*, detailing Hill’s banking philosophy and his founding of Metro Bank UK.<sup>31</sup> To write *FANS!*, Hill borrowed heavily from his original manuscript.<sup>32</sup> After *FANS!* became available on Amazon and other retailer establishments, TD Bank registered Hill’s original manuscript with the U.S. Copyright Office and, in 2012, filed copyright takedown requests demanding retailers remove

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24. *Id.*

25. See Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of eBay*, 63 WM. & MARY L. REV. (forthcoming) (manuscript at 35) (draft available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3801254](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801254) [https://perma.cc/9EUX-N2PA]) (describing TD Bank’s assertion of copyright as a case “smacked of vindictiveness”).

26. TD Bank, N.A. v. Hill (TD Bank I), No. 12-7188, 2015 WL 4523570, at \*1 (D.N.J. July 27, 2015).

27. TD Bank N.A. v. Hill (TD Bank III), 928 F.3d 259, 265–66 (3d Cir. 2019).

28. *Id.* at 266.

29. *Id.*

30. *Id.* at 267.

31. *Id.*

32. See *id.* at 266–67.

*FANS!* from their shelves.<sup>33</sup> A number of retailers complied with TD Bank's demand.<sup>34</sup> Even though TD Bank had no intention of publishing Hill's original manuscript, it nevertheless filed a copyright infringement suit against Hill seeking to permanently enjoin his publication and dissemination of *FANS!*<sup>35</sup> In 2016, a court granted TD Bank a permanent injunction and it was not until three years later, in 2019, that an appellate court vacated the permanent injunction when it considered the injunction's harm to the public interest weighed against TD Bank's interest.<sup>36</sup> In that analysis, the court explicitly recognized that TD Bank's interest was limited because it pursued its injunction against *FANS!* "not to safeguard the commercial marketability of a work but merely to suppress unwelcome speech."<sup>37</sup> Even though this case "smacked of vindictiveness" and the legal case ultimately failed,<sup>38</sup> TD Bank was successful in using copyright to suppress the dissemination of an author's book for years.

In certain instances, copyright is weaponized by parties who are already in legally adverse relationships. Recently, Sony Music Entertainment ("Sony") filed a retaliatory copyright infringement claim against musicians who asserted their legal right to terminate their copyright transfers to Sony.<sup>39</sup> Under copyright law, authors who transferred their copyrights after January 1, 1978 have the right to terminate those transfers 35 to 40 years after transfer.<sup>40</sup> Musicians John Lyon and Paul Collins filed notices to terminate the transfer of their copyrights to Sony for their musical sound recordings "Here Comes The Night, Live It Up," "The Beat," and other songs.<sup>41</sup> In response, Sony filed suit against Lyon and Collins for, among other things, contributory copyright infringement.<sup>42</sup> Specifically, Sony claimed in their suit that Sony owned the artwork on Lyon's and Collins's music al-

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33. *Id.* at 267.

34. *TD Bank, N.A. v. Hill* (TD Bank I), No. 12-7188, 2015 WL 4523570, at \*4 (D.N.J. July 27, 2015).

35. *TD Bank III*, 928 F.3d at 286. *See also* *TD Bank v. Hill* (TD Bank II), No. 12-7188, 2016 WL 3448264, at \*2 (D.N.J. June 14, 2016) (granting permanent injunction).

36. *TD Bank II*, 2016 WL 3448264, at \*2; *TD Bank III*, 928 F.3d at 286.

37. *TD Bank III*, 928 F.3d at 284.

38. *See* Samuelson, *supra* note 25, at 35.

39. Eriq Gardner, *Sony Suing Musicians for Allowing Attorney to Use Album Artwork*, HOLLYWOOD REPORTER (Oct. 5, 2020, 11:58 AM), <https://www.hollywoodreporter.com/thr-esq/sony-suing-musicians-for-allowing-attorney-to-use-album-artwork> [<https://perma.cc/JFW2-H5RW>].

40. 17 U.S.C. § 203 (1976).

41. Blake Brittain, *Sony Can't Defeat Claims over Musicians' Copyright Terminations*, BLOOMBERG L. (Apr. 1, 2020, 4:19 PM), <https://news.bloomberglaw.com/class-action/sony-cant-defeat-claims-over-musicians-copyright-termination> [<https://perma.cc/E7QR-KFTC>]; *Johansen v. Sony Music Ent. Inc.*, No. 19 Civ. 1094, 2020 WL 1529442 at \*1 (S.D.N.Y. Mar. 31, 2020).

42. *See* Gardner, *supra* note 39.

bums, and that Lyon and Collins were using those cover images for their copyright termination dispute without Sony's authorization.<sup>43</sup> Sony's assertion of copyright against Lyon and Collins appeared to be purely retributive, meant to punish the musicians for exercising their copyright termination rights and, perhaps, to warn other musicians who might consider doing the same.

Similarly, while instances of weaponizing copyright have certainly increased over the past years, there are older instances involving copyright weaponized to punish enemies in long-standing legal feuds. A famous retaliatory copyright claim involved *Hustler Magazine* ("Hustler") founder Larry Flynt and Moral Majority leader Reverend Jerry Falwell in the 1980s. Flynt was the founder and publisher of the monthly pornographic magazine *Hustler*. Falwell was the leader of Moral Majority, a political action group founded to further a conservative and religious agenda.<sup>44</sup> Falwell was vocal about his disapproval of Flynt and *Hustler*, blaming Flynt for "the decay of all morals."<sup>45</sup> In response to Falwell's insults, Flynt decided to "start poking some fun at" Falwell<sup>46</sup> by publishing a full-page parody advertisement mocking Falwell and his mother in *Hustler*'s November 1983 issue.<sup>47</sup> In response, Falwell sued Flynt and *Hustler* for libel, invasion of privacy, and intentional infliction of emotional distress.<sup>48</sup> Their infamous dispute ultimately resulted in the landmark 1988 Supreme Court decision *Hustler v. Falwell*<sup>49</sup> and inspired the 1996 blockbuster movie *The People vs. Larry Flynt*.<sup>50</sup> In order to fund his litigation against *Hustler*, Falwell made unauthorized copies of *Hustler*'s parody ad and distributed them in letters to his supporters to raise funds to sue "'Porno King' Larry Flynt" for "defil[ing] the good

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43. *See id.*

44. Larry Flynt, *My Friend, Jerry Falwell*, L.A. TIMES (May 20, 2007, 12:00 AM), <https://www.latimes.com/la-op-flynt20may20-story.html> [https://perma.cc/KY7H-CMWK]; *Moral Majority*, BRITANNICA, <https://www.britannica.com/topic/Moral-Majority> [https://perma.cc/Y7E2-9A2K].

45. Flynt, *supra* note 44.

46. *Id.*

47. *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1149–50 (9th Cir. 1986); *see also* *Jerry Falwell Talks About His First Time*, available at <https://boingboing.net/images/falwell-hustler-first-time.jpg> [https://perma.cc/T6TR-YUJJ].

48. *See* *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47–48 (1988).

49. *Id.*

50. *See* *The People vs. Larry Flynt*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_People\\_vs.\\_Larry\\_Flynt](https://en.wikipedia.org/wiki/The_People_vs._Larry_Flynt) [https://perma.cc/5WHL-UQEN] (describing the movie being "based in part on the U.S. Supreme Court case."); *see also* Edward Guthmann, *Milos Forman Explains Why He Made 'The People vs. Larry Flynt'*, CHI. TRIB. (Dec. 27, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-12-27-9612270059-story.html> [https://perma.cc/C62Y-526H].

name of my dear mother.”<sup>51</sup> In clear “retaliation for Falwell’s prior legal action against him,” *Hustler* sued Falwell for infringing the copyright to its parody ad.<sup>52</sup> After four years of litigation, the court finally dismissed *Hustler*’s retaliatory copyright suit under copyright’s fair use doctrine.<sup>53</sup>

Asserting copyright out of spite to punish another party or to retaliate against perceived wrongdoings is clearly not why copyright law grants authors exclusive rights to their copyrighted works. Not only is this use not aimed at protecting the economic interests of copyright holders, it also fails the purpose of copyright to “promote the progress of science and useful arts”<sup>54</sup> when copyright owners’ rights are used only to harm one another. In these cases, when copyright owners assert their right “just for the reason that it will harm others,” they are exceeding their jurisdiction.<sup>55</sup> As Professor Larissa Katz explains, when a property owner asserts their property right against another out of spite:

She has in that case used her power qua owner not to determine a worthwhile use of the thing but to . . . use her position just in order to harm someone else, out of spite or to gain leverage. When an owner’s decision about her thing is designed just to cause harm to another — whether as an end in itself or even as a means to some further valuable end — she abuses her right.<sup>56</sup>

Weaponizing copyright to punish or retaliate out of spite can harm the public without necessarily providing the public with a corresponding gain. In these spite cases, the rights conferred to copyright owners to incentivize creativity and dissemination are being used for abusive reasons that go beyond their charge. They defeat and contravene the purpose of granting exclusive rights to works under copyright. While some of the goals of these assertions, such as to punish racist or sexist outbursts on video, may appear worthwhile or justifiable, they can still harm the public interest when they result in the loss of valuable social commentary, cultural expression, or intangible arti-

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51. *Hustler Mag., Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1533 (C.D. Cal. 1985), *aff’d*, 796 F.2d 1148 (9th Cir. 1986).

52. Tehranian, *supra* note 2, at 265.

53. *Hustler Mag., Inc.*, 606 F. Supp. at 1532.

54. U.S. CONST. art. I, § 8, cl. 8.

55. Katz, *supra* note 13, at 1451.

56. *Id.*

facts, or make those works unavailable to the public and inaccessible to those who seek them.

*B. Weaponizing Copyright to Erase Facts and Bury Information*

Copyright is also weaponized to erase facts and bury information. Men assert copyright to silence victims from speaking out about sexual abuse and to bury evidence about their bad behaviors. Doctors claim copyright to wipe negative reviews of their professional services. Politicians assert copyright to hide their politically extremist views. Public figures or their families threaten copyright to bury embarrassing family histories and facts. Copyright owners have filed copyright infringement claims, sent threatening cease and desist letters, and filed online takedown demands in efforts to erase facts and bury information. In these instances, instead of protecting their exclusive right to disseminate their copyrighted works, copyright owners assert their copyright to *prevent* the dissemination of those works. In some of these instances, copyright owners' attempts fail to make the information disappear. In others, individuals succeed in removing content for a short period of time or even permanently. The success of the weaponization often depends on the power dynamics between the parties, their access to legal resources, and the motivation of the weaponizer compared with the putative infringer.<sup>57</sup> Although several copyright owners described below were ultimately unsuccessful at achieving their objective, there are likely many more cases that are unreported or undiscoverable in which copyright weaponization succeeded in burying information. It is axiomatic that the more successful copyright owners are at weaponizing copyright to silence or erase information, the less likely their abusive actions are to be discovered.

As the #MeToo movement began exposing the sexual misconducts of men in power, some of those men attempted to use copyright law to conceal facts about their bad behaviors and silence victims from exposing their misconduct. Some credit the escalation of the #MeToo movement to journalist Ronan Farrow's 2017 bombshell *New Yorker* article that exposed Harvey Weinstein's long history of sexually exploiting and assaulting women in Hollywood.<sup>58</sup> During Farrow's research into those incidents, including interviews with Weinstein's victims, Farrow faced an orchestrated attempt from The Weinstein Company ("TWC") and Farrow's own employer NBCUni-

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57. See *infra* Section III.A.

58. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [http://perma.cc/789E-RL2H].

versal News Group (“NBC”)<sup>59</sup> to assert copyright against Farrow and the media companies he was working with.<sup>60</sup> Specifically, Farrow described an instance when he received a cease and desist letter from TWC asserting that the copyright to the information he collected and prepared were “the property of NBC and do not belong to [him], nor [was he] licensed by NBC to use any such interviews.”<sup>61</sup> The same letter demanded that Farrow “turn over all [his] work product relating to TWC,” and threatened media outlets that worked with Farrow, including *The New Yorker*, that they were “on notice of [the] legal claims against them.”<sup>62</sup> These copyright threats were clearly meant to suppress the information that Farrow was collecting about Weinstein’s serious sexual misconducts, and to silence Weinstein’s victims. After consulting with an attorney, and despite these threats, Farrow eventually went ahead and published his exposé of Weinstein.<sup>63</sup>

Businesses have also learned to weaponize copyright to remove unflattering or negative reviews of their goods and services. For instance, in 2010, the media began reporting on a trend involving doctors who attempt to claim copyright ownership over patient reviews in order to silence bad reviews.<sup>64</sup> For instance, Dr. Stacy Makhnevich asserted copyright to takedown negative reviews of her New York dental practice from the online consumer review website *Yelp.com*.<sup>65</sup> In 2010, Robert Lee went to see Makhnevich for dental work.<sup>66</sup> One of the documents that Lee signed prior to his dental appointment at Makhnevich’s office was a “Mutual Agreement to Maintain Privacy,” which preemptively assigned to Makhnevich the copyright to any reviews that Lee were to write about Makhnevich’s dental services.<sup>67</sup> After his dental work, Lee shared his negative experience on *Yelp* on August 24, 2011, writing: “Avoid at all cost! . . . Scamming their cus-

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59. See generally FARROW, *supra* note 12.

60. *Id.* at 234.

61. *Id.* at 235. Excerpts of the cease and desist letter in Farrow’s book did not explain the theory under which NBC could claim copyright ownership of Farrow’s interviews; NBC’s argument was likely under copyright’s work-made-for-hire doctrine, because Farrow was employed by NBC when he gathered much of his resources.

62. *Id.* at 235.

63. See Farrow, *supra* note 58.

64. Joe Mullin, *Dentist Who Used Copyright to Silence Her Patients Is on the Run*, ARS TECHNICA (July 28, 2013 6:00 PM), <https://arstechnica.com/tech-policy/2013/07/dentist-who-used-copyright-to-silence-her-patients-is-on-the-run/> [https://perma.cc/D24H-CDPV]; see also *In the News*, DOCTORED REVIEWS, <https://www.doctoredreviews.com/press/in-the-news/> [https://perma.cc/BTD9-XEZA].

65. See Tehranian, *supra* note 2, at 254 n.37; see also Goldman & Silbey, *supra* note 7, at 947–50 (describing businesses that engage in “pre-creation acquisitions” of consumer reviews of their services in order to scrub negative reviews left on consumer review content platforms).

66. Mullin, *supra* note 64.

67. See Tehranian, *supra* note 2, at 254 n.37.

tomers! Overcharged me by about \$4000 for what should have been only a couple-hundred dollar procedure.”<sup>68</sup> In response, Makhnevich’s office asserted copyright to Lee’s review and sent a copyright takedown demand to *Yelp.com* to remove it.<sup>69</sup> Makhnevich also sent Lee a demand letter for \$100 a day for copyright infringement and threatened to pursue “all legal actions against him.”<sup>70</sup> Makhnevich’s assertion of copyright in this instance was clearly designed to silence Lee’s criticism and to make his negative review of Makhnevich’s services disappear.<sup>71</sup> As of September 2021, Lee’s review is available on Yelp but appears under reviews “that are not currently recommended” by Yelp.<sup>72</sup> Currently, on the *Yelp* page for Stacy Makhnevich, DDS, there are 42 reviews that *Yelp* has categorized as reviews “that are not currently recommended,” and 341 reviews that were removed for violating Yelp’s Terms of Service.<sup>73</sup> There are only six “Recommended Reviews” on Yelp for Stacy Makhnevich, DDS.<sup>74</sup>

Politicians and public figures also use copyright law to try to bury unpopular policies, past statements, or embarrassing family histories.<sup>75</sup> For instance, during Sharron Angle’s 2010 campaign for U.S. Senate against Harry Reid, Angle’s campaign asserted copyright to erase the extreme conservative views that she shared in the past.<sup>76</sup> While Angle was campaigning for the Republican nomination in Nevada’s Senate race, she published a campaign website advertising her views on abolishing Social Security and the Department of Education.<sup>77</sup> After gaining the Republican nomination, Angle’s campaign

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68. Mullin, *supra* note 64.

69. *Id.*

70. *Id.*

71. See Jodie Griffin, *The Doctor Will Be Right with You . . . After You Sign over Your Copyright*, PUBLIC KNOWLEDGE (June 8, 2020), <https://www.publicknowledge.org/blog/the-doctor-will-be-right-with-you-after-you-sign-over-your-copyright/> [https://perma.cc/DB2T-2F5L]; see also Eric Goldman, *The Latest Insidious Tactic to Scrub Online Consumer Reviews*, FORBES (July 23, 2013, 12:07 PM), <https://www.forbes.com/sites/ericgoldman/2013/07/23/the-latest-insidious-tactic-to-scrub-online-consumer-reviews/?sh=588a57f73e1e> [https://perma.cc/5QWG-7VPQ].

72. See 42 Reviews for Stacy Makhnevich, DDS that Are Not Currently Recommended, YELP, [https://www.yelp.com/not\\_recommended\\_reviews/stacy-makhnevich-dds-new-york?not\\_recommended\\_start=20](https://www.yelp.com/not_recommended_reviews/stacy-makhnevich-dds-new-york?not_recommended_start=20) [https://perma.cc/H55R-H6U9].

73. *Id.*

74. See Stacy Makhnevich, DDS, YELP, <https://www.yelp.com/biz/stacy-makhnevich-dds-new-york> [https://perma.cc/9Z5R-YSNL].

75. See, e.g., Smith, *supra* note 8, at 2068; see also *Caner v. Autry*, 16 F. Supp. 3d 689, 692 (W.D. Va. 2014) (asserting copyright infringement against student who posted videos of Caner’s past speeches on YouTube where Caner made (false) statements that he “had grown up as a Muslim in Turkey, steeped and trained in jihad, in a tradition that went back several generations in his father’s family”); David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 547–48 (2010) (detailing the Joyce estate’s use of copyright to control scholarly reporting on family history).

76. Smith, *supra* note 8, at 2035.

77. *Id.*

removed that website and replaced it with one expressing more moderate views to win over moderate and independent voters in Nevada.<sup>78</sup> Harry Reid's campaign recovered Angle's previous website and reproduced it on a webpage called "The Real Sharron Angle."<sup>79</sup> In response, the Angle campaign sent Reid a cease and desist letter asserting that the Reid campaign's reproduction of Angle's website infringed her copyright in her website.<sup>80</sup> Angle threatened "to pursue all available legal remedies" against Reid and his campaign because "[y]our Web site is like you . . . it's your intellectual property . . . . So they can't use something that's yours, intellectual property, unless they pay you for it or get your permission."<sup>81</sup> Angle's copyright threats were meant to hide her extremist views and policy statements from voters and the public. Despite Angle's threats, The Real Sharron Angle webpage remained up, and there is no record that Angle pursued any legal action against Reid.<sup>82</sup>

Similarly, TV-doctor Drew Pinsky ("Drew") in 2020 attempted to use copyright to conceal dismissive statements he made early in the pandemic. At the beginning of the COVID-19 outbreak in the U.S., Drew publicly dismissed the outbreak's seriousness on his shows *Ask Dr. Drew* and podcast *Dr. Drew After Dark*.<sup>83</sup> Specifically, Drew made statements "repeatedly suggest[ing] the coronavirus would be not as bad as the flu" and claiming that "the probability of dying of coronavirus was less than being hit by an asteroid."<sup>84</sup> On April 2, 2020, YouTuber Dr Droops compiled a five-minute video "of all of the inaccurate, contradictory things that Dr. Drew has said about

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78. *Id.*

79. *Id.*

80. *Id.*; Eduardo M. Peñalver & Sonia Katyal, *The Fair Use Senator: Can Harry Reid Really Post Sharron Angle's Old Campaign Web Site?*, SLATE (July 9, 2010, 3:02 PM), <https://slate.com/news-and-politics/2010/07/can-harry-reid-post-sharron-angle-s-old-web-site.html> [https://perma.cc/969X-7U7Z].

