THE NEW COPYRIGHT OPPORTUNIST

by JEANNE C. FROMER*

Thank you so much to the Copyright Society for having me here to deliver the 49th Annual Donald C. Brace Memorial Lecture. I am humbled to be in the august company of those who have previously delivered this lecture. What makes this all the more meaningful is to be here at Fordham Law School, where I began my academic career, at an event sponsored by the IP Institute run by my former, but always supportive, colleague Hugh Hansen. Thanks also to my NYU Law colleagues, many of whom are here tonight, and my other colleagues, for inspiring so much in this Lecture.

INTRODUCTION

This evening, I will speak about the new copyright opportunist. After defining copyright opportunism, I will review three recent litigation case studies that meet this definition of opportunism. I will then explore how courts might handle opportunistic lawsuits, particularly when the plaintiff is seeking to establish a new licensing market enabled by technological advances. I propose that opportunistic lawsuits can be resolved only at the intersection of copyright doctrine and policy, as informed by relevant economic and technological realities.

I. COPYRIGHT OPPORTUNISM DEFINED

Before I define what I mean by a "copyright opportunist," I will first discuss the "copyright troll," as a way to contrast the two concepts. In recent years, the term "troll" has been invoked frequently in the context of intellectual property. The term first emerged in patent law, where it was used pejoratively to indicate entities "focused on the enforcement, rather than the active development or commercialization[,] of their pat-

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ents."[1] The fear with trolls is that they get patent law's rewards without contributing enough to scientific or technological progress.[2]

The "troll" label has been deployed in copyright as well. For example, Shyam Balganesh uses the term to refer to an entity "whose entire business revolves around the acquisition and enforcement of copyright in works created by others."[3] Specifically, Balganesh is worried about a business like Righthaven, which acquired a limited right to seek redress for infringement online of copyrighted content like newspaper stories.[4] By contrast, Matt Sag thinks a "copyright troll" is "play[ing] a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim."[5] Sag is principally thinking about a plaintiff like Malibu Media, LLC, which produces pornographic videos and filed many infringement suits against different "John Does," presumably to provoke a fast and anonymous settlement.[6]

What these two definitions share is that a copyright troll's major purpose is to sue others, with little regard for the creation and distribution of copyrighted works, a foundational purpose of copyright law enshrined in the U.S. Constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[7]

Now consider what I am calling a "copyright opportunist." A copyright opportunist is a creator, owner, or distributor of a plausibly copyrighted work that currently has low licensing value, but the rightsholder is seeking to use copyright law to increase that value, typically through litigation. The opportunist is related to the troll in that the opportunist sees the courthouse as a principal mechanism to earn money. Yet the opportunist can be entirely distinct in that the opportunist might want to act in furtherance of copyright law's goal of promoting artistic or cultural progress by

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1 Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 328 (2010).

2 Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 572 (2014).

3 Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 738 (2013).

4 *Id.* at 738-46.

5 Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015).

6 Shyamkrishna Balganesh & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 IOWA L. REV. ONLINE 43, 51-55 (2016) (discussing how Malibu Media is the principal plaintiff in the empirical data Sag reports of copyright trolling).

7 U.S. CONST. art. I, § 8, cl. 8.

creating and distributing the opportunist's works. To the opportunist, the courthouse can be a means to secure a favorable judicial ruling and thereby create a robust creative and licensing market for the opportunist's works. This is not understood to be the troll's aim, even though a troll is a form of copyright opportunist. Not surprisingly, the term "opportunist" comes up in discussions of trolls.[8] But because the opportunist might be using litigation to promote copyright's goals, not all opportunists are trolls.

Copyright opportunists have existed as long as there has been copyright law. Some of the most notable copyright cases involve opportunists. For instance, Ira Arnstein, the perennially unsuccessful songwriter and litigant against Cole Porter and others, was an opportunist for seeking to use litigation to create a more favorable market for his songs.[9]

I suspect opportunism is taking on larger significance in copyright litigation given ever-greater rates of technological advancement. In this Lecture, I would like to explore how copyright law should address opportunism writ large. Is the copyright opportunist asserting rights in copyrighted works in litigation in ways disproportionate to their intrinsic licensing value? Or is the opportunist merely using copyright litigation to create the licensing market the rightsholder ought to have?

To derive a framework to answer these questions, I will explore three recent sets of cases, one involving basketball players' tattoos depicted in a realistic videogame, another involving lawsuits against celebrities by paparazzi photographers for posting their photos of them on social media, and a third involving claims of infringement in popular songs by copyright owners of much more obscure songs. All three of these case studies involve a plaintiff with a copyright claim that is in uncharted territory, because advances in technology have enabled new uses, reach, or markets for potentially copyrightable works. That is, there was no sizeable market for the ostensible copyright holder, but now due to technological advances, there might be if the copyright claim is successful. These cases do not involve slam-dunk claims against an infringer, but their claims are also not ridiculous. Unlike the spate of troll cases, which tended to be brought against unsophisticated and numerous defendants, the defendants in these cases are limited in number, as sophisticated as they come, and have deep pockets. By exploring these cases, I propose that the framework for analyzing copyright opportunism can be found at the intersection of copyright doctrine and policy, as informed by relevant economic and technological realities.

