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### Copyright Silencing

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# ESSAY

## COPYRIGHT SILENCING

Cathay Y. N. Smith†

Copyright has been weaponized to suppress speech,<sup>1</sup> frustrate competition,<sup>2</sup> punish third parties,<sup>3</sup> and silence criticism and erase facts.<sup>4</sup> This Essay highlights one form of copyright weaponization I call “copyright silencing.” Copyright silencing is a form of copyright weaponization where owners assert copyrights to silence criticism or suppress facts instead of to protect copyright owners’ legitimate interests<sup>5</sup> in their

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<sup>1</sup> See David S. Olson, *First Amendment Based Copyright Misuse*, 52 WILLIAM & MARY L. REV. 537, 547–48 (2010) (describing examples of “the Estate of James Joyce’s history of aggressive use of copyright claims to stifle the speech of others”).

<sup>2</sup> See, e.g., Adi Robertson, *The EFF is Suing over one of the Worst US Copyright Rules*, THE VERGE (July 21, 2016), <https://www.theverge.com/2016/7/21/12248454/eff-files-copyright-lawsuit-section-1201-anti-circumvention-rules> [<https://perma.cc/S2NP-S2T2>]; *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (including in copyright license agreement an overreaching provision barring licensee from creating competing products for 99 years).

<sup>3</sup> See Steven Asarch, *Pewdiepie and Alinity Drama Explained: What’s a Copy Strike?*, NEWSWEEK (May 23, 2018), <https://www.newsweek.com/pewdiepie-alinity-twitch-copy-strike-youtube-drama-reddit-941546> [<https://perma.cc/MD8F-N24J>] (Twitch streamer Alinity purportedly copyright striked YouTuber Felix “Pewdiepie” Kjellberg’s channel for calling Alinity a “Twitch thot”).

<sup>4</sup> Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. 929, 951-57 (2020) (describing instances where individuals acquire copyright to already-published content, including negative consumer reviews, in order to assert copyright to erase the reviews and suppress their dissemination).

<sup>5</sup> This Essay does not define “legitimate interests” of copyright owners. Some commentators have argued that copyright law is a law of incentives and the only legitimate interests copyright owners have in their works are market and economic interests or utilitarian incentive-based interests. Other commentators, however, recognize that laws—including copyright law—are not necessarily for a singular purpose, and that copyright owners have other interests, including

works. This Essay identifies recent or notable instances of copyright silencing, examines the harm copyright silencing perpetrates, and explains why it is increasingly difficult to stop the assertion of copyright to silence, suppress, and censor facts, information, and criticism.

In March 2020, as Americans sheltered in their homes to ride out the COVID-19 pandemic, many of them found themselves suffering from another form of fever—*Tiger King* fever. By now, most people have watched or, at a minimum, have heard of Netflix’s limited docuseries *Tiger King: Murder, Mayhem and Madness*. Released by Netflix on March 20, 2020, *Tiger King*—a documentary series following the extraordinary life and subsequent downfall of zookeeper Joe Exotic a.k.a. Joseph Allen Maldonado-Passage né Schreibvogel—became an overnight sensation with 34.3 million viewers over its first ten days of release.<sup>6</sup> In episode four, the series introduced audiences to Exotic’s intellectual property troubles, including a copyright infringement suit Exotic’s archenemy, Carol Baskin, owner of Big Cat Rescue, filed against Exotic and his company. The copyright infringement suit was based on Exotic’s unauthorized sharing of a photograph featuring three Big Cat Rescue employees holding bloody rabbit carcasses. Exotic shared the photograph in order to criticize Big Cat Rescue’s hypocrisy and to expose Big Cat Rescue’s volunteers’ perceived cruelty. In response, Big Cat Rescue acquired the copyright to the photograph and sued Exotic for copyright infringement in order to conceal the photograph and silence his criticism. This copyright infringement suit, along with other claims Baskin filed against Exotic, ended up bankrupting Exotic and eventually caused him to lose his zoo.<sup>7</sup>

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autonomy, moral, reputational, and privacy, in their copyright works. The validity of the issues examined and the arguments set forth in this Essay are not predicated on settling upon a singular definition of copyright’s legitimate interests.

<sup>6</sup> TIGER KING: MURDER, MAYHEM AND MADNESS (Netflix 2020) <https://www.netflix.com/title/81115994> [<https://perma.cc/SNF4-QSL6>] (last visited June 15, 2020); Tiger King, Wikipedia, [https://en.wikipedia.org/wiki/Tiger\\_King#cite\\_note-2](https://en.wikipedia.org/wiki/Tiger_King#cite_note-2) [<https://perma.cc/K9YK-A49Y>] (last visited June 15, 2020).

<sup>7</sup> David Lee, *Foe of ‘Tiger King’ Zookeeper Granted Oklahoma Property*, COURTHOUSE NEWS SERVICE (June 1, 2020), <https://www.courthousenews.com/foe-of-tiger-king-zookeeper-granted-oklahoma-property/> [<https://perma.cc/2MQS-2CC4>]; Abid Rahman, *‘Tiger King’: Joe Exotic Loses Zoo to Carol Baskin in Court Ruling*, THE HOLLYWOOD REPORTER (June 1, 2020), <https://www.hollywoodreporter.com/news/carole-baskin-awarded-joe-exotics-zoo-court-ruling-1296769> [<https://perma.cc/8XVU-52PJ>].