81. Smith, *supra* note 8, at 2035–36; John W. Dean, *How Harry Reid Might Respond to Sharron Angle's Planned 'SLAPP' Suit*, FINDLAW (July 9, 2010), <https://supreme.findlaw.com/legal-commentary/how-harry-reid-might-respond-to-sharron-angles-planned-slapp-suit.html> [https://perma.cc/PG7Q-MCQZ].

82. See Smith, *supra* note 8, at 2035–36; see also Peñalver & Katyal, *supra* note 80 ("[W]e applaud Reid's willingness to stick to his guns . . . and continue posting his archived version of Angle's Web site, even at the risk of a lawsuit.").

83. Associated Press, *Dr. Drew Pinsky Apologizes for Coronavirus Comments: 'I Got It Wrong'*, USA TODAY (Apr. 7, 2020, 8:20 AM), <https://www.usatoday.com/story/entertainment/celebrities/2020/04/07/coronavirus-dr-drew-pinsky-addresses-covid-19-criticism/2960027001/> [https://perma.cc/R79Q-DXKK].

84. *Id.*; see also Kate Cox, *Dr. Drew Apologizes for Being a COVID-19 Denier after Copyright Silliness*, ARS TECHNICA (Apr. 6, 2020, 3:25 PM), <https://arstechnica.com/tech-policy/2020/04/dr-drew-coronavirus-supercut-restored-to-youtube-after-copyright-takedown/> [https://perma.cc/X6V6-AN3T].

coronavirus” and posted it on YouTube.<sup>85</sup> It was circulated on social media, including in one instance by a reporter tweeting the link and accusing Drew of being “a snake oil salesman” and “a disgrace.”<sup>86</sup> In response, Drew Pinsky Inc. filed a copyright takedown notice to remove the video compilation from YouTube.<sup>87</sup> Drew also threatened social media users resharing the video compilation that “[i]nfringing copywrite [*sic*] laws is a crime. Hang on to your retweets. Or erase to be safe.”<sup>88</sup> YouTube took down the video compilation in response to Drew’s copyright threats and takedown notice. Eventually, the video became available again and there were no suits against social media users that shared the video compilation.<sup>89</sup>

While several of the above examples are recent or involve copyright assertions on the Internet, the use of copyright to control narratives and historical records has long been utilized by public figures, such as Howard Hughes,<sup>90</sup> Ron Hubbard,<sup>91</sup> Richard Wright,<sup>92</sup> J.D. Salinger,<sup>93</sup> and James Joyce.<sup>94</sup> The estate of James Joyce (“the Estate”), for instance, has a lurid history of controlling reporting on and scholarly research into the Joyce family.<sup>95</sup> The Estate fiercely guarded the Joyce family history, especially stories about Joyce’s daughter Lucia, and threatened scholars with copyright for their research and publication of information related to her.<sup>96</sup> Joyce’s daughter Lucia was a “troubled young woman” who was treated by psychiatrists and committed to a mental hospital at the age of 25.<sup>97</sup> She spent most of her life in mental hospitals and died in one in 1982.<sup>98</sup> Carol Shloss, an English professor, tried to write and publish a true biography about Lucia and her influence on Joyce’s writing.<sup>99</sup> The Estate threatened

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85. Dr Droops, *Compilation of all of the inaccurate, contradictory things that Dr. Drew has said about coronavirus*, YOUTUBE (Apr. 2, 2020), <https://www.youtube.com/watch?v=gsVRA485Go0&feature=youtu.be> [<https://perma.cc/LE45-XTC9>].

86. @yashar, TWITTER (Apr. 4, 2020, 12:18 PM), <https://twitter.com/yashar/status/1246472340243767296> [<https://perma.cc/Y8WQ-GFWG>].

87. Cox, *supra* note 84.

88. *Id.*

89. See *TV Doctor Believes Copyright Will Save Him From Criticism, Is Very Wrong*, ELEC. FRONTIER FOUND. (Apr. 4, 2020), <https://www EFF.org/takedowns/tv-doctor-believes-copyright-will-save-him-criticism-very-wrong> [<https://perma.cc/Z3RU-YQYC>].

90. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

91. *New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988).

92. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

93. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

94. Olson, *supra* note 75.

95. *Id.* at 550–53.

96. *Id.* at 550–51.

97. *Id.* at 550.

98. *Id.*

99. *Id.*

Shloss with copyright infringement for her plan to describe certain aspects of Lucia's life and to quote family documents relating to Lucia.<sup>100</sup> The Estate further threatened Shloss's publisher with infringement if it were to use, quote, or publish any of the objectionable materials related to Lucia.<sup>101</sup> Because of these threats, Shloss was constrained to cut a significant amount of pertinent information related to Lucia from her final published book.<sup>102</sup> Even though the Estate never filed copyright claims against Shloss or her publisher, their copyright threat achieved the Estate's goal of erasing embarrassing family facts from Shloss's book.<sup>103</sup>

In the 1988 decision *New Era Publications International v. Henry Holt and Co.*, Judge Pierre Leval warned that by "registering a copyright, public figures who are the expected focus of public interest could use this supposed commercial protection as an aggressive weapon to prevent the publication of embarrassing revelations and to obstruct criticism."<sup>104</sup> In his opinion, he listed a variety of hypotheticals, including:

[a politician who] campaigns on his decorations for wartime bravery and his strong law and order position. A journalist seeks to publish some of [the politician's] old letters which, if read carefully between the lines, seem to acknowledge that he did not participate in combat, was mistakenly decorated and spent his military career as a black marketeer in association with hoodlums; []

a religious leader is renowned for his selfless kindness, liberality of spirit and sympathy for the sufferings of others. A biographer seeks to publish extracts from his early letters and journals which display greed, callous indifference, and employ the language of racial and religious bigotry; []

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100. *Id.* at 550–53.

101. *Id.*

102. *Id.* at 553.

103. After being forced to remove pertinent information about Lucia from her book, Shloss ended up self-publishing that information on a website. The Estate sent her cease and desist letters asserting copyright infringement, and Shloss filed for declaratory relief in June 2006 in response. After the court refused to dismiss Shloss's suit, the parties settled. See Cynthia Haven, *Stanford Researcher Gets Six-figure Settlement from James Joyce Estate*, STAN. NEWS (Sept. 28, 2009), <https://news.stanford.edu/news/2009/september28/shloss-joyce-settlement-092809.html> [<https://perma.cc/94R3-ZBUA>].

104. *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1502 (S.D.N.Y. 1988).

the popular benign mayor of a city sent numerous memos to opponents in various conflicts threatening to “cut your heart out,” “castrate you,” “bust your kneecaps,” etc. A journalist questions the accuracy of the mayor’s public image and quotes from these memos.<sup>105</sup>

In all of these hypotheticals, Judge Leval surmised that a copyright owner could assert copyright to attempt to silence others, erase history, and control their image or reputation by making these bad facts about them disappear. If putative infringers do not have access to legal resources, or are not in a position to fight back against these attempts to weaponize copyright, copyright can successfully erase history. Unfortunately, the hypotheticals that Judge Leval posed in 1988 are eerily similar to instances described in this Section and later on in this Article.<sup>106</sup>

Using copyright to erase information is against the public interest, and can damage the historical record and subvert the ability to combat disinformation. It also appears to directly contravene the very purpose of copyright “to promote the progress of science and useful arts” when copyright is the very tool used to prevent the public dissemination of thoughts and works.<sup>107</sup> Even though these attempts are not always ultimately successful, they still cause harm to the individuals on the receiving end, and could potentially discourage others from publishing or reporting on information important to the public. Even if there may be alternative ways to express the facts or ideas in these works without copying them, the “inability to use the most evocative expression possible diminishes the power of a speaker’s message.”<sup>108</sup> It is often “the *words used* by the public figure (or the particular manner of expression) that are the facts calling for comment.”<sup>109</sup> Furthermore, using copyright to erase facts can “remove the most credible evidence to validate or contest those facts and ideas,” which “creat[es] opportunities to undermine the search for truth in the first place.”<sup>110</sup> As Professors Eric Goldman and Jessica Silbey explained, asserting copyright to erase facts and bury information can create “memory

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105. *Id.* at 1502.

106. See, e.g., *infra* Part V, the case of Slade Neighbors v. Veronica Monger, 2:20-cv-04146 (C.D. Cal. May 6, 2020), in which Neighbors sues his ex-girlfriend for disseminating the abusive text messages and emails that he sent her.

107. See U.S. CONST. art. I, § 8, cl. 8.

108. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1, 9–10 (2000).

109. *New Era Publ’ns Int’l.*, 695 F. Supp. at 1502.

110. Goldman & Silbey, *supra* note 7, at 935.

holes” in society by “relegat[ing] the facts and ideas which those works contain to persist[] only in people’s memories.”<sup>111</sup> This can allow facts or ideas to “fade out of circulation — and eventually fade away altogether.”<sup>112</sup> In this way, “[b]y facilitating the selective suppression of information for private benefit,” certain copyright owners are empowered to reclaim historical narrative and control what and how society thinks.<sup>113</sup>

### *C. Weaponizing Copyright to Suppress Criticism and Speech*

Copyright is also weaponized to censor criticism and suppress speech. Religious organizations assert copyright to remove content critical of their religion or their religious works. Movie studios use copyright to suppress negative reviews of their films. Public figures file copyright suits to censor criticism or commentary about their racist behaviors. While the instances described in this Section are similar to Section B above in that they involve using copyright to control narrative, the outcome that copyright owners seek to achieve in each section differ significantly. Specifically, unlike the scenarios discussed in Section II.B above, copyright is weaponized in this Section not to prevent the dissemination of the copyrighted works, nor to erase copyrighted works or the information within those works. Instead, the cases described below involve copyright owners asserting copyright to control what others say *about* them or their works. They use copyright to control narrative, public opinion, and social commentary about them or their works. The instances described in this Section do not involve copyright owners attempting to use copyright to make their own works or words disappear.

Recently, Netflix weaponized copyright to take down tweets that were critical of its controversial new French film *Cuties*. *Cuties* is a coming of age story about an 11-year old immigrant in Paris trying to find her identity.<sup>114</sup> The film includes scenes of the main character performing sexualized dance routines with her dance crew and being in adult situations.<sup>115</sup> The film, as well as its controversial poster,<sup>116</sup>

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<sup>111.</sup> *Id.*

<sup>112.</sup> *Id.*

<sup>113.</sup> *Id.* at 935–36.

<sup>114.</sup> Todd Spangler, ‘Cuties’ Controversy: Surge in Netflix Cancellations Was Short-Lived, *Data Shows*, VARIETY (Sept. 25, 2020, 3:46 AM), <https://variety.com/2020/digital/news/cuties-cancel-netflix-account-surge-data-1234783460/> [<https://perma.cc/7BUG-T3CG>].

<sup>115.</sup> *Id.*

<sup>116.</sup> Tom Grater, Netflix Apologizes for “Inappropriate” ‘Cuties’ Poster that Was Criticized for Sexualizing Children, DEADLINE (Aug. 20, 2020, 8:25 AM), <https://deadline.com/2020/08/netflix-apologizes-inappropriate-cuties-poster-criticized-sexualizing-children-1203018498/> [<https://perma.cc/BH59-DWLE>].

were criticized on social media, prompting a #CancelNetflix campaign<sup>117</sup> and a criminal indictment in Texas for promoting “lewd visual material depicting a child.”<sup>118</sup> Much of the criticism on social media involved users sharing clips from the movie or retweeting the Netflix-released trailer of the movie with comments such as: “IMAGINE A CHILD SEEING THIS #Cuties #Netflix #CancelNetflixCuties,” or “Go ahead and try to justify how this film is an appropriate representation of 11 year olds . . . . #CancelNetflix.”<sup>119</sup> In response, Netflix filed a dozen takedown requests to remove critical posts of its movie from Twitter.<sup>120</sup> While some of the posts were sharing clips from the actual movie, other critical posts were simply retweeting the film’s trailer, which Netflix had publicly released.<sup>121</sup> In its takedown requests, it appeared that Netflix not only sought to remove the film clips or trailer that these negative tweets shared, but also targeted the full tweets — in other words, it sought to remove the critical commentary in addition to the film clips or trailer they shared.<sup>122</sup> Netflix also only targeted its takedown demands to negative commentary about its movie, leaving alone positive tweets that also shared the same film clips or trailer.<sup>123</sup> Ultimately, Netflix was successful at removing its targeted reshared film clips and trailers from Twitter, but not the critical commentary.<sup>124</sup> Nevertheless, Netflix’s targeted assertion of copyright against negative reviews of its film was a clear use of copyright to suppress criticism and censor the speech of critics.

Religious organizations also weaponize copyright to remove and suppress critical or negative commentaries of their religion or religious works.<sup>125</sup> In July 2020, *FaithLeaks*, a whistleblower site operat-

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117. Spangler, *supra* note 114.

118. Maria Cramer, *Netflix Is Charged in Texas with Promoting Lewdness in ‘Cuties’*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/business/cuties-netflix-texas.html> [https://perma.cc/JM27-4P3U].

119. Kate Cox, *Netflix Files Copyright Claims Against Tweets Criticizing Movie, Trailer*, ARS TECHNICA (Nov. 5, 2020, 3:22 PM), <https://arstechnica.com/tech-policy/2020/11/netflix-dmca-takedown-requests-hit-negative-tweets-about-cuties/> [https://perma.cc/2A4C-KPZ5].

120. *Id.*

121. *Id.*

122. Ernesto Van der Sar, *Netflix Targets Critical ‘Cuties’ Tweets With Copyright Takedown Requests*, TORRENTFREAK (Nov. 5, 2020), <https://torrentfreak.com/netflix-targets-critical-cuties-tweets-with-copyright-takedown-requests-201105/> [https://perma.cc/QFN7-ZCAW].

123. *Id.*

124. *Id.*

125. See, e.g., Blake Brittain, *Jehovah’s Witnesses Sue FaithLeaks Owners Over Convention Videos*, BLOOMBERG L. (Apr. 30, 2020, 4:12 PM), <https://news.bloomberglaw.com/us-law-week/jehovahs-witnesses-sue-faithleaks-owners-over-convention-videos> [https://perma.cc/ZD8M-3Y47]; Nate Anderson, *Scientology Fights Critics with 4,000*

ed by Truth & Transparency Foundation, settled a copyright infringement claim for its unauthorized posting of a number of videos produced by the Jehovah's Witnesses for its annual convention.<sup>126</sup> During these annual conventions, organizers play videos about the organization's faith and Scriptural lessons.<sup>127</sup> In 2020, *FaithLeaks* obtained these videos in advance of the annual convention and posted them online, allowing commentary, criticism, and "analysis from ex-Witnesses on various forums across the Internet."<sup>128</sup> The social benefits of sharing these videos was clear. As one ex-Witness explained:

the videos simply deserve to be made public for the sake of criticism . . . while a [convention] speaker's ideas could be dismissed as personal thoughts, the videos are known by attendees to be directly from [sic] the organization . . . by making these videos publicly available, opportunity is given for open and unbiased discussion and criticism.<sup>129</sup>

Nevertheless, the Jehovah's Witnesses' publishing entity *Watch Tower* filed copyright takedown demands to have the videos removed and sued *FaithLeaks* and its founders for copyright infringement.<sup>130</sup> Due to its inability to maintain the high costs of litigation, Faith Leaks agreed to settle and remove all content from its websites, to never again publish any copyrighted materials belonging to Watch Tower, and to pay Watch Tower \$15,000.<sup>131</sup>

The Church of Scientology is similarly reputed to weaponize copyright in order to remove content critical of the organization.<sup>132</sup> In

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*DMCA Takedown Notices*, ARS TECHNICA (Sept. 8, 2008, 1:12 PM), <https://arstechnica.com/uncategorized/2008/09/scientology-fights-critics-with-4000-dmca-takedown-notices/> [<https://perma.cc/8QCV-G9DS>]; Fromer, *supra* note 2, at 563–64 (discussing the case *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1112–13 (9th Cir. 2000), where one religious organization sued the other for distributing copies of religious text that "conveyed outdated views that were racist in nature.").

126. Press Release, Truth & Transparency, Truth & Transparency Settles with Watch Tower (July 20, 2020), <https://www.truthandtransparency.org/press/2020/07/20/truth-transparency-settles-with-watch-tower/> [<https://perma.cc/FZR4-88AB>].

127. Brittain, *supra* note 125; *Annual Conventions of Jehovah's Witnesses*, JEHOVAH'S WITNESSES, <https://www.jw.org/en/jehovahs-witnesses/conventions/> [<https://perma.cc/PU4C-5VQ3>].

128. Hemant Mehta, *Jehovah's Witnesses Sue Owners of FaithLeaks for Posting 74 Convention Movies*, FRIENDLY ATHEIST (May 1, 2020), <https://friendlyatheist.patheos.com/2020/05/01/jehovahs-witnesses-sue-owners-of-faithleaks-for-posting-74-convention-movies/> [<https://perma.cc/N7SD-RKVD>].

129. *Id.*

130. Brittain, *supra* note 125.

131. Press Release, Truth & Transparency, *supra* note 126.

132. See, e.g., Evan Hansen, *Google Pulls Anti-Scientology Links*, CNET (Apr. 22, 2002, 12:58 AM), <https://www.cnet.com/news/google-pulls-anti-scientology->

2008, for instance, an entity representing the Church sent more than 4,000 DMCA takedown notices to YouTube within a 12-hour time period to remove videos critical of Scientology.<sup>133</sup> These critical videos included footage from Australian and German news media about Scientology, footage from a Clearwater City Commission meeting, and other videos that presented Scientology in a negative light.<sup>134</sup> In all of these instances, the objective of the religious organization's assertions of copyright was not to protect their market or economic interests in their copyrighted works, but to control the narrative of their religion and suppress critical commentary or negative opinions about their organizations.

Public figures may weaponize copyright to suppress criticism of their past statements or behavior. Michael Savage formerly hosted the conservative radio talk show the Savage Nation. On October 29, 2007, the Savage Nation aired a two-hour program in which Savage unleashed an anti-Muslim tirade.<sup>135</sup> During that program, Savage encouraged the deportation of Muslims and throwing "them out of [his] country"; he stated that "Muslims scream[] for the blood of Christians or Jews or anyone they hate"; he described Islam as "a religion that teaches convert or kill, a religion that says oppress women, kill homosexuals"; and he labeled "[t]he Quran [as] a document of slavery and chattel."<sup>136</sup> The Council on American Islamic Relations ("CAIR") responded to Savage by posting on its website a four-minute audio excerpt from the program that addressed and objected to each of Savage's remarks.<sup>137</sup> Savage then sued CAIR for copyright infringement for its posting of audio excerpts from his radio talk show.<sup>138</sup> While the court ultimately dismissed Savage's claim under copyright fair use, CAIR was still forced to absorb the significant costs of defending Savage's copyright suit.<sup>139</sup> In fact, even though Savage lost this copyright claim against CAIR, Savage seemed to have been emboldened by his ability to weaponize copyright against CAIR. He later asserted copyright against Brave New Films for its incorporation into a film of

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links/ [https://perma.cc/YQK4-2UMT]; Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube*, ELEC. FRONTIER FOUND. (Sept. 5, 2008), <https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube> [https://perma.cc/KPL3-4PN5] (discussing the 4000 DMCA takedown notices filed within 12 hours asserting copyright claims against videos with content critical of Church of Scientology); Anderson, *supra* note 125.

133. Galperin, *supra* note 132; Anderson, *supra* note 125.

134. Galperin, *supra* note 132.

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

136. *Id.*

137. *Id.*

138. *Id.* at \*6.