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[8] *See, e.g.*, Sag, *supra* note 5, at 1110.

[9] *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); *see generally* GARY A. ROSEN, UNFAIR TO GENIUS: THE STRANGE AND LITIGIOUS CAREER OF IRA B. ARNSTEIN (2012).

II. TATTOOS IN VIDEOGAMES

Let us first consider whether rendered versions of basketball players' tattoos appearing in a videogame infringes any copyright in the tattoos. In the recent case of *Solid Oak Sketches, LLC v. 2K Games, Inc.*, the licensee of five tattoo designs inked on three different NBA players — Eric Bledsoe, LeBron James, and Kenyon Martin — sued the developer and publisher of the NBA 2K series of basketball simulation videogames for depicting animated versions of these players that included the licensed tattoos. Recently, the district court granted the defendants' motion for summary judgment on the grounds of de minimis use, fair use, and authorized use.[10] This case isn't the only recent one on this issue: In the Northern District of Ohio, where the Cleveland Cavaliers are based, a tattoo artist who inked once or current Cavaliers LeBron James, Danny Green, and Tristan Thompson, has a similar, ongoing suit for infringement against the same defendants.[11]

When it comes to the extent of copyright protection for tattoos that have been reproduced in videogames that realistically depict people with those tattoos, copyright is in uncharted legal territory. Although there have been a number of lawsuits claiming copyright infringement of tattoos, like one by Mike Tyson's tattoo artist against the producers of "The Hangover: Part II" for reproducing Tyson's facial tattoo on Ed Helms's character,[12] they have all settled or been dismissed.[13] There have thus been no substantive rulings on copyright protection for tattoos. The legal questions abound, some more serious than others: Are tattoos original? Are they fixed in a tangible medium of expression, on skin? Does the artist or the person tattooed own rights in the tattoo?[14] And then there

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10 Solid Oak Sketches, LLC v. 2K Games, Inc., 2020 WL 1467394 (S.D.N.Y. Mar. 26, 2020).

11 *See* Hayden v. 2K Games, Inc., 375 F. Supp. 3d 823 (N.D. Ohio 2019) (allowing the copyright claims to proceed in full past the defendants' motion to dismiss).

12 Complaint, Whitmill v. Warner Bros. Entm't Inc., No. 4:11-CV-752 (E.D. Mo. Apr. 25, 2011).

13 *See, e.g.*, Matthew Beloni, *"Hangover" Tattoo Lawsuit Settled*, REUTERS (June 20, 2011), https://www.reuters.com/article/us-hangover/hangover-tattoo-lawsuit-settled-idUSTRE75K0DF20110621.

14 For a sampling of scholarship that has explored these legal questions, see Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97 (2003); Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313 (2006); Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129 (2013); Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. INTELL. PROP. L. 29 (2014); Mathew W. Parker, *That Old Familiar Sting: Tattoos, Publicity, and Copyright*, 151 J. MARSHALL REV. INTELL. PROP. L. 761 (2016); Chandel Boozer, Comment: *When the Ink Dries, Whose Tatt*

are the substantial questions of infringement liability: Does a tattoo artist grant an implied license for the inked party to display the artist's tattoo publicly? Does an implied license extend to third parties' use? Does any such license cover reproductions of the tattoo for realistic renditions of the inked party? Are there "free speech" concerns in denying realistic depictions of people, including their tattoos, in creative works? Are such uses fair?[15]

Steeped in this dizzying series of until-recently unanswered doctrinal questions, a court might try to sort through them clinically, one by one. Indeed, these questions should be answered. Yet the questions can best be answered by situating these lawsuits within the opportunism that drove them. The tattoo artist and licensee plaintiffs here are quintessential opportunists. They hold plausibly legitimate copyrights in these tattoos, which currently have relatively low licensing value. Historically, there has been a limited market for tattoo artists' works. The market has principally been to design custom tattoos for clients, to ink clients, and to create flash (mass-market) designs to market to tattoo shops.[16] This is not to say that this market does not offer lucrative rewards: More than 20% of Americans have at least one tattoo.[17] But even so, the market did not typically expand beyond sources of tattoos to be inked on people, which has kept the licensing value for tattoos relatively low. Additionally, tattoo artists have generally preferred to work outside copyright's legal system, as a study by

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Is it Anyway? The Copyrightability of Tattoos, 25 JEFFREY S. MOORAD SPORTS L.J. 275 (2018); Arianna D. Chronis, Note, *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works*, 104 IOWA L. REV. 1483 (2019). *Cf.* Shontavia Johnson, *Branded: Trademark Tattoos, Slave Owner Brands, and the Right to Have "Free" Skin*, 22 MICH. TELECOMM. & TECH. L. REV. 225 (2016) (exploring analogous questions in trademark law).

15 For an exploration of these questions, see the sources cited *supra* note 14. Another intriguing possibility is that photographs or digital depictions of tattoos are allowable under 17 U.S.C. § 113(c), which states that:

> In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

In this case, the useful article would be the human body housing the tattoo. I am grateful to Rebecca Tushnet for suggesting this possibility.