139. Tehranian, *supra* note 2, at 259.

one minute of Savage's same anti-Muslim rant.<sup>140</sup> Savage was able to have that film removed from YouTube by filing a copyright takedown notice, which dealt a significant blow to the film by "thoroughly neuter[ing] the power of its concentrated (and expensive) outreach campaign."<sup>141</sup> Savage's weaponization of copyright successfully achieved his objective to "silence[] his critics at precisely the right moment."<sup>142</sup>

Asserting copyright to suppress criticism seems especially antithetical to free speech. The ease with which copyright owners attempt to or successfully suppress speech, commentary, or criticism is alarming.<sup>143</sup> Even if, ultimately, a putative infringer prevails in countering a copyright takedown demand or copyright infringement suit, they still must expend the time, effort, and money to defend an illegitimate claim. This alone can serve to indirectly suppress speech, as putative infringers may not be able to sustain the expense of litigation, and copyright weaponizers may become emboldened to assert similar claims against other parties. As the court in *Rosemont Enterprises, Inc. v. Random House* explained:

The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.<sup>144</sup>

Nevertheless, as discussed below in Part III, because copyright law already embodies First Amendment safeguards, such as the idea-expression dichotomy and fair use, courts generally refuse to take on independent First Amendment analyses in copyright cases, even when those cases may implicate free speech.<sup>145</sup> This allows copyright owners to suppress critical speech either directly through assertions of

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140. *Id.* at 260.

141. *Id.*

142. *Id.*

143. *Id.* at 266 (acknowledging that copyright owners' ability to exploit copyright to suppress First Amendment rights "is particularly pressing").

144. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, J., concurring).

145. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 472 U.S. 539, 555–56, 560 (1985) (rejecting National Enterprises' contention that "First Amendment values require a different rule . . . when the information conveyed relates to matters of high public concern"); *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1062 n.4 (D. Mont. 2019).

copyright infringement claims or copyright takedown demands, or indirectly through mere threats to assert copyright.<sup>146</sup>

*D. Weaponizing Copyright to Protect Reputation and Moral Rights*

Copyright is also weaponized to protect reputation, moral rights, and other dignitary interests. Some of the most recent and visible assertions of copyright to vindicate these personal interests were the copyright assertions by musicians against Donald Trump for his campaign's unauthorized uses of music at rallies. Other copyright assertions have involved copyright owners attempting to prevent alt-right or racist uses of copyrighted characters, or to remove the inclusion of copyrighted works from controversial propaganda videos. These assertions of copyright are meant to protect copyright owners' reputations or to prevent their works from being used in ways that copyright owners disagree with or are morally opposed to. These uses are not necessarily to protect the exclusive market or economic interests in copyrighted works. In fact, many of these cases involve copyright owners who may have previously allowed unauthorized uses of their copyrighted works until those uses involved people or causes that they opposed.<sup>147</sup> Unlike the Section above, the copyright owners in this Section are not asserting their copyright to suppress speech that they disagree with; they just do not want their copyrighted works used alongside that speech.

"It's not very often that nerdy intellectual property lawyers get asked to fight the alt-right . . . [b]ut when we do, we're ready."<sup>148</sup> That was a statement from the attorney representing Matt Furie in his copyright claims against the Daily Stormer, InfoWars, and other alt-right or neo-Nazi media that were using his comic character creation Pepe the Frog.<sup>149</sup> Artist and comic book creator Furie created Pepe, a green anthropomorphic frog, as a character in his comic cartoon book series

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146. See, e.g., Olson, *supra* note 75, at 553 (discussing Joyce estate's weaponization of copyright to suppress critical speech).

147. See, e.g., Brian Frye, *Giorgio Angelini, Arthur Jones & Louis Tompros on Matt Furie & Pepe the Frog*, IPSE DIXIT PODCAST 5:00–6:00, 32:30–33:00 (Feb. 2, 2021), <https://shows.acast.com/ipse-dixit/episodes/giorgio-angelini-arthur-jones-louis-tompros-on-matt-furie-pe> [<https://perma.cc/2KQV-TZDX>].

148. Ross Todd, *'Feels Good Man': Wilmer Lawyers Play Key Supporting Role in New Doc About the Travails of Pepe the Frog Creator*, LITIG. DAILY (Sept. 2, 2020, 7:30 AM), <https://www.law.com/litigationdaily/2020/09/02/feels-good-man-wilmer-lawyers-play-key-supporting-role-in-new-doc-chronicling-pepe-the-frog-creator/> [<https://perma.cc/77XW-QU96>] (quoting Pepe's copyright attorney Louis Tompros).

149. *Id.*; Frye, *supra* note 147, at 0:32–0:50.

Boy's Club.<sup>150</sup> Furie's Pepe was a "chill" and "good natured" frog, an "everyman frog" who "live[d] with his three roommates" and liked "hanging out, playing pranks[,] . . . eating pizza, partying, that kind of thing."<sup>151</sup> Memes of Pepe quickly went viral and were popularized by celebrities and Internet users alike. While Furie did not authorize these early memetic uses of Pepe, he also did not take any actions to stop these uses of his creation.<sup>152</sup> Then the alt-right, white supremacist movement seized upon Furie's Pepe, eventually co-opting Pepe and turning him into a racist and anti-Semitic symbol of white supremacy. They recreated Pepe "to appear with a Hitler-like mustache, wearing a skullcap or a Ku Klux Klan hood" and used Pepe's appropriated image "in hateful messages aimed at Jewish and other users on Twitter."<sup>153</sup> Pepe the Frog became so radicalized and symbolic of the white supremacist movement that he was placed on the Anti-Defamation League's hate symbols database.<sup>154</sup> Furie asserted his copyright against alt-right organizations' uses of Pepe.<sup>155</sup> He sued InfoWars and others for copyright infringement for their unauthorized uses of Pepe in a Make America Great Again (MAGA) poster and in other racist, anti-Semitic, or alt-right propaganda works. These cases ended up settling.<sup>156</sup> Furie's motivation to assert his copyright against these racist uses of Pepe was not to protect his financial interest in Pepe, but to prevent uses of Pepe that he disagreed with or to which he was morally opposed.<sup>157</sup>

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150. Giaco Furino, *Pepe the Frog's Creator Talks Making Zine History*, VICE (Aug. 3, 2016, 12:25 PM), [https://www.vice.com/en\\_us/article/qkw97d/pepe-frog-creator-matt-furie-talks-zine-history](https://www.vice.com/en_us/article/qkw97d/pepe-frog-creator-matt-furie-talks-zine-history) [https://perma.cc/D6C6-88GB].

151. Adam Serwer, *It's Not Easy Being Meme*, ATLANTIC (Sept. 13, 2016, 12:25 PM), <https://www.theatlantic.com/politics/archive/2016/09/its-not-easy-being-green/499892/> [https://perma.cc/688K-D6BZ].

152. Frye, *supra* note 147, at 5:00–6:10.

153. Christopher Mele, *Pepe the Frog Meme Listed as a Hate Symbol*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/pepe-the-frog-is-listed-as-a-hate-symbol-by-the-anti-defamation-league.html> [https://perma.cc/4XL3-VV46].

154. *Pepe the Frog*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog> [https://perma.cc/9CJC-EKHT]; Mele, *supra* note 153.

155. See Frye, *supra* note 147, at 19:15–20:00.

156. See, e.g., Joint Stipulation To Dismiss Case, *Furie v. Infowars, LLC*, No. 18-CV-01830 (C.D. Cal. June 11, 2019), ECF No. 134; Stipulation of Dismissal (with prejudice), *Furie v. Logsdon*, No. 17-CV-00828 (W.D. Mo. Mar. 13, 2018), ECF No. 38; Holly Swinyard, *Pepe the Frog creator wins \$15,000 settlement against Infowars*, GUARDIAN (June 13, 2019), <https://www.theguardian.com/books/2019/jun/13/pepe-the-frog-creator-wins-15000-settlement-against-infowars> [https://perma.cc/B29X-EAV2]; Michael Kunzelman, *Settlement resolves lawsuit over Pepe the Frog paintings*, SPOKESMAN-REVIEW (Mar. 9, 2018), <https://www.spokesman.com/stories/2018/mar/09/settlement-resolves-lawsuit-over-pepe-the-frog-pai/> [https://perma.cc/LY2N-NLT2].

157. See Frye, *supra* note 147, at 14:30–15:00, 19:15–21:00; Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 507 (2020) ("Matt Furie's infringement lawsuit against InfoWars's unauthorized use of Pepe the Frog was

Similarly, artist Anish Kapoor sued the National Rifle Association (“NRA”) when it included an image of Kapoor’s popular Chicago Cloud Gate sculpture, also known as the Bean, in an NRA propaganda video.<sup>158</sup> Cloud Gate is a stainless-steel sculpture standing at about thirty-three feet tall, representing a large silver bean.<sup>159</sup> The sculpture is located in Millennium Park in downtown Chicago, where it reflects the skyline and serves as a popular tourist destination.<sup>160</sup> In 2017, the NRA released a video called “The Violence of Lies,” which featured a spokeswoman delivering a straight-to-camera message criticizing the media, schools, Hollywood elites, and President Obama for inciting protests against Donald Trump.<sup>161</sup> The video sparked immediate criticism, with commentators calling it “an open call to violence to protect white supremacy,” “disgusting,” and “revolting and frightening.”<sup>162</sup> In the video, an image of Cloud Gate in Chicago briefly “appears when [the spokeswoman] says, ‘[a]nd then they use their ex-president to endorse the resistance.’”<sup>163</sup> Kapoor sued the NRA for its unauthorized use of his sculpture in the video. The NRA defended its use, calling Kapoor’s suit an attempt to “muzzle First Amendment-protected speech just because he apparently disagrees with the message conveyed.”<sup>164</sup> Nevertheless, the NRA settled the case by agreeing to remove the image of Cloud Gate from the video.<sup>165</sup>

Photographer-mom Laney Griner asserted copyright to stop the notorious politician Steve King from using a photograph of her son.<sup>166</sup> Griner took the now-famous photograph of her son, Sam, on the beach featuring Sam holding up a fist full of sand. Sam’s photograph be-

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inspired not by pecuniary considerations but by Furie being ‘dismayed by Pepe’s association with white supremacy, anti-Semitism, and the alt-right.’”).

158. Sopan Deb, *N.R.A. to Pull Image of Sculpture from Its Video*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/arts/design/anish-kapoor-nra-bean.html> [https://perma.cc/GT4X-JRLE].

159. Joël Chevrier, *Anish Kapoor’s “Cloud Gate”: Playing with Light and Returning to Earth, Our Finite World*, THE CONVERSATION (Aug. 29, 2018, 12:36 PM), <https://theconversation.com/anish-kapoors-cloud-gate-playing-with-light-and-returning-to-earth-our-finite-world-102272> [https://perma.cc/UA2D-86XB].

160. *Id.*

161. Jonah Engel Bromwich, *N.R.A. Ad Condemning Protests Against Trump Raises Partisan Anger*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/us/nra-ad-trump-protests.html> [https://perma.cc/2NUK-YW6W]; see also Randy Wakeman, *The Violence of Lies: Dana Condemns [sic] Violence*, YOUTUBE (June 30, 2017), <https://www.youtube.com/watch?v=2ITrhTtFJc> [https://perma.cc/8EUV-ZGZR] (preserving a copy of the video).

162. Bromwich, *supra* note 161.

163. Deb, *supra* note 158.

164. *Id.*

165. *Id.*

166. Ed Payne, *‘Success Kid’ Appeals to Social Media to Get His Dad a Kidney Transplant*, CNN (Apr. 15, 2015, 4:30 AM), <https://www.cnn.com/2015/04/15/living/success-kid-dad-needs-help/> [https://perma.cc/5P28-G3PB].

came the viral meme known as “Success Kid,” resulting in CNN calling Sam “likely the Internet’s most famous baby.”<sup>167</sup> During King’s campaign for Congress, King’s campaign used the Success Kid meme on the WinRed fundraising website to solicit campaign donations.<sup>168</sup> King is infamous for making offensive and inflammatory xenophobic and racist remarks and is frequently criticized by politicians on both sides of the aisle.<sup>169</sup> After learning about King’s unauthorized use of Success Kid, Griner sent King’s campaign a cease and desist letter demanding the removal of her photo.<sup>170</sup> Griner also publicly stated that she “would never attach [her son’s] face willingly to any negative ad . . . but Steve King is just the worst of the worst . . . bigotry is just the antithesis of what we want to be the association with the meme.”<sup>171</sup> On December 30, 2020, Griner sued Steve King and his campaign for infringing her copyright in Success Kid.<sup>172</sup> This litigation is ongoing.

Asserting copyright to control who uses a copyrighted work, or how a copyrighted work is used, seems like a right that would appropriately be within a copyright owner’s control. A copyright owner should be able to pick and choose who is permitted to use their copyrighted work and how their copyrighted work is used. At the same time, some of the uses that copyright owners find most objectionable may be uses that benefit the public interest or offer the most social value. Take, for instance, the seminal copyright fair use case *Suntrust Bank v. Houghton Mifflin Co.*<sup>173</sup> In that case, author Alice Randall wrote *The Wind Done Gone*, an unauthorized parody of Margaret Mitchell’s historic fiction bestseller *Gone With The Wind*.<sup>174</sup> *The Wind Done Gone* retold the events of *Gone With The Wind* through the eyes of a slave in order to mock the book’s veneration of the Antebellum South and antiquated views on slavery.<sup>175</sup> Mitchell’s estate sued Randall for copyright infringement for her unauthorized use of

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167. *Id.*

168. Alan Yuhas, *Mother of ‘Success Kid’ Demands Steve King Stop Using His Meme*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/us/politics/steve-king-success-kid-meme.html> [https://perma.cc/NLP8-2PFC].

169. See Eli Watkins, *Steve King Warns Against Presuming ‘Every Culture Is Equal,’* CNN (May 29, 2019, 9:43 PM), <https://www.cnn.com/2019/05/29/politics/steve-king-culture-founding-fathers-iowa/index.html> [https://perma.cc/Q8N4-829W]; Manu Raju, Ashley Killough & Clare Foran, *Steve King Removed from Committee Assignments Following Racist Comments*, CNN (Jan. 15, 2019, 8:24 AM), <https://www.cnn.com/2019/01/14/politics/mitch-mcconnell-steve-king-condemnation/index.html> [https://perma.cc/8PST-DW5C].

170. Yuhas, *supra* note 168.

171. *Id.*

172. Griner v. King, No. 20-CV-03848 (D.D.C. June 21, 2021).

173. 268 F.3d 1257 (11th Cir. 2001).

174. *Id.* at 1259.

175. *Id.* at 1270.

the plots and characters from *Gone With the Wind*.<sup>176</sup> Randall's use was particularly objectionable to Mitchell's estate because it criticized the beloved classic novel, and included themes of homosexuality and miscegenation.<sup>177</sup> The court found Randall's use to be entitled to a fair use defense.<sup>178</sup> But this is just one example of how asserting expressive control over uses of copyrighted works to protect dignitary interests could have the potential effect of also suppressing valuable social commentary and expressive speech.

#### *E. Weaponizing Copyright to Preserve Privacy*

Copyright is also weaponized to preserve privacy. Women use copyright to remove intimate photographs of themselves from the Internet. Celebrities assert copyright to stop the dissemination of private videos or images. Photographers assert copyright to protect the privacy of individuals featured in their photographs. All of these assertions of copyright involve the attempt to protect personal privacy interests, and not the exclusive market or economic interests in the copyrighted work.

Nonconsensual pornography, also known as revenge porn, "involves the distribution of sexually graphic images of individuals without their consent."<sup>179</sup> Some of these images are taken without consent, and others are obtained with consent or perhaps taken by the individual herself and shared "within the context of a private or confidential relationship."<sup>180</sup> Revenge porn is shockingly common; one in twenty-five Americans have reported either being threatened with or being victims of nonconsensual pornography.<sup>181</sup> However, neither criminal laws nor privacy laws have yet to fully catch up with this alarming

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176. *Id.* at 1259.

177. See Tehanian, *supra* note 2, 281 ("[T]he Mitchell estate was particularly uncomfortable with *The Wind Done Gone* — not just because it was an unauthorized recasting of *Gone with the Wind*, but precisely because of its content." (citing *Suntrust Bank*, 268 F.3d at 1259)).

178. *Suntrust Bank*, 268 F.3d at 1276–77. After the 11th Circuit vacated the lower court's preliminary injunction and remanded to the lower court, the parties reached an agreement to dismiss the action. Consent Order, *Suntrust Bank v. Houghton Mifflin Co.*, No. 01-cv-00701 (N.D. Ga. Mar. 16, 2001), Court Docket No. 51 (May 17, 2002).

179. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

180. *Id.*

181. Jessica M. Goldstein, 'Revenge Porn' Was Already Commonplace. The Pandemic Has Made Things Even Worse., WASH. POST (Oct. 29, 2020 8:00 AM), [https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6\\_story.html](https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html) [<https://perma.cc/94MF-HMBM>].

trend, so women turn to copyright.<sup>182</sup> Consider Hilary's story. Hilary and her partner were in a long-distance relationship.<sup>183</sup> During their relationship, Hilary sent her partner intimate, nude selfies and videos of herself posing topless or simulating sexual acts.<sup>184</sup> After the relationship ended, without informing Hilary or seeking Hilary's consent, Hilary's ex-partner posted those intimate photos and videos on the Internet in order to humiliate her.<sup>185</sup> In response, Hilary filed applications with the U.S. Copyright Office to register over 100 images that she had shared with her ex-partner.<sup>186</sup> Hilary then filed copyright takedown demands to the content platforms hosting those photographs to demand their takedown.<sup>187</sup> Hilary did not assert copyright in order to protect the economic or market interests in her intimate photographs or her exclusive right to distribute those images. Her objective, instead, was to protect her privacy, remove those photos from the Internet, and stop the dissemination of her private images and videos.<sup>188</sup>

Copyright owners sometimes assert copyright to protect the privacy of other individuals featured in their copyrighted works. Wedding photographer Kristina Hill sued Public Advocate of the United States ("Public Advocate") when it used an engagement photograph Hill took of Brian Edwards and Thomas Privitere to support Public Advocate's anti-marriage equality agenda.<sup>189</sup> Public Advocate is a conservative activist group that opposes same sex marriage.<sup>190</sup> The Southern Poverty Law Center designated Public Advocate as a hate group for its anti-gay activism.<sup>191</sup> Public Advocate found Hill's en-

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182. *Infra* Section III.B.1. See also Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN (Apr. 27, 2015 1:32 PM), <https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html> [<https://perma.cc/ASL7-HC8Y>]; Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014), <https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/> [<https://perma.cc/6XQ3-SYWA>].

183. Fink, *supra* note 182. "Hilary" is a pseudonym.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1935 (2019) ("[C]opyright law may also provide an effective tool in sexual-privacy cases involving the distribution of intimate images created by victims . . . [V]ictims could file notice and takedown requests with content platforms after registering the copyright of their images."); Citron & Franks, *supra* note 179, at 359–60; Levendowski, *supra* note 182.

189. Complaint, Hill v. Public Advocate of the United States, 35 F. Supp. 3d 1347 (D. Colo. 2014) (No. 12-cv-02550), ECF No. 5.

190. *About Us*, PUB. ADVOC. OF THE U.S., <https://www.publicadvocateusa.org/about/> [<https://perma.cc/P625-6W9Y>].

191. Caitlin Gibson, *Loudoun Supervisor Eugene Delgaudio's Advocacy Organization Designated a 'Hate Group.'* WASH. POST (Mar. 26, 2012), <https://www.washingtonpost.com/blogs/the-state-of-nova/post/eugene-delgaudio/>

agement photograph online, which featured Edwards and Privitere holding hands and kissing. Public Advocate then reproduced that photograph on political mailers to criticize Colorado politicians and their pro-same sex marriage policies. Specifically, the mailer named the political candidate it was opposing and asked in a caption over the photograph: is this “[the politician’s] idea of ‘Family Values?’”<sup>192</sup> Hill sued Public Advocate for copyright infringement.<sup>193</sup> In this instance, Hill was not asserting her copyright in the photograph to protect the market interest of that engagement photo or to seek lost licensing revenue from Public Advocate. Hill’s objective was to protect and vindicate the violation of her clients’ privacy.<sup>194</sup>

Celebrities also assert copyright to protect their privacy. “This [case] reads like a telenovela, a Spanish soap opera. It pits music celebrities, who make money by promoting themselves, against a gossip magazine, that makes money by publishing celebrity photographs, with a paparazzo, who apparently stole the disputed pictures, stuck in the middle.”<sup>195</sup> That was the court’s introduction to the copyright infringement case involving pop singer and model Noelia Monge and gossip magazine Maya Magazines.<sup>196</sup> Monge married Jorge Reynoso, her agent, in a secret wedding in Las Vegas.<sup>197</sup> In order to uphold her “image as a young, single pop singer,” the couple kept their wedding a secret.<sup>198</sup> Two years later, six photos of that secret wedding were leaked to Maya Magazines, which published them with the headline “The Secret Wedding of Noelia and Jorge Reynoso in Las Vegas.”<sup>199</sup> Monge sued Maya Magazines for copyright infringement for publishing her copyrighted photographs without authorization.<sup>200</sup> Her objective for asserting copyright was not to protect the economic interests in those photos, but to protect her privacy and hide the fact that she had secretly married.<sup>201</sup> Other celebrities, such as Hulk Hogan,<sup>202</sup> Fred Durst,<sup>203</sup> and Bret Michaels and Pamela Anderson<sup>204</sup> have similarly

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advocacy-organization-designated-a-hate-group/2012/03/26/gIQAuakbcS\_blog.html [https://perma.cc/CW7N-L2DV].