16 *See generally* Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013).

17 Shontavia Johnson, *Why Your Tattoo May Leave You Open to a Copyright Infringement Lawsuit*, RAW STORY (Aug. 8, 2016, 1:51 PM), http://www.rawstory.com/2016/08/copyright-and-trademark-laws-mean-your-tattoo-may-leave-you open-to-an-infringement-lawsuit.

Aaron Perzanowski demonstrates[18] and which Kal Raustiala and Chris Sprigman refer to as one of copyright's "negative spaces."[19] Yet with technological advances for videogames that allow realistic sports play, a new market has potentially appeared if players' tattoos (and they frequently have many) are to be realistically rendered. Rightsholders in some of these tattoos are therefore using copyright litigation to try to increase these tattoos' licensing value. They want a piece of the defendants' sizeable profits. The NBA 2K videogames are the top-selling sports game in the industry and are considered to be worth over nine figures annually.[20] If the courts rule in the tattoists' favor, that ought to provide them a more substantial licensing market going forward.

Why does it matter that the plaintiffs are opportunists? The plaintiffs' opportunistic lawsuits are about whether a new copyright market enabled by technological advance will exist. Although the courts' decisions in these tattoo videogame cases are and will continue to be somewhat fine-tuned to the cases' specific facts, they will also likely indicate whether a general licensing market for tattoos depicted in videogames will exist. As such, the adjudicating courts will be acting quasi-legislatively to broaden copyright's reach, or not, as they think best.

When a court is acting in a quasi-legislative capacity like this, it behooves the court to ascertain the economic and technological facts surrounding the legal controversy.[21] Why? In these situations, the court will be creating an economic windfall not just for one party or the other depending on its ruling, but for the marketplace writ large. Because the legal questions are new and because a market beyond the scope of the case is at stake, a ruling court should go beyond a clinical analysis and extension of doctrine. A more comprehensive analysis would seek to understand the marketplace, the consumers, and the relevant technological facts to apply doctrine in accordance with copyright policy.

To be more concrete in the context of the tattoo videogame cases, the defendants sought to introduce expert marketplace and technological evi-

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18 Perzanowski, *supra* note 16.

19 Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1762 (2006).

20 Matt Kim, *2K's New Deal with the NBA for NBA 2K Is Reportedly Worth a Staggering $1.1 Billion*, USG (Jan. 15, 2019), https://www.usgamer.net/articles/2k-games-nba-deal-renewal-1-billion.

21 *Cf.* Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J.L. & ARTS 697 (2011) (suggesting that it could be preferable to have a legislative solution to the Google Book litigation, particularly because "[a]pproval of the [proposed] settlement would, among other things, have given Google the right to commercialize virtually every out-of-print book in the corpus," whereas a legislative solution would not have "anticompetitive and other socially undesirable aspects").

dence to help facilitate the courts' decisions. For example, there is an important legal question whether the tattoos are a de minimis use in the videogame. Quantitatively, it is harder with a videogame than with, say, a movie to estimate how frequently a tattoo appears because users can have distinct experiences each time they play, especially by choosing different players. Qualitatively, it is unknown how important a rendering of the players' tattoos is to consumers in their gaming purchase or experience. To get at both questions, the defendants sought to introduce evidence about how an average NBA 2K game is played and thus how frequently a protected tattoo would appear,[22] and consumers' reasons for purchasing an NBA 2K game.[23] Indeed, the Southern District of New York ruled this evidence admissible and relied on it in part to hold that the renderings of the players' tattoos in the video games was de minimis use.[24]

Also, the courts ought to grapple with how a rendered tattoo appearing in a videogame's realistic depiction of a person carrying the tattoo is distinct as an infringement matter than a photograph of the person carrying the tattoo. One might conclude that the tattooed person can legitimately display the tattoo publicly and others can photograph it, in reliance on principles of human autonomy, implied license, or free speech. One might further analogize the situation to Congress's allowance of photographs of a copyrighted building embodying an architectural work if the building is located in or ordinarily visible from a public place.[25] Whether such a principle might extend to a videogame's realistic renderings of real people and their tattoos requires a court to confront copyright's policy goals of mediating between the incentives copyright provides and desirable access to protected material for reasons of free speech or other weighty values, perhaps including human autonomy to be depicted accurately with one's tattoos. In this vein, 2K Games sought to introduce expert evidence of how intimately connected tattoos are to inked individuals' self-expression and the ways in which tattoos can customarily be used after they are inked.[26] This sort of evidence ought to bear on a court's determination of fair use or implied license, something the Southern District of New York indeed noted in ruling this evidence admissible and in relying

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22 Expert Report and Declaration of Ian Bogost, Ph.D., Solid Oak Sketches, LLC v. 2K Games, Inc., No. 1:16-cv-724 (LTS)(SDA) (S.D.N.Y. Aug. 24, 2018).

23 Report of E. Deborah Jay, Ph.D., Solid Oak Sketches, LLC v. 2K Games, Inc., No. 116CV00724 (S.D.N.Y. Aug. 24, 2018).

24 Solid Oak Sketches, LLC v. 2K Games, Inc., 2020 WL 1467394, at *6-*7, *12-*13 (S.D.N.Y. Mar. 26, 2020).

25 17 U.S.C. § 120(a) (2018).

26 Expert Report and Declaration of Nina Jablonski, Ph.D., No. 1:16-cv-724 (LTS) (SDA) (S.D.N.Y. Aug. 24, 2018).

on it to find that the defendant's use was fair and authorized by an implied license.[27]

The types of evidence the defendants set forth here help a generalist court make a reasoned decision at the intersection of copyright policy and doctrine, by examining the realities of the plaintiff's tattooing marketplace and the defendant's videogame marketplace and technology.

III. PAPARAZZI SHOTS OF CELEBRITIES

Consider now another ever-growing set of cases working their way through the courts. Since 2017, some paparazzi photographers have been suing celebrities for copyright infringement for posting these photographers' shots of them on social media. Some of the celebrities that have been sued include Khloe Kardashian, Justin Bieber, Jennifer Lopez, Gigi Hadid, Victoria Beckham, Nicki Minaj, and Ariana Grande.[28] (Some photographers have also been suing fashion companies, like Marc Jacobs, for posting similar shots on their social media accounts of celebrities wearing those companies' wares.[29] Those cases raise somewhat distinct legal issues, so I will leave them aside.)

These cases might seem like straightforward unauthorized copying of protected material. Similarly, these photographer plaintiffs might appear to be copyright opportunists in the most uninteresting way: Social media platforms are a relatively new technological medium for content distribution, and third parties are distributing the photographers' content there.[30] On this account, the photographers merely want to grow their photographs' licensing value by ensuring that they receive a financial share from celebrities' social media posts.

Yet the legal answer of infringement and the photographers' opportunism is more complex than it might first seem. Like tattoos in videogames, the courts are faced with a quasi-legislative question about a copyright marketplace for paparazzi shots posted by their celebrity subjects. A court can better answer the question of infringement writ large by looking at the paparazzi photography industry, social media economics, and the complicated dynamic between paparazzi and celebrities.

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[27] *Solid Oaks Sketches*, 2020 WL 1467394, at *7-*13.

[28] Julie Zerbo, *From Bella and Gigi Hadid and Goop to Virgil Abloh and Marc Jacobs: A Running List of Paparazzi Copyright Suits*, THE FASHION LAW (Feb. 21, 2020), http://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits.

[29] *See id.*

[30] For a fascinating interweave of photographers' stories and courts' takes on copyright in photography as it relates to the current age of digital reproduction, see Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019).

Paparazzi photographers have generally made a living from locating celebrities, typically in public; shooting them; and selling the resulting photographs to traditional media outlets.[31] As the internet expanded, the appetite for ever-new celebrity shots also grew, fueling a market for more paparazzi shots showing stars being just like us or very different than us.[32] There has long been a symbiotic relationship between paparazzi and celebrities: Paparazzi need celebrities to photograph, and celebrities thrive off of increased media attention from paparazzi shots.[33] This symbiosis has fueled relationships between paparazzi and celebrities. For one thing, many celebrities will inform paparazzi where they will be so they can arrange to be photographed and garner additional press.[34] Additionally, paparazzi and celebrities alike know that there are certain places they can go to photograph and pose for photographs, respectively.[35] These spots include outside celebrities' homes, at fixture restaurants and nightclubs, and at entertainment industry events.[36]

Consider the photographers' plight on the one hand. A paparazzo's payday has become increasingly slim, even as some have banded together into agencies like X17.[37] To the extent we as a society care about bolstering this industry's work product (and I will evade here what Barton Beebe calls "the problem of aesthetic progress"[38]), copyright law might be protective of these photographers' licensing market.[39] That might be all the more true of social media posts, which are increasingly being used as a substitute for traditional media, including as celebrities seek to control their personal brand and narrative.[40]

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31 Robert Valdes & Cristen Conger, *How Paparazzi Work*, HowStuffWorks (Sept. 16, 2004), https://entertainment.howstuffworks.com/paparazzi.htm.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*; Jennifer Buhl, *12 Things I Wish I Knew Before Becoming a Paparazzo*, Cosmopolitan (Aug., 28, 2015), https://www.cosmopolitan.com/career/a45449/things-i-wish-i-knew-before-becoming-paparazzi; David Samuels, *Shooting Britney*, Atlantic (Apr. 2008), https://www.theatlantic.com/magazine/archive/2008/04/shooting-britney/306735.

38 Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 Colum. L. Rev. 319 (2017).

39 *Cf.* Peter DiCola, Jessica Silbey & Eva Subotnik, *Existential Copyright and Professional Photography*, 95 Notre Dame L. Rev. 263 (2019); Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 Colum. J.L. & Arts 351 (2019).

40 *Cf.* Julie Zerbo, *What Does the Growing Number of Paparazzi Lawsuits Say About the Fashion Industry?*, The Fashion Law (Oct. 28, 2019), http://www.thefashionlaw.com/home/what-does-the-growing-number-of-paparazzi-lawsuits-say-about-the-fashion-industry ("Social media, or better yet, Instagram, in particular,

On the other hand, consider the celebrities' systemic role in paparazzi photographs. Their presence creates the value the photographs have. Also, they frequently arrange — explicitly or implicitly — to be photographed, style themselves, and choose how to pose for their shots.