192. Daniel Nasaw, *Privitere and Edwards: Our Photo Used in Anti-Gay Union Ad*, BBC (Oct. 4, 2012), <https://www.bbc.com/news/magazine-19804286> [https://perma.cc/TT4C-CGPD]. See also Complaint, *Hill*, 35 F. Supp. 3d 1347.

193. Complaint, *Hill*, 35 F.Supp.3d 1347.

194. See generally Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, in VISIONS OF PRIVACY IN THE MODERN AGE 191, 191–99 (Marc Rotenberg ed., 2015).

195. *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1168 (9th Cir. 2012).

196. *Id.*

197. *Id.* at 1168–69.

198. *Id.*

199. *Id.* at 1169.

200. *Id.*

201. See *id.*

202. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1325 (M.D. Fla. 2012).

203. *Durst v. Gawker Media, LLC*, No. 05-CV-01575 (C.D. Cal. Mar. 2, 2005).

asserted copyright to protect their privacy and prevent dissemination of their personal sex tapes.<sup>205</sup>

In all of these instances, copyright owners' primary objective in asserting copyright appears to be to protect their own or another individual's privacy. These assertions were not aimed at protecting the copyright owners' exclusive right to disseminate the copyrighted works, nor to protect the economic interests in these private images or videos. In fact, in many of these cases, the copyright owner had no intention to ever disseminate these copyrighted works, nor to seek to exploit a legitimate market for their works. In some of these instances, it is understandable that copyright owners should be able to protect deeply personal and intimate details about their lives. In other instances, however, weaponizing copyright to protect privacy could hinder the rights of others to express facts or to comment on issues of public concern. Indeed, in certain instances, there appears to be a thin line between weaponizing copyright to protect privacy and weaponizing copyright to erase facts and bury information.<sup>206</sup> Both objectives involve copyright owners that do not seek to exploit a legitimate market for their copyrighted works, and both involve copyright owners suppressing the dissemination of their copyrighted works. Similar blurry lines exist between other objectives copyright owners seek when asserting or weaponizing copyright.<sup>207</sup>

But regardless of whether the copyright owner asserts copyright to protect privacy, to protect other personal interests, or to achieve other noncopyright objectives, why use copyright? Why don't individuals rely on other areas of the law, such as privacy laws or moral rights, to protect these personal objectives? The Part below explores why individuals choose copyright and how copyright has become a weapon *par excellence* for individuals to achieve these noncopyright objectives.

### III. COPYRIGHT, THE WEAPON *PAR EXCELLENCE*

The previous Part demonstrated the prevalence of copyright owners weaponizing copyright to achieve noncopyright objectives. But why use copyright to achieve those objectives? In many of the instances described above, it appears that copyright owners should have alternative, and possibly more applicable, legal solutions to achieve their objectives. For instance, why do individuals who want to pre-

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204. *Michaels v. Internet Ent. Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

205. See Gilden, *supra* note 7, at 90–91.

206. See *infra* Part IV.

207. See *infra* Part IV.

serve their privacy use copyright instead of relying on statutory or common law rights of privacy to prevent dissemination of intimate and private information? Why don't creators rely on moral rights to prevent the tarnishment of their copyrighted works? Why is it so easy for copyright owners to use copyright to silence speech and suppress legitimate criticism? How did copyright become the weapon *par excellence*<sup>208</sup> for individuals to achieve objectives that are unrelated to copyright's purpose in protecting market exclusivity or economic interests?

This Part identifies two equally significant reasons that copyright has become the weapon *par excellence* for achieving the noncopyright objectives described above. The first Section analyzes what makes copyright an attractive legal tool to weaponize. As discussed below, copyright is, in many ways, a superior weapon to wield, especially in light of its judicial and extrajudicial applications and processes and limited First Amendment scrutiny. The second Section examines the gaps and limitations in other areas of the law, including privacy, moral rights, and false endorsement, leading individuals to assert copyright to fill those gaps and vindicate their personal interests.

### A. Why Copyright?

Several factors combine to make copyright a superior weapon to wield to silence and erase facts and information, suppress criticism and critical speech, punish and retaliate, protect reputation and moral rights, and prevent the dissemination of private information. For one, it is exceedingly easy to claim copyright in any works of expression, including tweets, texts, e-mails, selfies, etc. It is also easy to suppress content through the mere assertion of copyright, either with threatening letters or through copyright's extrajudicial notice and takedown process. Furthermore, copyright claims are subject to limited First Amendment review, and there are practical and legal limitations to copyright defenses that might discourage copyright weaponization. All of these factors combine to make copyright a superior weapon.

#### 1. Everything Is Copyrighted and Everyone Is an Infringer

It is easy for individuals to weaponize copyright because copyright attaches to expressive works the minute they are created in a tangible medium, and any unauthorized uses of that expressive work can violate copyright. Copyright protects "original works of author-

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208. Inspired by John Tehranian's description of copyright as "the weapon *par excellence* of the 21st-century censor." Tehranian, *supra* note 2, at 250.

ship fixed in [a] tangible medium of expression.”<sup>209</sup> It is easy to meet copyright’s low-threshold eligibility requirements. Works of authorship include literary, pictorial, graphic, sculptural, and musical works.<sup>210</sup> Fixation simply requires that the work is fixed in any tangible medium and perceivable for a period of more than a transitory duration.<sup>211</sup> Originality for copyright merely requires that a work is independently created and exhibits a modicum of creativity.<sup>212</sup> This means that “every Facebook post, Instagram photo, and YouTube video created with a smartphone potentially gives rise to a new bundle of copyright interests.”<sup>213</sup> The nude photographs that individuals take of themselves, for instance, are copyrighted original works of authorship fixed in a tangible medium of expression. The text messages or e-mails that abusers send to their partners are copyrighted literary works. The racist or COVID-denying rants that radio show or podcast hosts spew are protected by copyright. Parody ads, video games, political campaign websites, Twitch videos, album covers, film trailers, sex tapes, journal entries, unpublished manuscripts, religious videos and books, engagement and wedding photos, and cartoon memes all meet copyright’s originality, fixation, and work of authorship requirements to be copyrighted works.

In addition to the ease of creating a copyrighted work, copyright owners can also easily make out a *prima facie* case for infringement.<sup>214</sup> The owner of a copyrighted work has the right to prevent anyone else from reproducing, publicly displaying, distributing, and creating derivatives of their works. For instance, Harry Reid’s reproduction of Sharron Angle’s website technically violated Angle’s exclusive right to reproduce the text on her website.<sup>215</sup> Dr Droops’ compilation of Dr. Drew’s comments from his radio shows technically violated Dr. Drew’s exclusive right to create a compilation from his copyrighted commentary.<sup>216</sup> Steve King’s use of Success Kid technically violated Laney Griner’s exclusive rights to display and to reproduce her photograph.<sup>217</sup> In all of the instances described in Part II above, individuals assert copyright against technical violations of their exclusive rights under copyright. In these cases, “the rights they assert

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209. 17 U.S.C. § 102(a) (2010).

210. *Id.*

211. *See* 17 U.S.C. § 101 (2010).

212. *See* 17 U.S.C. § 102(a) (2010).

213. Gilden, *supra* note 7, at 73.

214. *See* Tehranian, *supra* note 2, at 264.

215. *See supra* Section II.B.

216. *Id.*

217. *See supra* Section II.D.

fall squarely within the doctrinal scope of IP laws . . . they follow the letter, but violate the spirit, of IP.”<sup>218</sup>

Because everyone almost every day creates copyrighted works, and so many activities technically infringe copyright through the reproduction, display, or creation of derivatives of copyrighted works, copyright is an effective weapon to silence, erase, suppress, censor, punish, protect, and achieve other noncopyright objectives.

## 2. Copyright Disputes Are Expensive and Copyright Weaponizers Are Motivated

In addition to being easy to assert, copyright cases can be expensive to defend. In many of the scenarios described above in Part II, there can be an imbalance of power between the often more powerful or well-funded copyright owner and the putative infringer.<sup>219</sup> It is often easier, less expensive, and less risky for putative infringers to capitulate to takedown demands instead of trying to fight copyright owners who weaponize copyright to achieve noncopyright objectives. For instance, in the copyright infringement litigation filed by Watch Tower against Faith Leaks over its posting of the Jehovah’s Witnesses’ copyrighted videos, Faith Leaks was ultimately forced to settle because it was unable to raise enough funds to continue defending Watch Tower’s infringement claims.<sup>220</sup> After settling the case, the founder of Faith Leaks stated, “[t]he result is absolutely agonizing and has been emotionally, mentally, and physically taxing on us, as it goes against our core values. . . . The result of not meeting [our fundraising] goal was that we had to engage in settlement negotiations with the extremely well-funded Watch Tower.”<sup>221</sup>

Copyright owners that weaponize copyright may also be greatly motivated to fight putative infringers in order to suppress content, and may be more aggressive in spending time and money to achieve their objectives. This is exacerbated by the ease of establishing copyright and asserting infringement,<sup>222</sup> and the limitations on and uncertain outcomes of copyright defenses.<sup>223</sup> For instance, individuals who assert copyright to protect their reputation or to bury evidence of their bad behaviors are understandably motivated to pursue all remedies

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218. Gilden, *supra* note 7, at 69.

219. *See infra* Part II. *But see* Gilden, *supra* note 7, at 105 (writing that, in the context of asserting IP to protect privacy concerns, the power dynamic between the parties can often be flipped. In other words, it is often the vulnerable who use IP to protect their sexual privacy. This is explored further below.)

220. *See* Press Release, Truth & Transparency, *supra* note 126.

221. *Id.*

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

223. *See infra* Section III.A.5.

that would help them achieve their goal. Because copyright weaponization's goal is not about money, but about achieving a personal objective, copyright owners are also not necessarily weighing the costs of copyright assertions against the financial benefits from asserting copyright. They are not making rational financial decisions in these cases because the ultimate benefits to them are not financial. For instance, in a case involving Slade Neighbors, a successful attorney, and his ex-partner Veronica Monger, Neighbors certainly had a strong incentive to assert copyright to prevent Monger's dissemination of the emotionally abusive text messages and e-mails that Neighbors sent.<sup>224</sup> To stop her, he was willing to not only assert copyright to remove that information from the internet, but also to file a copyright infringement suit against Monger to ensure that she was permanently enjoined from ever disseminating his abusive text messages or e-mails again.<sup>225</sup> Harvey Weinstein had strong motives to stop Ronan Farrow from reporting on Weinstein's victims' accounts of his sexual misdeeds.<sup>226</sup> Even Netflix Films was likely more motivated to suppress critical commentary about its film than its critics were motivated to ensure that their one-off negative comments remained visible.<sup>227</sup>

### 3. Copyright's Remedies Allow Suppression of Content with Limited First Amendment Review

Copyright owners can seek equitable relief, including injunction, against dissemination of their works, making copyright an effective weapon to stop the sharing of content or information. This is exacerbated by the fact that copyright is largely immunized from express First Amendment checks. Indeed, even though courts disfavor prior restraint of speech, they "show[] little hesitation in granting preliminary injunctions in cases of copyright infringement, even when the injunction amounts to a clear prior restraint of speech."<sup>228</sup> Because "preliminary injunction is a powerful remedy that is often the death knell of the case and may force settlement or abandonment of the case," issuing an injunction could result in suppressing speech without a trial or consideration of all of the evidence.<sup>229</sup>

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224. *See infra* Part IV.

225. *See infra* Part IV.

226. *See supra* Section II.B.

227. *See supra* Part II.

228. Tehranian, *supra* note 2, at 249. *But see* Samuelson, *supra* note 25 (finding courts no longer presume irreparable injury in copyright cases and no longer automatically enjoin unauthorized or even infringing uses of copyrighted works).

229. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 14 (2016).

Many of the objectives described in Part II seem to involve attempts to suppress speech, such as weaponizing copyright to censor criticism or erase facts and information. Courts, however, do not engage in independent First Amendment analyses in copyright cases. Instead, courts rely on the Copyright Act's "built-in First Amendment accommodations" to balance a copyright owner's right to exclude with the putative infringers' right to use the copyrighted works.<sup>230</sup> These built-in accommodations include copyright's idea-expression dichotomy and copyright's fair use doctrine.<sup>231</sup> Therefore, even in some of the scenarios described above where it may be obvious that the copyright owner had a censorial motive for asserting their copyright, courts still analyze those assertions under the fair use doctrine by balancing the four fair use factors in Section 107 of the Copyright Act. While copyright may not be "categorically immune from challenges under the First Amendment,"<sup>232</sup> it is certainly easier for the would-be censoring party to wield copyright than other tort claims, such as defamation, false light, invasion of privacy, or intentional infliction of emotional distress, which are otherwise protected under the First Amendment.<sup>233</sup>

#### 4. Copyright's Extrajudicial Remedy Encourages Weaponization

Copyright provides a powerful extrajudicial process for enforcement through the Digital Millennium Copyright Act's ("DMCA") notice and takedown regime.<sup>234</sup> Section 230 of the Communications Decency Act ("Section 230") immunizes content platforms from liability based on user-generated content posted on their platforms, except where that user-generated content infringes intellectual property laws.<sup>235</sup> To make up for that lack of immunity, the DMCA introduced a notice and takedown regime providing content platforms a safe har-

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230. *Eldred v. Ashcroft* (Eldred II), 537 U.S. 186, 219 (2003). See also *Peterman v. Republic Nat'l Comm.*, 369 F. Supp. 3d 1053, 1062 n.4 (D. Mont. 2019) ("[T]he [defendant] cites to no precedent supporting its position that the First Amendment demands an additional layer of protection," and the defendant's use of the copyrighted work is not "entitled to First Amendment protection above and beyond that built into the Copyright Act.").

231. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Eldred II*, 537 U.S. at 219; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).

232. *Eldred v. Reno* (Eldred I), 239 F.3d 372, 375 (D.C. Cir. 2001). This statement was later rejected by the Supreme Court in *Eldred II*, 537 U.S. at 221 ("[T]he D.C. Circuit spoke too broadly when it declared copyright's 'categorically immune from challenges under the First Amendment.'").

233. *Tehrani*, *supra* note 2, at 251.

234. John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 345, 360 (2018).

235. 47 U.S.C. § 230(e)(2) (2018); *Goldman & Silbey*, *supra* note 7, at 943.

bor from liability if they expeditiously remove infringing user-generated content from their platform.<sup>236</sup> This notice and takedown provision gives copyright owners a quick and easy process to demand removal of purportedly infringing content from content platforms such as YouTube and other intermediaries that host user-generated content. In most instances, once a copyright owner files a takedown demand, the content platform removes the purportedly infringing content, and the burden then shifts to the user or poster of the content to file a counter-notice objecting to the removal of their content. Goldman and Silbey describe this process as a “carrot-and-stick incentive” that can encourage over-suppression of content.<sup>237</sup> Specifically, this process encourages preemptive removal of user-generated content “regardless of whether the material or activity is ultimately determined to be infringing.”<sup>238</sup>

Even though the DMCA provides for a counter-notice process, that process has flaws. First, copyright owners may “time their DMCA takedown notices carefully . . . [to] have materials removed online during a particularly damaging interval (as in the Savage case), regardless of how good a fair-use claim there might be for the use of those materials.”<sup>239</sup> Furthermore, as discussed above, copyright weaponizers may be greatly motivated to remove unflattering or reputation-damaging information,<sup>240</sup> which could encourage them to file suit in federal court in response to a counter-notice. In that situation, content platforms are not obligated to restore the purportedly infringing content while the suit is pending, thereby keeping that content offline and out of the public’s reach.<sup>241</sup> This makes the DMCA a copyright weaponizer’s ally. Utilizing DMCA’s takedown process allows copyright owners to achieve the immediate result of removing content from online dissemination, and can often result in that content’s permanent removal due to the risk, uncertainty, hassle, and potential expense in filing a counter-notice to object to the removal. While Section 512(f) of the DMCA allows recipients of meritless DMCA takedown demands to sue for damages if the filers “knowingly materially misrepresented” that the posted content was infringing,<sup>242</sup> and some recipients have been successful under Section 512(f),<sup>243</sup> it is

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236. Goldman & Silbey, *supra* note 7, at 944.

237. *Id.*

238. 17 U.S.C. § 512(g)(1) (2019).

239. Tehranian, *supra* note 2, at 275.

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

241. *See Tehranian, supra* note 2, at 275–76.

242. 17 U.S.C. § 512 (f) (2019).

243. *See, e.g.,* Online Pol’y Grp. v. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004). In 2003, two college students obtained and posted online leaked email messages between employees at Diebold, a manufacturer of electronic voting machines. Those email messages

often cheaper, faster, and less risky for recipients of DMCA takedowns to remove content than to hire counsel to file suit under Section 512(f).

DMCA's notice and takedown process can also be weaponized to punish and retaliate against content creators like PewDiePie. For instance, after being copyright struck by Campo Santo for using a racist term in his video stream,<sup>244</sup> PewDiePie claimed that the copyright strike was "a pretty big deal," because "[i]f I get more than three of them, my channel will shut down."<sup>245</sup> PewDiePie was referring to Google's copyright strike policy for content creation channels like YouTube,<sup>246</sup> under which one copyright strike may affect the content creator's ability to monetize their content, and three copyright strikes will result in the termination of the content creator's account and any associated channels, the removal of all videos uploaded to the account, and the inability to create any new channels on the content platform.<sup>247</sup> Copyright law, its relative immunity from First Amendment scrutiny, and the DMCA notice and takedown process thus make copyright an easy weapon to wield.

### 5. Copyright Defenses Fail to Discourage Copyright Weaponization

A final reason for copyright's superior ability to be weaponized is the lack of strong defenses or legal hurdles to stop copyright owners from succeeding in weaponizing copyright. First, many disputes involving copyright weaponization may not reach a decision on the merits. Unless the media or social media picks up on the dispute, these cases of copyright weaponization can go unnoticed or undetect-

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appeared to call into question the accuracy of Diebold's electronic voting machine's ability to accurately tabulate voters' preferences. Anonymous users on IndyMedia linked to the online location of those leaked emails. In response, Diebold filed DMCA takedown requests to demand the removal of those links on IndyMedia, claiming copyright infringement. IndyMedia's hosting company and the two college students sued Diebold for violating Section 512(f). The court granted summary judgment finding "that portions of the email archive were so clearly subject to the fair use defense that no reasonable copyright holder could have believed that [they] were protected by copyright." *Diebold, Inc. v. Online Policy Group*, DIGIT. MEDIA L. PROJECT (Nov. 14, 2007, 10:27), <https://www.dmlp.org/threats/diebold-inc-v-online-policy-group#node-legal-threat-full-group-description> [<https://perma.cc/CTS6-S7Q3>] (internal quotations omitted).

244. See *supra* Section II.A.

245. Julia Alexander, *YouTube Accepts Campo Santo's Copyright Strike Against PewDiePie, Could Lead to Bigger Issues*, POLYGON (Sept. 14, 2017, 5:46 PM), <https://www.polygon.com/2017/9/14/16309430/pewdiepie-campo-santo-strike> [<https://perma.cc/NP9G-UAHR>] (quoting PewDiePie).

246. See *Copyright Strike Basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000?hl=en#zippy=%2Cwhat-happens-when-you-get-a-copyright-strike> [<https://perma.cc/YS83-JUMK>].

247. *Id.* After one copyright strike, a creator has to go through Copyright School.

ed. In practice, faced with assertions of copyright infringement, putative infringers often voluntarily remove their offending works,<sup>248</sup> or content platforms take the works down in response to copyright owners' DMCA copyright takedown demands.<sup>249</sup> This means that weaponization can be effective in suppressing content through mere assertions of copyright.<sup>250</sup> As the Electronic Frontier Foundation explained, "[s]tern threats making vague claims about stolen intellectual property are often effective even if there's no legal merit to them."<sup>251</sup> Even when cases do gain attention or make it to court, there are limitations on the defenses that should discourage copyright weaponization such as fair use, copyright misuse, or state anti-SLAPP laws, discussed below.

Fair use is identified as one of copyright's built-in First Amendment accommodations, and it would appear to be an effective defense against many of the scenarios described in Part II.<sup>252</sup> Fair use guarantees "breathing space within the confines of copyright."<sup>253</sup> It excuses otherwise infringing works for the purposes of criticism, commentary, news reporting, teaching, scholarship, research, and other socially valuable or transformative uses.<sup>254</sup> Defending fair use, however, can be expensive and time consuming.<sup>255</sup> Even defendants with strong fair use defenses have to expend money and time, including on discovery, to vindicate their rights.<sup>256</sup> Furthermore, fair use results can sometimes be unpredictable because of its fact-specific and case-by-case analysis.<sup>257</sup> This unpredictability has caused some courts and scholars

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248. Goldman & Silbey, *supra* note 7, at 947; *see also* Olson, *supra* note 75, at 553 (noting that the threat of copyright made the author and publisher preemptively remove content from manuscript that otherwise would have been fair use).

249. *See* Tehranian, *supra* note 2, at 282–83.

250. Goldman & Silbey, *supra* note 7, at 947 (threats serve to "effectively suppress content without any judicial oversight").

251. McKeown, *supra* note 229, at 13 (internal quotations omitted).

252. *See* Fromer, *supra* note 7, at 580 (finding that courts "are more likely to conclude that there is a fair use defense to infringement when the market effects driving the plaintiff's copyright suit are irrelevant."); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1633 (1982) ("Because the owner's antidissemiation motives make licensing unavailable in the consensual market, and because the free flow of information is at stake, a strong case for fair use can be advanced in these cases.").

253. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

254. 17 U.S.C. § 107 (2018); Cathay Y. N. Smith, *Copyright Silencing*, 106 CORNELL L. REV. ONLINE 71, 83 (2021).

255. *Id.* at 83–84.

256. *See* Tehranian, *supra* note 2, at 267.

257. *See, e.g.*, LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004) ("in America [fair use] simply means the right to hire a lawyer to defend your right to create."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); David Nimmer, *Fairest of Them All and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. &

to describe fair use as “one of the most ‘troublesome’ doctrines,” “bilkilowing white goo,” and “naught but a fairy tale.”<sup>258</sup> Even though scholars disagree on the extent of fair use’s predictability,<sup>259</sup> the folklore of fair use’s difficulties can lead putative infringers to shy away from spending the time and money to defend legitimate fair uses of copyrighted works.<sup>260</sup> Finally, courts can sometimes appear to be sympathetic to the personal objectives that these copyright weaponizers seek to achieve. For instance, in *Hill v. Public Advocate of the U.S.*, the court refused to dismiss Hill’s copyright infringement claim on fair use grounds even though it was clearly asserted to vindicate personal rather than economic interests.<sup>261</sup> The court in *Monge v. Maya Magazines* similarly dismissed the magazine’s fair use defense even though its use of the photograph was newsworthy, and it appeared that Monge asserted copyright for the noncopyright purpose of hiding the fact that she had secretly married her manager.<sup>262</sup> Thus, even though in these cases the putative infringer could articulate relatively strong fair use defenses to the assertions of copyright against them, the courts refused to dismiss the copyright claims based on fair use.<sup>263</sup> And even if many of the assertions of copyright in Part II could ultimately be considered fair use, it could cost a putative infringer too much time and money to reach that final adjudication. Capitulating to copyright weaponizers’ demands to takedown content is often much easier.

Other legal solutions, such as copyright misuse or state anti-SLAPP laws, also suffer from practical and legal limitations making them mostly ineffective in discouraging copyright weaponization. Copyright misuse is an equitable defense that is based on the concept

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MARY L. REV. 1525, 1666 (2004) (“Fair use is an *ex post* determination, a lottery argument offered by accused infringers forced to gamble, after the fact, that they did not need permission before.”); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008) (“Fair use . . . remains fairly unpredictable and uncertain in many settings . . .”).

258. McKeown, *supra* note 229, at 4.

259. See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (“[F]air use law is both more coherent and more predictable than many commentators have perceived . . .”); Smith, *supra* note 8, at 2064 (finding pattern in fair use cases involving unauthorized political uses of copyrighted works). See generally Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

260. See, e.g., Elizabeth L. Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 637 (2019) (“Folklore about litigation odds and outcomes will discourage disadvantaged creators from pursuing claims even when they seem strong.”).

261. See *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347 (D. Colo. 2014).]

262. See *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1173–75 (9th Cir. 2012).

263. Buccafusco & Fagundes, *supra* note 1, at 2454 (“[C]ourts are far from universally sympathetic to the [fair use] defense, even when owners’ suits clearly seek to vindicate only noneconomic interests.”).

of unclean hands.<sup>264</sup> Copyright misuse has traditionally been applied in cases where owners assert copyright to frustrate competition.<sup>265</sup> The court in *Video Pipeline v. Buena Vista Home Entertainment*, however, acknowledged that copyright misuse “might operate beyond its traditional anti-competition context” and could be asserted in situations where copyright owners attempt to use their copyright to restrict critical speech.<sup>266</sup> Specifically, the *Video Pipeline* court explained that “[a] copyright holder’s attempt to restrict expression that is critical of it (or of its copyrighted good, or the industry in which it operates, etc.) may, in context, subvert . . . copyright’s policy goal to encourage the creation and dissemination to the public of creative activity.”<sup>267</sup> Similarly, in *Omega S.A. v. Costco Wholesale Corp.*, the court considered that copyright misuse could exist in situations other than antitrust or restrictive licensing agreements and “could be applied to new situations as they arose.”<sup>268</sup> Weaponizing copyright to suppress information and censor criticism is certainly using copyright “in a manner violative of the public policy embodied in the grant of a copyright.”<sup>269</sup> However, there is still uncertainty over how copyright misuse might more broadly apply and what actions it actually could cover. As a fairly new concept, copyright misuse has not been recognized by the Supreme Court, and lower courts have generally “applied the doctrine sparingly.”<sup>270</sup> Furthermore, courts frequently limit the defense to application in limited anti-competitive situations.<sup>271</sup>

Anti-SLAPP laws are state laws allowing for early dismissal and fee shifting to defendants facing certain meritless litigation. SLAPP stands for “strategic lawsuit against public participation,” and anti-SLAPP laws are intended to “provide breathing space for free speech

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264. Judge, *supra* note 2, at 902.

265. See Judge, *supra* note 2, at 903–04.

266. *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191, 206 (3d Cir. 2003). See also Deepa Varadarajan, *The Uses of IP Misuse*, 68 EMORY L.J. 739, 761 (2019); Olson, *supra* note 75, at 581.

267. *Video Pipeline, Inc.*, 342 F.3d at 205–06.

268. *Omega S.A. v. Costco Wholesale Corp.*, 2011 WL 8492716, at \*2 (C.D. Cal. Nov. 9, 2011).

269. *Id.* (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990)).

270. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011).

271. See, e.g., *Philips North Am., LLC v. Summit Imaging Inc.*, 2020 WL 6741966, at \*8 (2020) (describing copyright misuse as a defense that “forbids a copyright holder from securing an exclusive right or limited monopoly not granted by the Copyright Office” and prevents “copyright holders from using the conditions to stifle competition”) (internal quotations omitted). See also, Xiyin Tang, *Can Copyright Holders Do Harm to Their Own Works?*, 54 U.C. DAVIS L. REV. 1245, 1278–79 (2021) (acknowledging courts’ limited application of the copyright misuse doctrine to antitrust violations, but discussing cases in which the concept of copyright misuse being applied in cases where copyright owners use copyright to regulate extra-copyright interests, such as *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 304–06 (2d Cir. 1966)).

on contentious public issues.”<sup>272</sup> Specifically, anti-SLAPP laws can “decrease the ‘chilling effect’ of certain kinds of . . . speech-restrictive litigation . . . by making it easier to dismiss . . . suits at an early stage of the litigation.”<sup>273</sup> California’s anti-SLAPP law, for instance, allows defendants to strike any legal claims asserted against a defendant for “exercis[ing] [their] constitutional right of petition or [their] constitutional right of free speech in connection with a public issue or an issue of public interest.”<sup>274</sup> State anti-SLAPP laws, however, do not apply to federal causes of action, such as copyright infringement claims.<sup>275</sup> Furthermore, several courts have ruled that state anti-SLAPP laws are inconsistent with Federal Rules of Civil Procedure, because they require a plaintiff to make a showing higher than is required by the federal rules for their claim to survive to trial.<sup>276</sup> Finally, with the exception of California and a few other states, state anti-SLAPP laws have narrowly focused on preventing suits arising from a party’s exercise of its right to petition.<sup>277</sup> Therefore, state anti-SLAPP laws do not create any practical or legal hurdles to copyright weaponization.<sup>278</sup>

All of the reasons above combine to make copyright a superior weapon to wield to achieve personal objectives such as silencing and suppressing content, erasing and burying information, punishing and retaliating against perceived wrongdoings, protecting reputation and moral rights, and preserving privacy. But these reasons alone would not be enough to cause the widespread weaponization of copyright that we are seeing today. In addition to the benefits of using copyright, many individuals also turn to copyright to fill gaps in other areas of the law, including privacy, moral rights, and false endorsement.

### *B. Copyright as Legal Gap Filler*

In addition to the benefits of weaponizing copyright,<sup>279</sup> another reason for the widespread weaponization of copyright is the existence of gaps and limitations in other areas of the law. “The law often

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272. *La Liberté v. Reid*, 966 F.3d 79, 85 (2d Cir. 2020) (citing *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015)).

273. *Id.* (quoting EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 118 (5th ed. 2014)).

274. Cal. Civ. Proc. Code § 425.16(e) (1971).

275. *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

276. See, e.g., *La Liberté*, 966 F.3d 79; *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350–57 (11th Cir. 2018); *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019).

277. See Matthew D. Bunker & Emily Erickson, *#AINTTURNINGTHEOTHERCHEEK: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC L. REV. 801, 806–07 (2019).

278. There is currently no federal anti-SLAPP statute.

279. *Infra* Section IV.B.

moves to fill a gap.”<sup>280</sup> This statement is certainly true in the areas of privacy law, moral rights law, and laws preventing false endorsement and false association. Because of the gaps and limitations in these other areas of the law, copyright rises above as a superior remedy to prevent dissemination of private or intimate information, to prevent tarnishment or false association of copyright works, and to protect the reputation of creators and copyright owners by rejecting perceptions of endorsement or association.

### 1. Copyright Is Better than Privacy Laws at Protecting Privacy

It would appear that privacy laws or even criminal laws should be more fitting than copyright law to preserve privacy and prevent the nonconsensual dissemination of intimate content. However, these legal solutions have proven to be far less efficient than copyright law for protecting individuals’ privacy. As a preliminary matter, the United States does not have a structured or protective privacy regime.<sup>281</sup> Privacy laws are inconsistent and state-specific, and state statutory protection “is generally scattershot and focused on specific areas, such as medical information, banking data, data held by the federal government and the like.”<sup>282</sup>

Privacy claims are also limited by First Amendment considerations.<sup>283</sup> A case described in Part II, *Hill v. Public Advocate*, is useful to illustrate the First Amendment scrutiny of privacy claims compared to copyright claims.<sup>284</sup> In that case, as described above, Public Advocate used the engagement photograph that Katrina Hill took of same-sex couple Brian Edwards and Thomas Privitere in a political campaign against same-sex marriage.<sup>285</sup> In addition to the copyright infringement claim Hill asserted against Public Advocate for its unauthorized use of her photo, Edwards and Privitere also asserted a claim against Public Advocate for appropriation of name or likeness, a privacy tort under Colorado law.<sup>286</sup> The court, however, dismissed Edwards and Privitere’s claim for privacy violations because Public

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280. McKeown, *supra* note 229, at 14.

281. See McKeown, *supra* note 229, at 14.

282. McKeown, *supra* note 229, at 15.

283. See, e.g., Lauren Frias, *Ex-Rep. Katie Hill Loses Lawsuit Against Daily Mail for Publishing Nude Photos of Her, Accuses Judge of Thinking ‘Revenge Porn’ Is Free Speech*, INSIDER (Apr. 7, 2021), <https://www.businessinsider.com/katie-hill-lawsuit-daily-mail-nude-photos-2021-4> [<https://perma.cc/LNP6-H7VX>] (discussing a court’s dismissal of Hill’s claim against the Daily Mail on anti-SLAPP grounds because Daily Mail’s publication of intimate photographs of Hill were “a matter of public issue or public interest” and did not violate California’s revenge-porn law).

284. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347 (D. Colo. 2014).

285. *Id.* at 1351–52.

286. *Id.* at 1355.

Advocate's unauthorized use "relate[d] to a legitimate matter of public concern" and was therefore immunized under the First Amendment.<sup>287</sup> Hill's claim for copyright infringement, on the other hand, survived Public Advocate's motion to dismiss.<sup>288</sup> The parties settled shortly afterward.<sup>289</sup>

Section 230 also immunizes Internet platforms from personal privacy claims. Thus, privacy laws do not provide individuals with the immediate relief of removing private and personal content from the Internet. Because copyright infringement is an exception to Section 230's immunity for content platforms, content platforms are motivated to quickly remove online content accused of infringing copyright.<sup>290</sup> On the other hand, platforms are generally immunized from personal privacy claims and other tort claims by Section 230.<sup>291</sup> This means that content platforms may not be as pressured to remove user-generated content that violates a person's privacy as they would be to remove the same user-generated content if it infringes copyright.<sup>292</sup> As Professor Danielle Citron explained, this "give[s] content platforms a free pass to ignore destructive sexual-privacy invasions, to repost illegal material knowingly and deliberately, and to solicit sexual privacy invasions while ensuring that abusers cannot be identified."<sup>293</sup> For instance, both Professor Citron and Professor Andrew Gilden have described an instance on the dating app Grindr where a man, Gutierrez, set up an imposter profile for his ex-partner, Matthew Herrick. Gutierrez posted Herrick's nude photographs on Grindr, claimed that Herrick fantasized about being raped, and shared Her-

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287. *Id.* at 1357.

288. *See id.* at 1360. *See also* Deidre A. Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1, 34 (2016) ("[C]opyright infringement allegations are more likely to hold up for a plaintiff than are right to privacy or right of publicity claims. This helps to explain why one seeking to stop the dissemination of a particular work might opt to proceed under copyright in addition to any extant privacy causes of action.").

289. Caitlin Gibson, *Case Against Advocacy Group Tied to Loudoun County Supervisor Ends in Settlement*, WASH. POST (June 19, 2014), [https://www.washingtonpost.com/local/virginia-politics/case-against-advocacy-group-tied-to-loudoun-county-supervisor-ends-in-settlement/2014/06/19/e6ea1b1e-f7cc-11e3-a3a5-42be35962a52\\_story.html](https://www.washingtonpost.com/local/virginia-politics/case-against-advocacy-group-tied-to-loudoun-county-supervisor-ends-in-settlement/2014/06/19/e6ea1b1e-f7cc-11e3-a3a5-42be35962a52_story.html) [<https://perma.cc/G6SK-K8PU>].

290. *See supra* Section III.A.4. *See also* Gilden, *supra* note 7, at 104 ("The IP exception to CDA immunities has the benefit of forcing intermediaries to respond to specific claims of harm by their users without eliminating the general flexibility to balance safety and privacy that the CDA otherwise provides.").

291. 47 U.S.C. § 230 (2019).

292. Goldman & Silbey, *supra* note 7, at 942 (under Section 230, "online publishers, virtually without exception, are not liable for privacy violations or reputational injuries attributable to content provided by third parties and are not obligated to remove content in response to complaints or legal threats").

293. Citron, *supra* note 188, at 1943; *see also* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2029–30 (2014).

rick's home address.<sup>294</sup> Herrick notified and complained to Grindr over fifty times, but Grindr ignored his complaints and refused to remove the imposter dating profile.<sup>295</sup> Herrick finally sued Grindr asserting a variety of tort claims as well as a copyright claim for displaying nude photographs that he had taken of himself.<sup>296</sup> The court dismissed the Herrick's tort claims based on Grindr's immunity under Section 230, but permitted Herrick to amend his copyright claim against Grindr.<sup>297</sup> Unlike privacy or other tort laws, copyright provides a much more effective solution to remove nonconsensual personal or intimate content online.<sup>298</sup>

Finally, even though more than half of the states have enacted laws criminalizing revenge porn, reliance on criminal law can be complicated. First, relying on criminal law requires garnering sympathy from law enforcement and relying on law enforcement to take action.<sup>299</sup> As Professor Gilden explained, law enforcement may not understand certain sexual contexts or sexual minority communities, and could be hostile or unhelpful in contexts that they do not understand.<sup>300</sup> Furthermore, according to Professor Mary Anne Franks and Professor Citron, law enforcement may not take victims of revenge porn seriously, and can sometimes blame or shame victims for appearing in these sexual images or videos.<sup>301</sup> These prejudices can especial-

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294. See Citron, *supra* note 188, at 1943.

295. *Id.* at 1943–44.

296. Gilden, *supra* note 7, at 87.

297. *Id.*

298. See Tehranian, *supra* note 234, at 359 (“[L]ong-established First Amendment principles make invasion of privacy claims against internet entities who simply further the recording’s distribution far more difficult to sustain . . .”). Additionally, unlike the European Union, the U.S. has not adopted Federal legislation recognizing a “right to be forgotten.” See Lisa Vaas, *Google Wins Landmark Case: Right to be Forgotten Only Applies in EU*, NAKED SEC. BY SOPHOS (Sept. 25, 2009), <https://nakedsecurity.sophos.com/2019/09/25/google-wins-landmark-case-right-to-be-forgotten-only-applies-in-eu/> [<https://perma.cc/S5D9-6VH7>]. Because of these gaps, some Internet service providers have created policies to help victims of nonconsensual pornography remove their private content online. See *Remove Non-Consensual Explicit or Intimate Personal Images from Google*, GOOGLE SEARCH HELP, <https://support.google.com/websearch/answer/6302812> [<https://perma.cc/4HAJ-MG94>] (providing a process for removing revenge porn if “[t]he imagery shows you . . . nude, in a sexual act, or an intimate state . . . [and y]ou . . . didn’t consent to the imagery or the act and it was made publicly available [or] you intended the content to be private and the imagery was made publicly available without your consent”). But these are policy choices by private companies that are not based on underlying privacy or tort laws.

299. See Gilden, *supra* note 7, 101.

300. See *id.*

301. See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 226 (2011); Citron & Franks, *supra* note 179, at 366–67.

ly affect women and sexual minorities.<sup>302</sup> Unlike state criminal laws, copyright law empowers victims of nonconsensual pornography to control the removal of their intimate images online, rather than relying on the mercies of law enforcement. Additionally, while violations of federal criminal law are exempt from Section 230's immunity, Section 230 appears to "trump[] any state criminal law," and "[a] lot of [content platform] companies are under the impression they can't be touched by state criminal laws."<sup>303</sup> This means that content platforms may not be as motivated to expeditiously remove images that violate state criminal nonconsensual pornography laws as they are with removing images that infringe copyright. This leads copyright owners to weaponize copyright to fill privacy gaps to more efficiently and effectively protect their private information and prevent dissemination of intimate images.