These industry and economic considerations would seem to bear on celebrities' defenses to infringement, particularly fair use, implied license, and joint authorship. In fact, in one of these lawsuits, Gigi Hadid claimed fair use and implied license in part on these grounds: "Ms. Hadid posed for the camera and thus herself contributed many of the elements that the copyright law seeks to protect"; "It is one thing for paparazzi to take advantage of Ms. Hadid by surveilling her, taking photographs of her every public movement, and selling them for profit. It is quite another to demand damages based on an Instagram post by the very person whose image the photographer sought to exploit in the first place."[41]

Moreover, consider whether these cases might be the unusual ones in which the celebrity subject can be deemed to be a joint author of the work shot by the photographer, even under the Ninth Circuit's test: 1) each "author superintends the work by exercising control"; 2) the "putative coauthors make objective manifestations of a shared intent to be coauthors"; and 3) "the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised."[42]

Two Kardashian sisters have thoughtfully weighed in on their freedom to use paparazzi photographs of themselves. Lest you think I am being condescending, their reactions are probably among the more sophisticated from celebrities on copyright law. Khloe Kardashian observed online how she has to license photos of herself to post: "A paparazzi sued me in the past for reposting an image of MYSELF. So now it just takes me a little longer because I have to go and license the images . . . MAKES NO SENSE."[43] She discussed arranging to get her own pictures taken so she

has essentially replaced traditional media outlets, such as magazines, as the home for fashion viewership and discovery, and as fashion magazine readership falls, and the online sale of luxury goods continues to grow . . . , digital alternatives like Instagram are proving to be the most effective home for advertisements.").

41 Memorandum of Law in Support of Defendant's Motion to Dismiss, at 10, 12, XClusive-Lee, Inc. v. Hadid, No. 19 Civ. 520 (E.D.N.Y. June 5, 2019). Annemarie Bridy has made a similar argument grounded in implied licenses. *See* Annemarie Bridy, *A Novel Theory of Implied Copyright License in Paparazzi Pics*, Law360 (Aug. 6, 2019, 11:43 am), https://www.law360.com/articles/1185445/a-novel-theory-of-implied-copyright-license-in-paparazzi-pics.

42 Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).

43 Ellie Woodward, *The Kardashians Are at War with the Paparazzi over Deleted Fan Accounts*, BuzzFeed (Aug. 23, 2018, 8:37 am), https://www.buzzfeed.com/elliewoodward/kardashians-war-with-paparazzi-deleted-fan-accounts.

can use them without issue.[44] Her sister Kim Kardashian chimed in to agree that "[m]aybe [they should] start [their] own agency? And let [us and] all of the fans post whatever . . . they want."[45]

Kardashian musings aside, there have been no substantive court rulings yet. Yet as these cases make their way through the courts, it will be important for judges to consider the paparazzi photography-celebrity dynamics and the marketplace offered by social media in contrast to or replacement of traditional media. A clinical application of copyright doctrine does not offer up an answer as to infringement and the specific industry and economic dynamics, as informed by copyright policy, help fill in the gaps.

IV. OBSCURE MUSIC

Consider now one last case study, that of obscure music. Lately, copyright holders of obscure songs have been suing creators of successful songs for infringement. In some ways, there is nothing new about this category of lawsuit: Earlier, I mentioned Ira Arnstein's mid-twentieth-century suits against Cole Porter and others for infringement of his obscure songs. But there is one big difference that makes these lawsuits "new," so to speak. It used to be that a defendant could win even if the plaintiff's and defendant's songs were similar, on the basis that there was no copying in fact, as evidenced by Ronald Selle's suit against the Bee Gees: In 1977, the band recorded the song at issue while holed up in a chateau located in a French village, so there was just about no way the band could have copied the plaintiff's American song.[46] There have been cases in which defendants have disputed copying but have been found liable on the ground of subconscious copying, as happened to Michael Bolton in the Isley Brothers' case against him twenty years ago.[47] Yet these "subconscious copying" cases have remained a minority of infringement cases, and probably thankfully so, because systematically differentiating independently created works from subconsciously copied ones is impracticable, as Jessica Litman has pointed out.[48]

What is new in these suits by copyright holders of obscure songs against creators of more successful songs is the background condition against which they are being asserted. The "celestial jukebox" that might call up any song instantaneously for a user, which Jane Ginsburg, Paul

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[44] *Id.*

[45] *Id.*

[46] Selle v. Gibb, 741 F.2d 896, 899, 901-03 (7th Cir. 1984).

[47] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482-85 (9th Cir. 2000).

[48] Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 240 (1991); *accord* Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887 (2019).