## 2. Copyright Is Better than Moral Rights Laws at Protecting Moral Rights and Reputation

Copyright owners weaponize copyright to assert control and protect a copyright owner's personal reputation, protect moral rights in their works, and prevent works from becoming associated with disparaging or tarnishing uses. While it seems that copyright ownership and its attendant rights should protect these interests, these are traditionally considered personal rather than economic interests, and do not fit the standard story that has frequently justified copyright protection.<sup>304</sup>

Outside of copyright law, U.S. law provides little solution for copyright owners to prevent unauthorized uses of their works that damage their reputation, tarnish or associate their works with degrading ideas, or harm their authorial dignity in their works. This is especially true online, where "[a]nyone who releases cultural artifacts into a digital network — whether via text message, cloud storage, or Facebook — risks that artifact being used by others in ways that reshape their work, family, and romantic relationships and limit their ability to

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302. See Tehranian, *supra* note 234, at 362–63 ("The historical double-standard on, sexual promiscuity and the prevalence of practices such as slut-shaming mean that the impact on a young woman who finds her naked body trending on Twitter may be quite different than that on a similarly-situated young man."); Gilden, *supra* note 7, at 101 ("LGBT activists should be cautious of inviting law enforcement into spaces where naked images are shared regularly, as it may be difficult for state actors to distinguish . . . unconscionable activities . . . from other forms of sexual image-sharing that fall within the community's norms.").

303. Josh Blackman, *Federal "Revenge Porn" Legislation in the Works*, JOSH BLACKMAN (Nov. 25, 2013), <http://joshblackman.com/blog/2013/11/25/federal-revenge-porn-legislation-in-the-works/> [https://perma.cc/BMY3-ZGX9].

304. See McKeown, *supra* note 229, at 7–8; Balganes, *supra* note 7, at 21 n.65 (surveying scholarship critical of using copyright to protect dignitary or privacy interests).

set the terms of their own cultural participation.”<sup>305</sup> Copyright owners in these situations can suffer legitimate injuries separate from economic injuries to their copyrighted works.<sup>306</sup> When those works are used in ways that are especially offensive to copyright owners, owners choose to weaponize copyright because they are unable to rely on other legal solutions. For instance, in the dispute between Griner and King over King’s unauthorized use of Griner’s photograph of her son, Griner explained that she “would never attach [her son’s] face willingly to any negative ad . . . . [B]igotry is just the antithesis of what we want to be the association with [Success Kid].”<sup>307</sup> Griner eventually filed a copyright infringement claim against King, his campaign, and the Republican fundraising site WinRed for their unauthorized use of Success Kid in order to ensure that her photograph is not used by a politician who Griner described as “just the worst of the worst.”<sup>308</sup> Griner’s use of copyright in this instance appears to be to protect her reputation and to prevent her work from being tarnished or associated with bigotry and hate.

Moral rights protect noneconomic rights a creator retains in their work, including the creator’s right to protect the integrity of their work from distortions that could damage the creator’s honor or reputation.<sup>309</sup> Moral rights originated in Europe, and in some European countries, moral rights grant creators the right of attribution, the right of disclosure and withdrawal, the right of integrity, and, in certain instances, the right to have access to the original work, to compel the completion of a work, or to prevent their work from being associated with undesirable products or institutions.<sup>310</sup> In the United States, the Visual Artists Rights Act (“VARA”) is the only federal law that explicitly protects the moral rights of creators,<sup>311</sup> and VARA is significantly narrower than moral rights legislation in European countries.<sup>312</sup> VARA only grants creators the right to attribution and the right to integrity, including the right to prevent the destruction of works of

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305. Gilden, *supra* note 7, at 109.

306. See Buccafusco & Fagundes, *supra* note 1, at 2480–81 (describing a view opposing the economic consequentialist theory for copyright).

307. Yuhas, *supra* note 168.

308. *Id.*

309. Cathay Y. N. Smith, *Creative Destruction: Copyright’s Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. 601, 608 (2020).

310. See U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 13–14 (2019); Smith, *supra* note 309, at 608.

311. See generally *id.* at 40–107 (discussing VARA and other federal laws that could protect moral rights, including Misappropriation and Unfair Competition under the Lanham Act, Section 1202 of Title 17, and other Title 17 Provisions).

312. Smith, *supra* note 309, at 614 n.91.

recognized stature.<sup>313</sup> Furthermore, VARA only applies to a narrowly defined “work of visual art.”<sup>314</sup> A work of visual art is a painting, drawing, print, sculpture, or still photograph image produced for exhibition purposes “existing in a single copy, in a limited edition of 200 copies or fewer.”<sup>315</sup> It does not include music or literary works, and does not apply to reproductions of a work of visual art.<sup>316</sup> Therefore, neither Griner’s Success Kid meme, nor any of the purportedly infringing works described in Part II of this Article, would likely meet the definition of a work of visual art to be protected under VARA. Therefore, even if any of the infringing uses described in Part II could violate a creator’s moral right of integrity by distorting, mutilating, or modifying a work to prejudice the creator’s honor or reputation,<sup>317</sup> creators would not have a cause of action under VARA. VARA rights are also subject to copyright’s fair use defense.<sup>318</sup>

Not being eligible to assert a moral rights claim, some copyright owners have tried, but failed, to assert a false endorsement claim under the Lanham Act based on unauthorized uses of their copyrighted works.<sup>319</sup> Section 43(a) of the Lanham Act provides a cause of action for false association against “the use of false designations of origin, false descriptions, and false representation in the advertising and sale of goods and services.”<sup>320</sup> Courts frequently reject false endorsement claims that are based solely on the use of another’s copyrighted work.<sup>321</sup> Copyright owners, therefore, instead assert copyright to raise “what is essentially a trademark-related claim — in other words, they use their ability to control the exploitation of the work to challenge uses that suggest an authorization or sponsorship of the message conveyed by the defendant’s use.”<sup>322</sup> In *Henley v. DeVore*, Don Henley asserted a Lanham Act false endorsement claim and copyright infringement claim against politician Charles DeVore for his unauthorized use of Henley’s songs, “The Boys of Summer” (“Summer”) and

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313. 17 U.S.C. § 106A.

314. 17 U.S.C. § 106A(a).

315. 17 U.S.C. § 101 (definition of a “work of visual art”).

316. *See id.*

317. *See* 17 U.S.C. § 106A(a)(3)(A).

318. 17 U.S.C. § 106A(a) (“Subject to section 107 . . .”).

319. *See, e.g.,* *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1166–68 (C.D. Cal. 2010); *Nichols v. Club for Growth Action*, 235 F. Supp. 3d 289, 297–98 (D.D.C. 2017); *Oliveira v. Frito Lay, Inc.*, 251 F.3d 56, 61–62 (2d Cir. 2001). *But see* *Browne v. McCain*, 611 F. Supp. 2d 1073, 1080–81 (C.D. Cal. 2009) (refusing to dismiss Jackson Browne’s Lanham Act claims against John McCain for McCain’s unauthorized use of Browne’s music at a campaign rally).

320. *See Henley*, 733 F. Supp. 2d at 1166.

321. *See supra* note 319 (collecting cases).

322. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1402 (2011).

“All She Wants to Do is Dance.”<sup>323</sup> Summer, written by Henley, described nostalgia for a past summer romance.<sup>324</sup> The iconic song began, “Nobody on the road / Nobody on the beach / I feel it in the air / The summer’s out of reach / Empty lake, empty streets / The sun goes down alone / I’m driving by your house / Though I know you’re not home . . . .”<sup>325</sup> DeVore, a California assemblyman who was seeking the Republican nomination for senate, incorporated Summer into a campaign video criticizing Obama, Nancy Pelosi, and Obama’s supporters.<sup>326</sup> DeVore rewrote the lyrics from Summer to create and record “The Hope of November” (“November”) using the music from Summer.<sup>327</sup> The lyrics for November began, “Obama overload / Obama overreach / We feel it everywhere / Trillions in the breach / Empty bank, empty street / Dollar goes down alone / Pelosi’s in the House / So we now all must atone . . . .”<sup>328</sup> Henley argued that DeVore’s use of his iconic songs falsely suggested that Henley endorsed DeVore and his political campaign.<sup>329</sup> The court dismissed Henley’s false endorsement claim, finding that Henley could not maintain a Lanham Act claim based purely on the use of his songs.<sup>330</sup> Based on the same facts, however, the court granted Henley’s summary judgment on his copyright infringement claim, finding that DeVore’s unauthorized uses of Henley’s songs infringed Henley’s copyright.<sup>331</sup> This case is an example of how copyright owners succeed in weaponizing copyright to protect their reputational interests that may not be protected by other laws, such as the Lanham Act.

Finally, while trademark law allows an owner to sue for the dilution by tarnishment of a trademark, there is no similar cause of action for tarnishment of a copyright. Therefore, copyright owners weaponize copyright to protect their works from tarnishment from unsavory

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323. *See Henley*, 733 F. Supp. 2d at 1147, 1149.

324. *Id.* at 1147.

325. *Id.* at 1169 App. A.

326. *Id.* at 1148.

327. *Id.*

328. *Id.* at 1169 App. A.

329. *Id.* at 1147, 1149.

330. *Id.* at 1166–68. The *Henley* court relied on *Oliveira v. Frito Lay, Inc.*, 251 F.3d 56 (2d Cir. 2001). In *Oliveira*, Astrud Oliveira sued Frito Lay for using her 1964 song recording of The Girl from Ipanema in Frito-Lay’s television advertisement for Baked Lay’s Potato Crisps. *Oliveira*, 251 F.3d at 57–58. Based on the fame of her recording, Oliveira claimed to have earned trademark rights in that recording, and that the public recognized it as designating her as a singer. *Id.* at 59. Similar to *Henley*, the *Oliveira* court did not agree that a performer could hold a trademark in her own musical performance. *Id.* at 62; *Henley*, 733 F. Supp. 2d at 1167. But dissimilar to *Henley*, Oliveira did not hold the copyright in the recording of her musical performance, and ultimately lost her case against Frito Lay. *Oliveira*, 251 F.3d at 58, 63.

331. *Henley*, 733 F. Supp. 2d at 1164.

or degrading uses.<sup>332</sup> Matt Furie's lawsuit against Infowars and other unauthorized racist uses of Pepe the Frog is an example of a copyright owner weaponizing copyright to prevent the tarnishment and disparaging association of his copyrighted work.<sup>333</sup> Pepe the Frog is perhaps the most notorious example of an expressive work that was appropriated as a meme and deliberately tarnished and radicalized by white supremacists and the alt-right. Furie asserted copyright against alt-right and other racist uses of Pepe to prevent the further tarnishment of Pepe the Frog and stop its association with racism and hate.<sup>334</sup> Under trademark law, trademark owners can assert a claim for trademark dilution by tarnishment if a defendant uses the mark on unwholesome, disparaging, or inferior services "that may create a negative association with the goods or services covered by the famous mark."<sup>335</sup> The racist and hateful uses of Pepe the Frog certainly tarnished Furie's expressive work, to the point where it risked becoming more associated with white supremacy and anti-Semitism than its original meaning.<sup>336</sup> Nevertheless, there is no claim for dilution by tarnishment of copyrighted works,<sup>337</sup> and Furie's best choice to save Pepe was to weaponize copyright against these hateful uses of his work.

Several factors contribute to copyright's function as a weapon *par excellence* for copyright owners to achieve noncopyright objectives. One of those factors is the gaps or limitations in our legal system that do not effectively protect privacy interests, reputational interests, moral rights, or dignitary interests in copyrighted works. In the instances described above, it appears that copyright has moved in to fill the gaps left by privacy and other laws, and created a more efficient way to protect those personal interests. Other factors that contribute to the increase in copyright weaponization are the limited First Amendment scrutiny afforded to copyright claims, the DMCA's powerful extrajudicial regime, and the very few legal hurdles placed in the way of copyright weaponization. All of these factors together make copy-

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332. See Buccafusco & Fagundes, *supra* note 1, at 2469 ("[C]oncern for sacredness and defilement are commonplace in copyright disputes.").

333. See Frye, *supra* note 147, at 20:45–30:00, 26:40–27:00.

334. *Id.*

335. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 955 F. Supp. 605, 614 (E.D. Va. 1997).

336. See Pepe the Frog, *General Hate Symbols*, ADL, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog> [<https://perma.cc/BM5P-L6SF>]; Mele, *supra* note 153.

337. To be clear, I am not arguing here that there *should* be a dilution by tarnishment cause of action for copyright. There are criticisms of the Lanham Act's trademark dilution provisions, and those identified problems and critiques would likely extend to the creation of any form of copyright dilution by tarnishment cause of action. See generally Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008).

right an attractive solution to achieve the many noncopyright objections described in this Article.

#### IV. WHAT TO DO ABOUT COPYRIGHT WEAPONIZATION?

As detailed in Part II of this Article, copyright owners weaponize copyright to silence and erase facts, suppress criticism and critical speech, punish and retaliate, protect moral rights and reputation, and preserve privacy. Part III explained why copyright owners choose to weaponize copyright instead of relying on other legal solutions to achieve their objectives. As detailed in that Part, weaponizing copyright offers many benefits to copyright owners that other legal solutions do not. This Part explores the different proposals on handling copyright weaponization.

There are three main approaches to handling copyright weaponization. One approach is to reject all uses of copyright to protect non-economic interests, including personal interests. A second approach is to accept copyright's ability to protect important privacy interests, but to reject all other noncopyright uses of copyright. The third approach is to recognize copyright's use for multiple purposes, including to protect personal interests such as privacy, reputation, and dignity and moral rights in copyrighted works. This Part explains each of these approaches, critically examines the benefits and concerns of each one, and assesses whether there is a fair and just way to handle the increasingly widespread practice of copyright weaponization.

##### *A. Reject Copyright Weaponization*

There are strong reasons to limit copyright to protecting economic interests in copyrighted works. Copyright is justified though the utilitarian theory which posits that creators will create works based on copyright law's promise of market exclusivity.<sup>338</sup> Therefore, because the very existence of copyright is justified by this market rationale, this approach would support the notion that copyright owners should only assert their copyright when their market exclusivity is threatened. Limiting copyright assertions to only instances where a copyright owner's objective is to protect economic interests in their copyrighted works may also be the cleanest and clearest rule to limit censorial uses of copyright that impede speech or limit dissemination of information. Rejecting any uses of copyright to protect personal interests such as privacy, reputation, moral rights, or dignitary interests would further

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338. See Balganes, *supra* note 7, at 8 (explaining the generally accepted market rationale theory of copyright).

copyright's goal of disseminating information. There is strong support for this approach.<sup>339</sup>

For instance, Judge Margaret McKeown rejects assertions of copyright that are incompatible with copyright and its function as the engine of free expression, including using copyright to protect privacy.<sup>340</sup> While sympathetic to copyright owners with limited legal solutions to protect their privacy or prevent dissemination of intimate information, McKeown maintains that "copyright cannot be everything to everybody. Our legal system . . . protects the expression of ideas. No matter how noble and important the values of privacy and protection of reputation, copyright is not the direct vehicle for their vindication."<sup>341</sup> Specifically, McKeown emphasizes that "the protection of privacy is not a function of the copyright law,"<sup>342</sup> and "a trumped up copyright claim" invoked to remedy personal harms, rather than economic harms, "cannot justify censorship in the guise of authorship."<sup>343</sup>

Similarly, Professors Christopher Buccafusco and David Fagundes advocate for policing of "the role of non-incentive-based objections to unauthorized use" of copyrighted works, and reject copyright asserted against "unauthorized uses of . . . works that are entirely divorced from reasons for [their] creat[ion]."<sup>344</sup> For instance, responding to concerns about unauthorized uses of copyrighted works tarnishing or degrading those works, they hold firm that "[e]x post anxieties about uses that tarnish or degrade a work or that upset the author's sense of fairness should not be remedied by copyright law."<sup>345</sup> Instead, copyright should only support a copyright owner if the unauthorized use of their work would undermine their desire to create new works.<sup>346</sup> Buccafusco and Fagundes support their argument by noting the high cost but low reward to the public when copyright owners use copyright to protect personal rather than economic

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339. See, e.g., Keller, *supra* note 288, at 36–37 ("[E]ven if copyright can be contorted to cover a case like the Ashley Madison case," where copyright owners assert copyright in order to remove personal information online, "perhaps it should not. This contortion has the potential to create both doctrinal and practical problems, including . . . providing perverse incentives to copyright owners."); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990) ("[C]opyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so."); McKeown, *supra* note 229, at 16.

340. McKeown, *supra* note 229, at 7–8.

341. *Id.* at 16.

342. *Id.* at 7 (citing *Garcia v. Google*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc) (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003))).

343. *Id.* at 1.

344. Buccafusco & Fagundes, *supra* note 1, at 2484.

345. *Id.*

346. *Id.* at 2485.

interests in their works.<sup>347</sup> The public suffers a loss when work is removed from the public due to copyright. Where that copyright is used to vindicate personal interests, but not to protect the owner's creative incentives, the public suffers a loss without benefitting from a corresponding gain.<sup>348</sup> Because of this resulting imbalance, Buccafusco and Fagundes maintain that "[w]hen there is no reason to think that the defendant's copy will substitute for the author's work, there is no threat to the author's creative incentives, and thus, no need for copyright protection."<sup>349</sup>

Professor Jeanne Fromer likewise highlights two problems when copyright is used to protect noncopyright interests. First, copyright was "designed with particular scenarios in mind, and [its] costs and benefits are attuned to those scenarios."<sup>350</sup> Therefore, when copyright owners weaponize copyright, they are asserting their copyright outside of those scenarios, which "can impose greater cost on society than the intellectual property laws had anticipated without concomitant benefit."<sup>351</sup> Second, Fromer warns that in legal decisions involving copyright asserted to protect personal interests, courts are not always explicit about whether the copyright owner's personal motives influenced the court's ruling.<sup>352</sup> For instance, there may be cases in which a court takes into consideration the copyright owner's noncopyright motives in granting the infringer's fair use defense, or perhaps takes into consideration the harm to a copyright owner's reputational, dignitary, or privacy interests in denying the infringer's fair use defense. "In these instances, even if the particular judicial rule is sensible for the circumstances of the ill-fitting motivations, it might be a poor rule to impose on plaintiffs with archetypical motivations."<sup>353</sup> These poor rules have the potential to distort copyright law and future decisions by being applied to archetypical copyright cases "outside of the contexts in which they were relevant."<sup>354</sup> Because of the distortions and harms that may be caused by copyright weaponization, Fromer would limit copyright assertions "that do not bear on the reason for granting . . . copyright protection in the first place."<sup>355</sup>

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347. *Id.* at 2487.

348. *Id.*

349. *Id.* at 2441. *But see* Gordon, *supra* note 252, at 1634 ("Market failure should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright — notably, a desire to keep certain information from the public.").

350. Fromer, *supra* note 2, at 587.

351. *Id.* at 587.

352. *Id.* at 589.

353. *Id.* at 589.

354. *Id.* at 590.

355. *Id.* at 556–57.

While there are solid reasons to reject weaponizing copyright to achieve the noncopyright objectives described in Part II above, there are also concerns with limiting copyright's use only to protect economic interest of the copyrighted work. As a preliminary matter, it can be difficult to accurately determine a copyright owner's economic versus noneconomic objective, especially where the copyright owner may be motivated to achieve multiple objectives.<sup>356</sup> One of those objectives could be to protect the economic interest and income stream from their copyrighted work, while another could be to punish and retaliate or to prevent the association of their works with people or causes that they find morally repugnant.<sup>357</sup> This creates difficulties and uncertainty if any assertion of copyright is to be rejected when the objectives sought are personal.