Goldstein, and others notably worried about decades ago,[49] has actually arrived in the past few years with services like Spotify and YouTube. Other than a song locked in a desk drawer, all songs are now accessible to any third party. Then, as long as a song's similarity to another passes a certain threshold, the song will likely be deemed to have been copied in fact and on its way to being found to be infringing. That is, copyright infringement is found based on copying in fact and copying in law (or substantial similarity), and copying in fact is frequently premised circumstantially on access plus similarity to the plaintiff's work.[50] As such, in the age of the true celestial jukebox, access is nearly always a given and whatever increment of similarity will establish copying in fact will now be all that needs to be shown to establish copying in fact.

Demonstrating as much is the recent jury verdict of $2.78 million in the infringement suit by Christian rapper Flame against pop singer Katy Perry[51] (though the district court subsequently threw out the jury verdict on the grounds of lack of originality of the plaintiff's work and lack of substantial similarity, yet upheld the jury's findings on access).[52] Flame's 2008 song *Joyful Noise* bears some, but by no means airtight, similarity to Perry's 2013 hit *Dark Horse*. In this case, now on appeal to the Ninth Circuit, the district court ruled that the six million YouTube and My Space views of Flame's song and popularity in the niche Christian rap market supported the jury's finding of the defendants' access to *Joyful Noise*.[53] The district court had earlier ruled that this evidence was relevant, overruling the defendants' objections that they had not heard the song, the song did not have commercial success, the song was not widely disseminated, and the song had success only in the most niche of markets.[54] After the jury found infringement, one commentator explained:

> There's no denying that "Dark Horse" and "Joyful Noise" sound similar. The beat in the latter's opening moments sounds a little like the

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[49] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1st ed. 2003); Jane C. Ginsburg & Myriam Gauthier, *The Celestial Jukebox and Earthbound Courts: Judicial Competence in the European Union and the United States over Copyright Infringement in Cyberspace*, 173 REV. INT'L DU DROIT D'AUTEUR 61, 85 (1997).

[50] *Three Boys Music*, 212 F.3d at 481.

[51] Tatiana Cirisano, *Katy Perry Asks Judge to Throw Out $2.78 Million 'Dark Horse' Verdict*, BILLBOARD (Oct. 11, 2019), https://www.billboard.com/articles/business/8532770/katy-perry-appeals-dark-horse-copyright-ruling.

[52] Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020).

[53] *Id.* at *13-*14.

[54] Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2019 WL 2992007 (C.D. Cal. July 5, 2019); Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2018 WL 5095118 (C.D. Cal. Oct. 17, 2018); Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2018 WL 3954008 (C.D. Cal. Aug. 13, 2018).

> drop in the former—but "Joyful Noise" is noticeably faster than "Dark Horse." It's also in an entirely different key, and as soon as Flame begins to rap, the song's electric guitar solos and overtly religious lyrics are impossible to recognize as even vaguely being related to "Dark Horse." [Flame] and co. had musicologist Todd Decker testify as an expert witness during the trial, who determined that Perry and her team had copied their song's beat; the musicologist that Perry and her team put forward, however, determined that all the supposedly copied elements of "Dark Horse" were simply part of pop and trap music.[55]

Even though the district court subsequently overturned the jury's finding of substantial similarity, more broadly, the combination of access via the celestial jukebox and similarity due to genre constraints can make it elementary to establish copying in fact and substantial similarity. Of course, good expert testimony that a music segment is a basic, and oft-used, building block of music can seek to counteract claims of improper similarities, but that will not always be straightforward.

Perhaps emboldened by the jury's verdict, there are now many more actual or threatened cases in the pipeline that pit an obscure song against a successful one: singer-songwriter Steve Ronsen's song *Almost* against Lady Gaga's Oscar-winning song *Shallow based* on a shared three notes (G, A, B) that appear in *Shallow*'s hook,[56] and PuertoReefa and Sakrite Duexe's hip-hop song *Broad Day* against Lil Nas X and Cardi B's collaboration, *Rodeo*, based on "use [of] the same chord progression (E, F, G, F, E) [and] also the same 4-measure phrase that outlines it."[57]

The "obscure song" plaintiffs are opportunists not because they are seeking to carve out music licensing markets that had not previously existed, but instead because they are bringing claims against some of the most popular musicians that would have been laughable before the "everything is accessible" age in which we currently live. Courts ruling on these claims need to be sensitive to current conditions when they probe how to apply copyright law's bedrock doctrines of copying in fact and cop-

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55 Shaad D'Souza, *How Katy Perry's "Dark Horse" Lawsuit Could Change Pop Forever*, FADER (Aug. 1, 2019), https://www.thefader.com/2019/08/01/katy-perry-dark-horse-lawsuit-blurred-lines-copyright-essay-2019.

56 Marsha Silva, *Lady Gaga Accused of Copyright Infringement on 'Shallow'—Based on 3 Notes*, DIGITAL MUSIC NEWS (Aug. 12, 2019), https://www.digitalmusicnews.com/2019/08/12/lady-gaga-shallow-copyright-infringement; Emily Smith, *Lady Gaga Slams Claim She Stole 'Shallow' from Unknown Songwriter*, PAGE SIX (Aug. 8, 2019), https://pagesix.com/2019/08/08/lady-gaga-accused-of-stealing-shallow-from-unknown-songwriter.