Another issue to consider is the narrow definition of "economic interests" that copyright concerns. Specifically, copyright protects copyright owners from economic harm from market substitution, not economic harm from criticism that might decrease the demand for the original work.<sup>358</sup> Therefore, harm to privacy, safety, or reputation is not harm in the copyright sense.<sup>359</sup> At the same time, loss of privacy, safety, and reputation could lead the copyright owner to suffer real economic harm, even if that harm is not specific to the copyrighted work itself. Unauthorized uses can also harm reputation of creators, leading to the loss of future financial opportunities. For instance, many people supposed Furie created Pepe the Frog in support of white supremacy, which harmed his reputation and his ability to later sell children's graphic books.<sup>360</sup> Similarly, in *Kienitz v. Sconnie Nation LLC*, the court recognized that the unauthorized use of a photograph:

may injure [the photographer] Kienitz's long-range commercial opportunities . . . . He promises his subjects that the photos will be licensed only for dignified uses. Fewer people will hire or cooperate with Kienitz if they think that the high quality of his work will make the photos more effective when used against them!<sup>361</sup>

The plaintiff in *Galvin v. Illinois Republican Party* made a similar argument that the defendant's unauthorized political use of his photo-

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356. See *infra* Part V.

357. *Infra* Part V.

358. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994).

359. McKeown, *supra* note 229, at 7.

360. See Frye, *supra* note 147, at 49:45–50:00.

361. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759–60 (7th Cir. 2014).

graph “harm[ed] the reputation of [the photographer’s] subjects and thus the value of his photographs.”<sup>362</sup> The court in *Galvin* seemed willing to recognize that “such ‘negative complements’ can impair a plaintiff’s ‘long-range commercial opportunities’ even if a defendant’s unauthorized use does not reduce the value derived from the plaintiff’s original work.”<sup>363</sup> Sometimes, tarnishing uses of copyrighted works can also harm the indirect economic interests of the copyrighted work itself. For instance, once Pepe the Frog became an icon of white supremacy and hate, Furie had trouble selling his original Pepe the Frog merchandise.<sup>364</sup> Nevertheless, the Supreme Court was clear that these are not the harms that copyright is meant to prevent:

[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act . . . . [T]he role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.<sup>365</sup>

Finally, one of the major concerns with limiting copyright use to protect only economic interests is the loss of the only practical solution for individuals to protect their private information and intimate images from dissemination.<sup>366</sup> Because victims of nonconsensual pornography or forced disclosure of private information are often women or sexual minorities, this approach could take away one of the more effective weapons that these already vulnerable individuals have to

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362. *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1197 (N.D. Ill. 2015).

363. *Id.* at 1196.

364. FEELS GOOD MAN (Ready Fictions 2020).

365. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994) (internal quotation omitted); see also Gordon, *supra* note 252, at 1633 (“[W]hile criticism and the like may indeed reduce an owner’s receipts, the goal of copyright is to generate incentives for the production of works that satisfy consumer tastes. If a criticism reveals a work’s flaws, it is appropriate that demand for the work should decrease.”)

366. See, e.g., Associated Press, *U.K. Tabloid Must Run Front-Page Statement on Meghan Markle’s Legal Win, Judge Rules*, L.A. TIMES (Mar. 5, 2021, 8:02 AM), <https://www.latimes.com/entertainment-arts/story/2021-03-05/tabloid-run-front-page-statement-meghan-markle-legal-win> [<https://perma.cc/9ZGW-X4GD>] (explaining that British tabloid violated Markle’s privacy and infringed Markle’s copyright when it reproduced large portions of a private letter that Markle wrote to her father, which her father provided to the tabloids). But see Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y U.S.A. 209, 238 (2013) (“[C]oncern for the victims of these reprehensible [revenge porn] sites is understandable, but distorting copyright law is not the right solution.”).

fight back and protect themselves from continued subjugation and harms to their sexual autonomy.<sup>367</sup>

*B. Accept Copyright Weaponization to Protect Privacy*

There are strong arguments to allow copyright to not only protect economic interests in copyrighted works, but also to be weaponized in limited circumstances to protect privacy. Privacy is an important and legitimate personal interest. As outlined above, because of various limitations in privacy laws, copyright appears to be a superior solution for individuals to protect their private information due both to its efficiency and effectiveness. This approach, endorsing copyright's use to protect privacy interests, enjoys strong support.<sup>368</sup>

As a preliminary matter, Professor Shyamkrishna Balganesh challenges the commonly accepted understanding that traditional uses of copyright were limited to protecting only economic interests in copyrighted works.<sup>369</sup> He argues that privative copyright claims, or actions brought to prevent dissemination of private and personal works, “are almost as old as Anglo-American copyright law itself” and trace their acceptance to early English law from the 1700s.<sup>370</sup> These privative copyright claims are asserted to protect personal rather than economic interests in the copyright works, specifically, to protect copyright owners’ privacy and dignitary interests. Balganesh argues for consideration for using copyright to protect the dissemination of private information in cases where the copyright owner is the creator, the work has remained private, and the work is revelatory of the author’s identity.<sup>371</sup> This would allow, for instance, nonconsensual pornography victims to assert copyright to prevent the dissemination of the intimate images that they took of themselves,<sup>372</sup> or Meghan Markle to assert copyright against the tabloids that reproduced her private letter to her father.<sup>373</sup>

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367. See, e.g., Tehranian, *supra* note 234, at 362–64; Bambauer, *supra* note 293, at 2044 (“[Revenge porn] distribution risks worsening tenacious social mores that treat those who engage in sex differently based upon gender, and it may cause victims to internalize those norms.”); Gilden, *supra* note 7, at 82–84.

368. See, e.g., Balganesh, *supra* note 7, at 6–7; Goldman & Silbey, *supra* note 7, at 943–46; Bambauer, *supra* note 293, at 2048–49; Levendowski, *supra* note 10, at 439.

369. Balganesh, *supra* note 7, at 37.

370. *Id.* at 37, 40–41 (describing the earliest privative copyright case, *Thompson v. Stanhope*, where a court enjoined a widow’s publication of her late-husband’s letters where his heirs argued that the letters’ publication would harm the late-husband’s reputation and honor).

371. See *id.* at 61–62.

372. See Fink, *supra* note 184.

373. See Associated Press, *supra* note 366.

Similarly, Goldman and Silbey would permit copyright owners to weaponize copyright in the limited circumstance where the goals of copyright and privacy converge.<sup>374</sup> This would involve asserting copyright to protect “never-disseminated works during the author’s lifetime, where unapproved dissemination, or even the threat of such dissemination, can undermine the author’s intellectual freedom and thus authorial productivity.”<sup>375</sup> Goldman and Silbey consider and illustrate this limited circumstance in different forms of works where copyright could align with privacy goals, including never- and limited-disseminated works, heirs and nostalgic remembrances, and photos and videos.<sup>376</sup> In spite of the possibility of this limited circumstance existing, they warn that “[i]n most instances . . . using copyright to protect privacy produces untenable conflicts with fundamental rights, such as the right of free speech and the public interest in science and self-government that free speech promotes.”<sup>377</sup>

Because of the limitations on privacy torts and other legal solutions to protect privacy,<sup>378</sup> a few scholars specifically recognize the benefit of allowing victims of nonconsensual pornography to weaponize copyright to defend themselves against public dissemination of their intimate images. Professor Derek Bambauer, for instance, advocates for the use of copyright to address the problem of nonconsensual pornography.<sup>379</sup> He justifies his proposal to use copyright to combat nonconsensual pornography with copyright’s traditional utilitarian theory.<sup>380</sup> Specifically, Bambauer argues that protecting intimate images from dissemination would incentivize the creation of those images, because creators would be able to rely on copyright to assert control over how and when those images are used and shared.<sup>381</sup> Professor Amanda Levendowski also supports using copyright to combat revenge porn.<sup>382</sup> Similar to Bambauer, Levendowski recognizes non-consensual pornography as “a perfect example of the ways in which

374. Goldman & Silbey, *supra* note 7, at 989.

375. *Id.* at 989.

376. *Id.* at 970–88 (in each instance, while recognizing that sometimes it seems appropriate to provide copyright protection in limited circumstances, Goldman and Silbey find other closely related circumstances where distorting copyright could undermine copyright’s social balance).

377. *Id.* at 989.

378. See *supra* Section III.B.

379. Bambauer, *supra* note 293, at 2052.

380. *Id.* at 2031–32, 2039–42.

381. *Id.* at 2031–32, 2051–52 (“[T]he typical answer to non-consensual distribution is for people to avoid creating intimate media in the first place. Thus, in the absence of a copyright-based approach . . . we will likely forgo the real and significant benefits that accrue to partners who consensually employ these materials.”). See also Levendowski, *supra* note 10, at 442.

382. See generally Levendowski, *supra* note 10.

negative copyrights incentivize creation: those images would never have been shared if victims did not believe they could control who saw them.”<sup>383</sup> Levendowski justifies the use of copyright to fight non-consensual pornography based upon the gaps in legal solutions available to victims.<sup>384</sup> Professor Ann Bartow similarly recognizes the ability of victims of nonconsensual pornography to own copyright to their intimate imagery in an effort to “use the notice and takedown provision of the DMCA to try to reign in the online distribution of works of revenge pornography.”<sup>385</sup>

Privacy is an important and legitimate interest that is not appropriately protected by current privacy laws, especially in the online context. Therefore, it seems reasonable to allow copyright to fill the gap in privacy laws and permit copyright owners to weaponize copyright to protect this important personal interest. There are, however, concerns with this approach, as it could be both over- and under-inclusive. Consider the *Hill* case where two private individuals’ engagement photo, capturing one of their happiest moments, was disseminated by a hate group to denigrate and disparage their very union.<sup>386</sup> In that instance, because the couple had first shared their engagement photo online to celebrate their union, some of the approaches advocated in this section may not permit copyright to be weaponized to prevent this violation of privacy. Therefore, limiting this approach to works that have never been disseminated can be under-inclusive if the goal is to provide certain control over the dissemination of personal images and information.

On the other hand, this approach could also become over-inclusive. As discussed below, there is a thin line between weaponizing copyright to protect privacy and weaponizing copyright to hide information and erase history.<sup>387</sup> Take, for instance, the dispute between Slade Neighbors and his ex-partner Veronica Monger.<sup>388</sup> Neighbors clearly wanted to silence Monger and protect his reputation by asserting copyright to wipe evidence of his abusive history. At the same time, he was also motivated to protect his private text messages and e-mails to his intimate partner. If copyright is weaponized to broadly protect private information, Neighbors might be able to succeed in using copyright to silence Monger and suppress facts evincing his abusive behavior. Similarly, Harvey Weinstein’s orchestrated attempt to silence his victims and suppress the content and publication

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383. *Id.* at 442.

384. *Id.* at 428–37.

385. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 45 (2012).

386. *See supra* Section II.E.

387. *See infra* Part V.

388. *See supra* Section III.A.2; *infra* Part V.

of Ronan Farrow's report<sup>389</sup> could also be viewed as an attempt to weaponize copyright to protect Weinstein's privacy — even though the information he attempted to keep private was his history of pressuring women for sex. Other examples include *Monge v. Maya Magazines*, involving a celebrity's assertion of copyright to hide her secret marriage,<sup>390</sup> *Four Navy SEALs v. Associated Press*, involving military members asserting copyright to prevent criticism of their behavior,<sup>391</sup> and Jehovah's Witnesses' copyright suit against Faith Leaks to prevent dissemination of their yet-published religious videos.<sup>392</sup> Advocating for copyright to be weaponized to protect privacy interests might serve victims of nonconsensual pornography and victims of other forms of forced disclosure of private information and allow them to control the removal or dissemination of their personal content or images. However, it could also open the door for copyright owners to claim protection of privacy interests when their ultimate goal is to suppress unwelcomed speech and silence and erase information and facts. As discussed further in Part V below, this approach can be particularly vulnerable to issues of “blurry lines and overlapping objectives.”<sup>393</sup>

### *C. Support Copyright Weaponization to Protect Personal Interests*

While no proposed approach supports copyright owners who use copyright to silence victims or suppress speech, several scholars do accept the benefits of weaponizing copyright to protect personal interests, including privacy interests, and also interests implicating dignity, autonomy, moral rights, and other emotional and cultural interests.

For instance, Professor John Tehranian recognizes an exception for copyright owners who assert copyright to vindicate dignitary or privacy interests.<sup>394</sup> While Tehranian generally criticizes the use of copyright for censorial purposes, including to suppress the dissemination of fact, he distinguishes copyright asserted to protect dignitary interests from copyright asserted for censorial motives. The former involves copyright owners who use copyright to prevent their highly creative works “from unwanted derivation that undermine the integrity of the work.”<sup>395</sup> The latter involves copyright owners who attempt to limit the use of factual works.<sup>396</sup> Tehranian might, for example,

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389. See *supra* Section II.B.

390. See *supra* Section II.E.

391. See *infra* Part V.

392. See *supra* Section II.C.

393. See *infra* Part V.

394. See Tehranian, *supra* note 2, at 280–82.

395. *Id.* 280–82.

396. *Id.* 282.

excuse musicians who assert copyright against unauthorized political uses of their works by politicians such as Trump because the musicians “may not wish for their creative output to become associated with causes that might undermine the perceived meaning of their works.”<sup>397</sup> Even though these musicians might also be motivated to censor Trump, their “desire to suppress the . . . particular expression may have served as an animating factor in the decision to file suit. But it was not the primary motivator.”<sup>398</sup> To Tehranian, this is distinguishable from copyright owners that assert copyright to censor “expression of basic facts or commentary on matters of public concern.”<sup>399</sup>

Professor Andrew Gilden acknowledges that “IP is doing work that it was not intended to do. And this is ok.”<sup>400</sup> He recognizes copyright’s ability to empower individuals to assert autonomy and control over their life stories through “some degree of control over images, sounds, and texts.”<sup>401</sup> In that sense, copyright “becomes inseparable from autonomy, self-definition, and identity development,”<sup>402</sup> and provides traditionally “marginalized groups . . . [a] discursive space for their own meaningful cultural participation.”<sup>403</sup> Gilden acknowledges that copyright law “may have been designed with a narrow set of market-oriented concerns in mind,” but argues that it “can evolve into a more capacious tool for managing boundaries in a social media environment and addressing a broader set of concerns.”<sup>404</sup> In fact, Gilden proposes certain reforms to allow the law to “embrace[] a more pluralistic notion of IP values,” including anonymizing copyright registrations with the U.S. Copyright Office to prevent private information or intimate images from becoming part of the public record.<sup>405</sup>

Some scholars argue for even broader uses of copyright to prevent and remedy personal harms that unauthorized uses of copyrighted works may cause, such as harms to reputation, dignity, and moral rights.<sup>406</sup> Professor Madhavi Sunder, for instance, recognizes copyright “as more than a mere tool for incentivizing creativity,” but also as a framework that “regulate[s] the cultural meanings and social rela-

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397. *See id.* at 281.

398. *Id.*

399. *Id.* at 282.

400. Gilden, *supra* note 7, at 68.

401. *Id.* 106.

402. *Id.*

403. *Id.* at 107.

404. *Id.* at 110.

405. *Id.* at 112.

406. *See, e.g.,* Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 14 (2001); Roberta Rosenthal Kwall, “Author-Stories”: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine, 75 S. CAL. L. REV. 1, 24 (2001).

tions that flow from” cultural creations and artifacts, and as a “struggle over social relations.”<sup>407</sup> Professor Margaret Chon maintains that using copyright to protect certain privacy and other personal interests “should not be categorically excluded as beyond the legitimate purview of copyright’s concerns,” affirming that “copyright will not be stretched beyond its breaking point by incorporating” these personal interests.<sup>408</sup> While she focuses her arguments on asserting copyright to protect privacy, especially its use against nonconsensual pornography,<sup>409</sup> Chon more broadly describes how copyright and intellectual property “operate[] within a larger frame of human flourishing.”<sup>410</sup> She advocates for copyright to serve functions beyond just “promoting commercial activity,” but to also serve “in generating many other social benefits and costs.”<sup>411</sup> Professor Edward Lee makes a similar argument for copyright to protect an author’s reputation or privacy interests in situations where the author of the work asserts the copyright.<sup>412</sup> Lee recognizes the interests of authors — not merely copyright owners — in copyrighted works:

Authors have legitimate privacy interests in their works before first publication, which intersects with their right not to speak under the First Amendment. Authors also have valid reputational interests with respect to their works that, in some cases, copyright law may appropriately protect. Protecting these personal interests need not conflict with the utilitarian goals of copyright law to incentivize authors to create works. Indeed, a reasonable regard for such interests in copyright law may help to fuel authors to create more works as copyright law empowers them to develop their name and reputation as authors, protected from unauthorized uses of their works constituting infringement.<sup>413</sup>

Copyright seems to lose some of its meaning if copyright owners are not able to control or prevent even the most debasing uses of their works. It would appear that copyright owners should have the right to

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407. Sunder, *supra* note 5, at 274.

408. Margaret Chon, *Copyright’s Other Functions*, 15 CHL-KENT J. INTELL. PROP. 364, 366 (2016).

409. *Id.* at 366–67, 377–78.

410. *Id.* at 377.

411. *Id.* at 378.

412. Edward Lee, *Suspect Assertions of Copyright*, 15 CHL-KENT J. INTELL. PROP. 379, 381–82 (2016).

413. *Id.* at 385.

assert copyright to protect privacy, reputational, and dignitary interests by protecting their works from disparaging or demeaning uses. There are, however, concerns with this approach. Copyright was not created to protect these noneconomic interests and, as examined already in this Article,<sup>414</sup> weaponizing copyright to protect these personal interests can distort copyright and its remedies, and impose greater costs on society.<sup>415</sup>

Additionally, there may be no clear option to allow copyright to protect interests such as privacy or dignitary interests without also inadvertently permitting copyright to be weaponized to silence, suppress, and punish. This could permit copyright to threaten free speech, rule of law, and the ability to combat disinformation, which can ultimately undermine the discovery of truth.

Furthermore, a strong justification for weaponizing copyright to protect privacy, dignitary, and other personal interests is the limitations or gaps in other areas of the law.<sup>416</sup> But should copyright law be doing the job of filling the gaps in these other areas of the law? Copyright was not created to protect personal interests and is an imperfect fit to remedy these personal harms. Could relying on copyright in fact undermine privacy claims in certain contexts, including nonconsensual pornography, by diminishing the conceptualization of the harm in these instances and making them reliant on ownership and proof? Furthermore, if we are content with copyright being used for purposes of protecting privacy, reputational, or dignitary interests, could the law become complacent in holding back important and necessary reforms of laws, such as in the areas of privacy and others?

Regardless of whether copyright *should* be weaponized to protect these personal noncopyright objectives, we know that it *is* being weaponized to achieve the objectives discussed above. The practice is widespread and likely more expansive than this Article can capture, considering the many disputes that get quietly settled or content that gets quickly taken down by content platforms. Some scholars are justifiably worried about the increasing ease with which copyright owners are able to weaponize copyright to achieve personal objectives,<sup>417</sup> and others are understandably less concerned when those uses are to protect equally important personal interests.<sup>418</sup>

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414. See *supra* Part II.

415. See Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2348 (2014); Fromer, *supra* note 7, at 587; Buccafusco & Fagundes, *supra* note 1, at 2436.

416. See *supra* Section III.B.

417. See *supra* Section IV.A.

418. See *supra* Section IV.C.

However, any attempts to propose or decide a solution to reform copyright weaponization is complicated by the blurry lines and overlapping objectives copyright owners might seek to achieve through weaponizing copyright. In some instances, it may be apparent when copyright is weaponized to achieve a noncopyright objective, but other cases can be less clear. As discussed in Part V below, the difficulties in accurately determining a copyright owner's motivations for weaponizing copyright complicates attempts to propose reforms to solve copyright weaponization or to fully embrace any of the three general approaches examined above.

## V. BLURRY LINES AND OVERLAPPING OBJECTIVES

Without the ability to draw clean lines between objectives or to firmly categorize objectives that are morally defensible from others that we might find morally wrong,<sup>419</sup> it is difficult to propose legal frameworks that effectively distinguish between cases where weaponizing copyright should be condemned and cases where weaponizing copyright might be excused or even justified.

As a preliminary matter, there may be instances when the utilitarian goals of privacy or dignity converge and overlap with copyright,<sup>420</sup> such as in situations where the assertion of copyright to protect privacy or moral rights incentivizes the copyright owner's future creation due to their ability to control the use or dissemination of their works.<sup>421</sup> Some scholars have argued that the inability to control the dissemination and sharing of intimate images could disincentivize the creation of those images.<sup>422</sup> For instance, if Hilary knew that she would have no control over the dissemination of her intimate photographs and videos, she likely would not have created those photographs in the first place.<sup>423</sup> Similarly, the ability to protect moral rights in works could also incentivize further creativity.<sup>424</sup> Artists such

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419. See Rosenblatt, *supra* note 260, at 600 ("Law identifies some behaviors as admirable and others as shameful, and assigns legal value to some activities and not others.").