57 Madison Bloom, *Lil Nas X, Cardi B, More Hit with Copyright Infringement Lawsuit for "Rodeo"*, PITCHFORK (Oct. 4, 2019), https://pitchfork.com/news/lil-nas-x-cardi-b-more-hit-with-copyright-infringement-lawsuit-for-rodeo; Shaad D'Souza, *Lil Nas X and Cardi B Sued for Copyright Infringement*, FADER (Oct. 7, 2019), https://www.thefader.com/2019/10/07/lil-nas-x-cardi-b-sued-copyright-infringement-rodeo-2019.

ying in law, something the district court in the Katy Perry case did not do. It is particularly worrisome how easy it is to find access and then copying in fact in our current age. One possibility, as Chris Buccafusco argues in forthcoming work, is that copyright law should dispense with the copying-in-fact requirement because it no longer does any work. Instead, I am more partial to working through how to beef up the requirement because otherwise every single work that exists now seems accessible to anyone and many works seem similar based on genre constraints. Do we truly each have access to each of the 400 hours of video uploaded to YouTube every minute,[58] which is estimated to take about 60,000 years to watch completely,[59] or to the over 30 million songs on Spotify, to which 20,000 new songs are added each day?[60]

V. HANDLING THE OPPORTUNIST

I have just presented three cases of copyright opportunism, enabled by technological change that have opened up potential new markets or access possibilities. I suggest, with this Lecture's title, that these are new copyright opportunists rather than the same old ones long present in copyright law. The newness derives from the widely-acknowledged increasing rate at which technology has been advancing,[61] specifically in the copyright context to facilitate new modes of distribution. This technological acceleration thus provides increasingly frequent chances for courts to rule on copyright opportunism.

To borrow from Justice Souter's discussion of fair use in *Campbell v. Acuff-Rose Music, Inc.*, how should courts "separate[e] the [deserving but opportunistic] sheep from the [nothing but opportunistic] goats"?[62] The two types of opportunists often look the same, particularly at the outset.

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[58] Kit Smith, *52 Fascinating and Incredible YouTube Statistics*, BRANDWATCH (July 15, 2019), https://www.brandwatch.com/blog/youtube-stats.

[59] *How Many Yeas Would It Take to Watch Every Video on YouTube as of 2018?*, QUORA, https://www.quora.com/How-many-yeas-would-it-take-to-watch-every-video-on-YouTube-as-of-2018 (last visited May 9, 2020). It is also estimated that over 23 million YouTube videos have over one million views each. *See How Many Videos Are on YouTube 2017*, QUORA, https://www.quora.com/How-many-videos-are-on-YouTube-2017-1 (last visited Nov. 3, 2019) (estimating over seven billion videos on YouTube); *Only 0.33% of YouTube Videos Generate 1 Million or More Views. . . #SXSW*, TRICHORDIST (Mar. 12, 2014), https://thetrichordist.com/2014/03/12/only-0-33-of-youtube-videos-generate-more-than-1m-views/ (reporting estimate that 0.33% of YouTube videos have over one million views).

[60] Josh Levenson, *Apple Music vs. Spotify: Which Service Is the Streaming King?*, DIGITAL TRENDS (Oct. 11, 2019, 8:03 am), https://www.digitaltrends.com/music/apple-music-vs-spotify.

[61] *See, e.g.*, RAY KURZWEIL, THE SINGULARITY IS NEAR 35-110 (2006).

[62] 510 U.S. 569, 586 (1994) ("This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats

They are each heading to the courthouse with a plausibly copyrighted work that currently has low licensing value but which they are hoping will have high litigation value. They might have tried to negotiate a license with the defendant, which in all the cases I discussed was a well-resourced heavy hitter, and gotten nowhere. The opportunist's leverage, if any, is therefore only in the courthouse.

Yet the deep disconnect between the current licensing value of the copyrighted work and the possible litigation value of the work ought to be a hallmark that an infringement plaintiff is an opportunist. And that always ought to give a court pause. As Michael Burstein has argued in the context of patent law, "the pricing mechanism in a liquid market may more easily and quickly incorporate information about litigation value than commercialization value."[63] To Burstein, that imbalance is worrisome because a patent's "value in a market [actually] fails to reflect the value of the underlying technology."[64] A patent may be invalid or cover marginal technological contributions, suggesting it should have low market value, but because of risk aversion in litigation, targeted assertions against those feeling compelled to pay up, and sometimes overly generous court rulings, the patent has high litigation value. One can readily see how a similar dynamic could play out in copyright law, with defendants acquiescing to a new copyright market or a court ruling there ought to be one.

A disconnect between a copyright's current licensing value and potentially high litigation value ought to signal to a court that a clinical application of doctrine might not be its best way forward, especially when there is a new copyright market categorically at stake, as with tattoos rendered in realistic videogames on subjects carrying those tattoos, celebrities' social media posts of paparazzi photographs of themselves, and obscure, but accessible, songs that are somewhat similar to popular songs. Beyond the three cases studies that I discussed, there are other recent examples of opportunistic litigation to carve out a new copyright market: Should there be a copyright market for dance moves incorporated into video games, as the Backpack Kid, originator of the flossing dance, and Alfonso Ribeiro, creator of the Carlton Dance, alleged against the makers of the videogame Fortnite?[65] Should there be a copyright market for caption snippets a user can activate when listening to an audiobook, to clarify or look up a word

in a parody case, since parodies almost invariably copy publicly known, expressive works.").

63 Michael J. Burstein, *Patent Markets: A Framework for Evaluation*, 47 ARIZ. ST. L.J. 507, 513 (2015).

64 *Id.*

65 Elizabeth A. Harris, *A Real-World Battle over Dancing Avatars: Did Fortnite Steal the Floss?*, N.Y. TIMES (Jan. 11, 2019), https://www.nytimes.com/2019/01/11/arts/fortnite-floss-dance-lawsuits.html.

the user has heard, as book publishers asserted in a recent suit against Audible?[66] Should there be a copyright market for third parties' embedded content from social media posts containing the content, as was alleged by a photographer of New England Patriots quarterback Tom Brady against news organizations that embedded tweets of the photograph on their sites?[67]

With all due respect to Judge Forrest, who wrote the opinion on liability for embedding tweets, I think she got the framework for analyzing an opportunistic suit for a new market wrong when she wrote, albeit wittily:

> When the Copyright Act was amended in 1976, the words "tweet," "viral," and "embed" invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day. That technology and terminology change means that, from time to time, questions of copyright law will not be altogether clear. *In answering questions with previously uncontemplated technologies, however, the Court must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright.* In this copyright infringement case, concerning a candid photograph of a famous sports figure, the Court must construe how images shown on one website but stored on another website's server implicate an owner's exclusive display right.[68]

Of course, Judge Forrest is correct that a court's ruling should be grounded in "familiar guiding principles of copyright." But these principles don't provide the complete answer when a new copyright market is at stake. When a new copyright market is at stake, a court ought to look at the intersection of doctrine and policy, about whether an extension of doctrine to a new market aligns with copyright's policies that navigate between copyright's incentives to create and distribute works and broad access to works. A court can delve into this intersection of doctrine and policy only if it has a robust understanding of the plaintiff's marketplace, the defendant's marketplace, and the technologies at issue. That is, a court ought to be preoccupied with (a more benign form of Judge Forrest's "distracted by") "new terms or new forms of content" and the technological and economic mechanisms underlying them. What are the industries on each side doing to increase social welfare vis-à-vis copyrighted works,

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[66] Andrew Albanese, *In Filings, Audible Says 'Captions' Copyright Case Should Be Dismissed*, PUBLISHERS WEEKLY (Sept. 13, 2019), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/81169-in-filing-audible-says-captions-copyright-case-should-be-dismissed.html.

[67] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

[68] *Id.* at 585-86 (emphasis added).

and what are the marketplace realities for them to continue doing that? How are they using technology to effectuate those goals?

Courts that are open to engage in a robust inquiry cannot be expected to possess this specialized information intrinsically or to undertake this inquiry on their own. Litigants are well-placed to put this economic and technological information before the court, just as 2K Games' lawyers did in the tattoo videogame cases. Courts also ought to feel emboldened in these cases to appoint economic or technological experts as special masters to help sort through these issues.[69]

Courts are currently used to thinking about the technological and economic details related to a copyright infringement case only in narrow areas. For example, all courts know to look to "the effect of the use upon the potential market for or value of the copyrighted work," as required by the copyright statute in analyzing fair use.[70] And courts will look to economic realities in awarding "the copyright owner's actual damages and any additional profits of the infringer," as set out in the statute.[71] But economic and technological facts are relevant throughout copyright infringement cases. To give but one example, which Mark Lemley and I have written about, when assessing substantial similarity, it is more consistent with both copyright doctrine and policy to assess substantial similarity through the lens of a typical consumer of the copyrighted works at issue than through the lens of a detached and fictional reasonable observer.[72] The reason is that "the consumer is likely to be the audience that most directly measures whether the plaintiff's work and the defendant's work at issue in . . . litigation substitute for one another in the marketplace. When the consumer is the audience for IP infringement, . . . third parties will be discouraged from producing substitutes without permission from the rights holder."[73]

CONCLUSION

This Lecture began with a mention of copyright trolls, which tend to have a bad reputation in copyright law. By contrast, the copyright opportunist is less easy to judge. The copyright opportunist arrives at court with all shades of gray for a court to sort through. And the court can sort through those shades and arrive at a ruling only by analyzing the economic and technological realities underpinning the opportunist's litigation claims, connecting them to copyright policy, and using all those to fill in the inter-

69 FED. R. CIV. P. 53.
70 17 U.S.C. § 107(4) (2018).
71 *Id.* § 504(a)(1).
72 Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1290-94, 1299-301 (2014).
73 *Id.* at 1276.

stices of copyright doctrine. Unlike troll suits, which Shyam Balganesh has argued are unwelcome for upsetting the copyright ecosystem by converting tolerated infringement into litigation, opportunistic suits ought to be most welcome in courts to develop copyright law so long as courts are using a robust set of tools to derive their rulings.