420. See *supra* Section IV.B.; Goldman & Sibley, *supra* note 7, at 989.

421. See Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1763 (2012) ("[S]olicitude for, and sometimes protection of, creators' moral-rights interests can strengthen utilitarian incentives in copyright . . . law . . ."); Levendowski, *supra* note 10, at 442; Bambauer, *supra* note 293, at 2031–32, 2039–42. See generally ROBERTA ROSENTHAL Kwall, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010) (discussing the relationship between copyright law and author creativity and moral rights).

422. See Lee, *supra* note 412, at 385; Levendowski, *supra* note 10, at 442; Bambauer, *supra* note 293, at 2031–32, 2039–42. But see generally Tushnet, *supra* note 415.

423. See *supra* Section II.E.

424. See, e.g., Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 70 (1985).

as Furie or musicians may be more inclined to continue creating expressive works if they know they can rely on copyright to prevent their works from being used to promote policies or ideologies that they disagree with or morally oppose.<sup>425</sup>

Furthermore, it can be difficult to determine a copyright owner's objectives in asserting their copyright. Even though in some instances it may be apparent when copyright is weaponized to achieve a noncopyright objective, other cases can be less clear. Consider, for instance, the dispute involving photographer William Greenblatt and the iconic photograph he took of the gun-toting couple, Mark and Patricia McCloskey.<sup>426</sup> The McCloskeys made headlines in June 2020 when they were photographed brandishing a rifle and pistol while yelling at Black Lives Matter protesters marching through their neighborhood in St. Louis.<sup>427</sup> United Press International photographer William Greenblatt shot a photograph of the McCloskeys holding their guns.<sup>428</sup> That photograph went viral and was shared widely by news outlets and on social media.<sup>429</sup> Greenblatt's photograph of the McCloskeys catapulted the couple into infamy.<sup>430</sup> The McCloskeys were invited to appear on Fox's Tucker Carlson Tonight and Sean Hannity to defend their actions.<sup>431</sup> They also delivered remarks at the 2020 Republican National Convention in support of Donald Trump and gun rights, and against the Black Lives Matter movement.<sup>432</sup> A few months later, the McCloskeys began handing out greeting cards featuring a reproduction of Greenblatt's photograph overlaid with the caption: "Patty & Mark McCloskey v. The Mob June 28, 2020."<sup>433</sup> In response, Greenblatt sent the McCloskeys a cease and desist letter demanding \$1,500 for their reproduction of his copyrighted photo.<sup>434</sup>

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425. See *supra* Section II.D.

426. Michael Zhang, *Gun-Toting Couple Billed by Photog for Using Viral Photo on Greeting Cards*, PETAPIXEL (Nov. 7, 2020), <https://petapixel.com/2020/11/07/gun-toting-couple-billed-by-photog-for-using-viral-photo-on-greeting-cards/> [<https://perma.cc/T7GU-L5XS>].

427. Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went on in St. Louis That Day?*, BBC (Aug. 25, 2020), <https://www.bbc.com/news/election-us-2020-53891184> [<https://perma.cc/U5GK-HDE8>].

428. Zhang, *supra* note 426.

429. *Id.*

430. *Id.*

431. Lussenhop, *supra* note 427.

432. Joan Greve, *St Louis Couple Who Threatened Black Lives Matter Protesters Speak at RNC*, GUARDIAN (Aug. 25, 2020), <https://www.theguardian.com/us-news/2020/aug/24/st-louis-couple-mc-mark-patricia-mccloskey> [<https://perma.cc/43QC-TDGN>]; PBS NewsHour, *WATCH: Mark and Patricia McCloskey Defend Right to Firearms | 2020 RNC Night 1*, YOUTUBE (Aug. 24, 2021), <https://www.youtube.com/watch?v=QIL4df8VNW> [<https://perma.cc/Z96M-ER2K>].

433. Zhang, *supra* note 426.

434. *Id.* The McCloskeys sued Greenblatt and his publishers for trespass, invasion of privacy, and intentional infliction of emotional distress. Complaint at 6–11, *McCloskey v.*

In this instance, what was Greenblatt's objective in asserting copyright against the McCloskeys? In an interview, Greenblatt explained that "[p]eople steal work all the time. They take it and feel that it's theirs. . . . It's not even about the money. I could care less about the money."<sup>435</sup> Does that mean that his assertion of copyright was to vindicate certain personal interests? To protect his reputation and prevent his copyrighted photograph from being tarnished by the McCloskeys' use? Perhaps Greenblatt wanted to punish the McCloskeys for their unauthorized use or for smugly handing out greeting cards with Greenblatt's photo. Or perhaps Greenblatt wanted to suppress the McCloskeys' criticism and comparison of Black Lives Matter protesters to "the mob." At the same time, Greenblatt also acknowledged that his photograph of the McCloskeys that day was the most successful and viral photograph that he had taken in his fifty years as a photographer.<sup>436</sup> His cease and desist letter to the McCloskeys was also accompanied by a demand for \$1,500.<sup>437</sup> Even though Greenblatt said that it was not about the money, perhaps Greenblatt was in fact motivated, at least in part, by missing out on the financial interests that he could generate from his copyrighted photo. It is also possible that Greenblatt was trying to achieve multiple objectives. This makes it difficult to categorize Greenblatt's objective(s) or even clearly identify his use of copyright as weaponizing copyright. The difficulty in assessing a copyright owner's objective, and the potential to incentivize creation of works by protecting noncopyright interests, complicate calls to reject all noncopyright uses of copyright and to accept approaches that rely on being able to distinguish between economic and non-economic objectives.<sup>438</sup>

Even in instances where it appears obvious that a copyright owner is weaponizing copyright to achieve a noncopyright objective, the owner may be motivated by more than one objective, or their primary objective may overlap with other, secondary motivations. Some of the objectives that individuals seek to achieve through weaponizing copyright, such as preserving sexual privacy, may appear more morally defensible than others, such as silencing sexual assault victims. However, the lines between objectives can be blurry, and many of these objectives themselves overlap. Someone who asserts copyright out of spite to punish, such as Campo Santo's copyright strike against

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RedBubble, Inc., No. 2022-CC10261 (St. Louis Cir. Nov. 6, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/11/stl-mccloskey.pdf> [<https://perma.cc/RPL2-U72P>].

<sup>435</sup> Zhang, *supra* note 426.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> See *supra* Section IV.A.

PewDiePie, may also want to protect their own reputation by preventing the association of their works with a racist.<sup>439</sup> A photographer like Hill might sue Public Advocate to protect the privacy of her clients from appearing in the hate group's anti-gay campaign flier,<sup>440</sup> but she may also want to prevent the association of her work with a listed hate group, or to protect her reputation as a photographer. Artists like Kapoor may assert copyright against organizations such as the NRA because they do not want their work associated with divisive propaganda, but perhaps they also want to suppress commentary with which they disagree, or to punish organizations like the NRA because of their controversial politics.<sup>441</sup>

Take, for instance, the case involving Navy SEALs' attempt to remove photographs of themselves mistreating Iraqi prisoners. In *Four Navy SEALs v. Associated Press*, the wife of a Navy SEAL uploaded to SmugMug a number of photographs that her husband had taken at Camp Jenny Pozzi, a Navy SEAL facility in Iraq.<sup>442</sup> A reporter for the Associated Press ("AP"), Seth Hettena, found those photos online while writing a news article about U.S. soldiers abusing Iraqi prisoners.<sup>443</sup> Hettena published his article along with the photos in worldwide media outlets.<sup>444</sup> The photos featured uniformed U.S. military personnel "mugging or grinning for the camera" next to detained and hooded prisoners; showed them "sitting on, lying atop, or stepping on detainees, some of whom are hooded"; and showed a soldier "pointing a firearm at a prisoner's bloody head at point-blank range."<sup>445</sup> Five Navy SEALs who appeared in and purportedly took those photographs filed a copyright infringement claim against the AP seeking to enjoin the AP from further dissemination of the photographs.<sup>446</sup> It appears that the case ultimately settled with a stipulated dismissal.<sup>447</sup> The Navy SEALs' assertion of copyright clearly was not to protect their own exclusive right to disseminate the photos or their lost financial interest in the photographs, but what was their objective? Was it to silence and erase evidence of their bad behavior? Was it to suppress negative commentary about the behaviors depicted in

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439. Robertson, *supra* note 18 (quoting tweet by Sean Vanaman (@vanaman): "[o]ur game on his channel = endorsement").

440. *See supra* Section II.E.

441. *See supra* Section II.D.

442. *Four Navy SEALs v. Associated Press*, 413 F. Supp. 2d 1136, 1141 (S.D. Cal. 2005).

443. *Id.* at 1141.

444. *Id.* at 1141–42; *see also* Tehranian, *supra* note 2, at 271–72.

445. *Four Navy SEALs*, 413 F. Supp. 2d at 1141.

446. *Id.* at 1142.

447. *See* Stipulation for Dismissal at 2, *Five Navy SEALs v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005) (No. 05-cv-00555).

the photograph? Perhaps it was to protect the privacy of the soldiers featured in the photographs?

Overlapping motivations certainly make it difficult to accurately categorize the objectives that copyright owners seek to achieve through weaponizing copyright. It makes it difficult for policymakers to accept any one of the approaches discussed above in Part IV, and makes it nearly impossible to suggest one solution, such as stronger copyright defenses or creation of a federal anti-SLAPP law, that might discourage weaponization without unintentionally foreclosing the only viable option to individuals to protect their privacy or other noneconomic, but equally legitimate, personal interests. Consider another example. In *Neighbors v. Monger*, successful attorney Slade Neighbors and his ex-partner Veronica Monger ended their allegedly abusive relationship.<sup>448</sup> After the relationship ended, Monger created a Me-Too blog “dedicated to women who have survived or are in abusive relationships, with powerful executive men.”<sup>449</sup> On the blog, Monger posted general information on sexual assault and victims of domestic violence, including articles on how to develop a “safety plan”; articles on Harvey Weinstein and celebrities talking about domestic abuse; and other resources and support for victims of domestic violence.<sup>450</sup> In addition to those resources, Monger posted her personal stories detailing Neighbors’s emotional and physical abuse of her during their relationship.<sup>451</sup> Included in her descriptions were photos of herself with a bruised face, and screen captures of text messages and reproductions of e-mails between her and Neighbors supporting his “alleged physical and mental abuse.”<sup>452</sup> In response, Neighbors filed copyright applications with the U.S. Copyright Office to register his text messages and e-mails that he sent to the ex<sup>453</sup> — the same text messages and e-mails that she had reproduced on her blog. Neighbors then sued her for copyright infringement, seeking an injunction to remove her blog and damages for her unauthorized reproduction, dis-

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448. Complaint at 3, *Slade Neighbors v. Veronica Monger*, No. 20-cv-04146 (C.D. Cal. May 6, 2020); Milord A. Keshishian, *Using Copyright Law to Silence Alleged Abuse Victim? Fair Use Defense?*, L.A. INTELL. PROP. TRADEMARK ATT’Y BLOG (May 7, 2020), <https://www.iptrademarkattorney.com/copyright-fair-use-defense-silence-criticism-news-reporting-victim-critic-infringement/> [https://perma.cc/VH8D-NDEP].

449. While Monger’s blog is no longer active, there are archived versions available on Internet Archive. See, e.g., SLADE NEIGHBORS ATTORNEY #ME-TOO — JOURNEY GETTING THRU DOMESTIC ABUSE, <https://web.archive.org/web/20200528212119/http://sladeneighborsattorneyme-too.com/> [https://perma.cc/D6US-9MYR].

450. *Id.*; Keshishian, *supra* note 448.

451. Keshishian, *supra* note 448.

452. *Id.*; SLADE NEIGHBORS ATTORNEY #ME-TOO, *supra* note 449.

453. Email 1 and 7 Other Unpublished Works, U.S. Copyright Registration No. TXu002193010 (filed May 1, 2020); Text Message 1 and 8 Other Unpublished Works, U.S. Copyright Registration No. TXu002192994 (filed May 1, 2020).

tribution, and public display of his text messages and emails.<sup>454</sup> While the lawsuit was pending, the Me-Too blog and all materials on the blog were removed.<sup>455</sup> The case settled and was dismissed on September 30, 2021.<sup>456</sup>

Neighbors clearly asserted copyright to silence his ex-partner. At the same time, when Neighbors created and sent his text messages and e-mails to Monger, he likely expected that those messages and e-mails would remain private. Perhaps Neighbors weaponized copyright not just to silence or erase evidence of his abusive behavior, but also to preserve his privacy. Consider, then, Harvey Weinstein's assertion of copyright against Ronan Farrow.<sup>457</sup> Assuming Weinstein could have articulated some form of copyright ownership over materials about his sexual misconducts, Weinstein could also argue that he too was trying to protect his private and intimate information from dissemination. Compare those two instances with women who assert copyright to protect their intimate photographs from dissemination.<sup>458</sup> Is there any way to draw a clear and clean line between Neighbors's and Weinstein's use of copyright from women who use copyright to shield themselves from nonconsensual pornography? In these cases, there obviously exists a difference in power dynamics between the parties. One side involves two powerful men asserting copyright to silence their victims and erase evidence of their abusive behaviors. The other side involves vulnerable victims of revenge porn asserting copyright as the only solution to remove intimate images from public dissemination and protect their privacy. However, is there any way to manage copyright to allow it to be weaponized to discourage the powerful from using it to cover-up and bully others, but not prevent it from filling key gaps in protecting privacy of the already vulnerable? If copyright owners should be permitted to assert copyright to protect privacy, as discussed in one of the approaches above, could a court's copyright ruling in a case involving a sympathetic revenge porn victim be weaponized by bad actors like Neighbors or Weinstein, allow-

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454. Complaint at 5–6, *Slade Neighbors v. Veronica Monger*, No. 20-cv-04146 (C.D. Cal. May 6, 2020).

455. See Inactive Domain, <http://sladeneighborsattorneyme-too.com/> [<https://perma.cc/CB9U-G66N?type=image>]; Unreachable Webpage, <http://www.sladeneighborsattorneyme-toodomesticviolence.com/> (last visited Dec. 14, 2020). Monger's blog is no longer accessible at either web address, but previous posts can be accessed through the Internet Archive's Wayback Machine. SLADE NEIGHBORS ATTORNEY #ME-TOO, *supra* note 449.

456. Text Entry Order, *Slade Neighbors v. Veronica Monger*, No. 20-cv-04146, Docket No. 29 (Feb. 4, 2021); Order on Joint Stipulation for Dismissal with Prejudice, *id.*, Docket No. 41 (Sept. 30, 2021).

457. See *supra* Section II.B.

458. See *supra* Section II.E.

ing them to assert copyright to wipe evidence of their abusive behaviors?

Similarly, weaponizing copyright to protect reputation, dignity, or moral rights in a work can also lead to the suppression of valuable social commentary. Take, for instance, the dispute between Margaret Mitchell's estate and author Alice Randall over her parody book *The Wind Done Gone*.<sup>459</sup> Mitchell's estate had the practice of requiring any licensee of *Gone With The Wind* to "sign a pledge that says [they] will under no circumstances write anything about miscegenation or homosexuality."<sup>460</sup> Randall's parody book identified main character Ashley Wilkes as gay and described Rhett Butler in a love affair with Cynara, a slave.<sup>461</sup> While Mitchell's estate may find Randall's treatment of the book disparaging, demeaning, and a violation of moral rights, allowing Mitchell's estate to weaponize copyright to protect its personal interests would stifle legitimate commentary, criticism, and fair use of the copyrighted work. Similarly, in *Wojnarowicz v. American Family Association*, artist David Wojnarowicz sued American Family Association for copyright infringement for publishing a pamphlet featuring his art.<sup>462</sup> The pamphlet's purpose was to solicit support to terminate public funding by the National Endowment for the Arts of artworks such as Wojnarowicz's featured in the pamphlet.<sup>463</sup> Wojnarowicz was understandably upset at the unauthorized use of his art to advocate against a cause in which he believed. However, allowing Wojnarowicz to weaponize copyright to stop this use because it disparaged his work, harmed his authorial dignity, or associated his work with a cause that he morally opposed would also allow him to suppress legitimate criticism and dissemination of information of public interest.

The blurry lines and overlapping motivations behind copyright assertions, and the difficulty in ascertaining copyright owners' motivations, complicate the analysis and frustrate arguments supporting any of the approaches discussed in Part IV above. Furthermore, based on the reasons that copyright owners choose to weaponize copyright instead of relying on other legal solutions, discussed in Part III above, it is clear that any attempt to reform or fix these concerns must be comprehensive. Reforms targeted only at punishing copyright owners who weaponize copyright through anti-SLAPP laws, stronger copyright misuse defenses, or stricter applications of Section 512(f) or

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459. See *supra* Section II.D.; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

460. *Suntrust Bank*, 268 F.3d at 1282 (Marcus, J., concurring).

461. *Id.* at 1270–71.

462. *Wojnarowicz v. Am. Fam. Ass'n*, 745 F. Supp. 130, 133–34 (S.D.N.Y. 1990).

463. *Id.*

DMCA notice and takedown processes could foreclose the already-limited options given to victims of privacy violations to shield and protect their privacy and sexual autonomy. Privacy, reputation, and other dignitary interests are legitimate interests that deserve consideration through some thoughtful and balanced legal framework. Reforms that punish copyright weaponization, therefore, need to be concurrent with reforms that strengthen laws or fill gaps that individuals are currently weaponizing copyright to fill. At the same time, any reform must also consider the blurry lines and overlapping objectives that copyright owners often seek in weaponizing copyright. They should take into account existing power imbalances of parties involved in weaponizing copyright, and should help rather than hinder attempts to level the playing field between traditionally vulnerable victims and the powerful. Reforms to solve copyright weaponization that rely on drawing lines based upon moral intuitions alone, or attempts to limit or protect some but not all of the objectives described above, will undoubtedly face concerns about not capturing enough harmful and abusive behaviors or foreclosing copyright owners' abilities to protect legitimate personal interests.

## VI. CONCLUSION

"[Copyright] has infiltrated our lives so that we all exist in a field of uses and infringements."<sup>464</sup> While this may benefit society in certain respects, it also creates opportunities for individuals to weaponize copyright to silence, erase, suppress, censor, punish, protect, and achieve other noncopyright objectives. Some of these objectives may appear justified, such as asserting copyright to protect privacy or reputation. Other objectives may appear more harmful, such as asserting copyright to punish and retaliate, silence information and facts, and suppress legitimate criticism and speech. As examined in this Article, however, copyright owners are frequently motivated to achieve multiple objectives through weaponizing copyright, and many of the objectives themselves overlap. This makes it difficult to suggest or create reforms to discourage copyright owners from weaponizing copyright to achieve certain objectives, without inadvertently foreclosing options for copyright owners to protect legitimate personal interests. Due to the ease of wielding copyright as a weapon, and the limitations and gaps in other legal solutions such as privacy and moral rights, copyright is often the most effective and efficient solution for copy-

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464. Rebecca Tushnet, *WIPIP, Session 2.B. — Copyrights*, REBECCA TUSHNET'S 43(B)LOG (Feb. 12, 2021 6:32 PM), <https://tushnet.blogspot.com/2021/02/wipip-session-2b-copyrights.html> [<https://perma.cc/3L3A-8L3N>] (quoting Mark Lemley).

right owners to protect privacy, reputation, authorial dignity, and emotional and cultural interests. At the same time, and for similar reasons, copyright is also the weapon *par excellence* for the modern silencer, punisher, and eraser. Perhaps this Article tells a larger story of the problem when too many things are copyrightable and too many uses are infringing. But for now, the focus can be a narrower challenge to consider comprehensive approaches to discourage harmful copyright weaponization without fully foreclosing options for the most vulnerable in our society to fight back and protect their legitimate personal interests.