This Essay identifies the copyright infringement lawsuit featured in *Tiger King* as an example of a growing threat in copyright law, namely, copyright owners using copyrights to silence critics and censor public dissemination of facts and information. Other notable examples of copyright silencing include Dr. Drew's recent use of copyright to censor criticism of his previous public opinions making light of COVID-19, Harvey Weinstein's use of copyright to suppress investigation into his sexual exploitations and misconducts, and Tea Party-favorite political-candidate Sharron Angle's use of copyright to erase evidence of her former ultra-conservative views on education and social security. Copyright silencing is detrimental to free speech and public discourse, and is contrary to the purpose of copyright law to encourage the dissemination of ideas and information. Copyright silencing can also harm legitimate copyright claims, distort copyright rules, and erase history. However, because copyright silencing frequently goes unnoticed when putative infringers capitulate to demand letters to remove the offending materials or ISPs remove the materials pursuant to DMCA takedown notices, because motivations of copyright owners asserting rights can be difficult to determine or can overlap with interests such as privacy interests, and because of practical limitations on legal solutions like fair use, copyright misuse, and anti-SLAPP laws, copyright silencing is increasingly difficult to defeat.

## I

### COPYRIGHT SILENCING: TIGER KING, DR. DREW, HARVEY WEINSTEIN, AND OTHER EXAMPLES

Joe Exotic shared a photograph on his personal Facebook page.<sup>8</sup> The photograph featured three smiling volunteers at Carol Baskin's Big Cat Rescue in Tampa, Florida riding on a golf cart holding bloody rabbit carcasses (the Rabbit Photo).<sup>9</sup> Big Cat Rescue claims to be "one of the largest accredited sanctuaries in the world dedicated to abused and abandoned big cats."<sup>10</sup> In addition to sharing the Rabbit Photo on Facebook, Exotic also shared the Rabbit Photo in videos that he and his employees created on different platforms, including

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<sup>8</sup> Big Cat Rescue Corp. v. Big Cat Rescue Entm't Group, Inc., 2013 WL 12158980, at \*3 (M.D. Florida Jan. 15, 2013).

<sup>9</sup> See Complaint, Big Cat Rescue Corp v. Big Cat Rescue Entm't Group, Inc., Docket No. 8:11-cv-02014 (M.D. Fla. Sept. 2, 2011), Exhibit 1 (original photo) and Exhibit 3 (photo shared by Joe on YouTube).

<sup>10</sup> About BCR, <https://bigcatrescue.org/contact-bcr/> [<https://perma.cc/2CFL-MLN7>] (last visited June 16, 2020).

YouTube and Vimeo, in order “to highlight what he saw as the hypocrisy of . . . Baskin’s accusations against him for cruelty to animals.”<sup>11</sup> The videos that Exotic created and shared were titled, for instance, “Saga 36 Carole Baskin staff kills animals,” “Big Cat Rescue Sage 42 part 2 the real truth,” “Big Cat Rescue’s Double Standards,” “Big Cat Rescue Killing Innocent Bunnies for entertainment,” and “Big Cat Rescue and the lies to cover up.”<sup>12</sup> Exotic claimed that he shared the Rabbit Photo and created the critical videos “because he believed that it depicted the killing of innocent rabbits for the false pretense of rehabbing animals, and that the practice needed to stop. He wanted people to know that it was wrong.”<sup>13</sup> Not enjoying the negative publicity and criticism, Big Cat Rescue acquired the copyright to the Rabbit Photo and filed DMCA takedown notices for the removal of Exotic’s critical videos and filed a copyright infringement suit against Exotic and his zoo.<sup>14</sup> After protracted litigation involving multiple motions to compel and for sanctions, Exotic agreed to a consent judgment permanently enjoining him and his company, and anyone working with him or his company, from ever “reproduc[ing], distribut[ing] and us[ing], modify[ing] or publish[ing]” the Rabbit Photo “or any other substantially similar photograph for any purpose.”<sup>15</sup>

The scenario in *Tiger King* is not an isolated incident in which a copyright owner asserts copyright in order to silence criticism or suppress public dissemination of information. This behavior occurs more frequently than is reported, and does not always (or even often) result in copyright owners filing copyright infringement suits against putative infringers. Unless picked-up by journalists or shared on social media, copyright silencing can frequently go unnoticed and undetected, as putative infringers capitulate to demand letters to remove the offending material, or Internet service providers

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<sup>11</sup> Joshua Lamel, *The Copyright Lawsuit in Tiger King is an Outrage*, SLATE (May 7, 2020), <https://slate.com/technology/2020/05/tiger-king-joe-exotic-carole-baskin-copyright-fair-use.html> [<https://perma.cc/W2WW-JC77>]; *Big Cat Rescue Corp.*, 2013 WL 12158980 at \*3–8.

<sup>12</sup> *Big Cat Rescue Corp.*, 2013 WL 12158980 at \*3–4.

<sup>13</sup> Defendants’ Response in Opposition to Plaintiff’s Motion for Summary Judgment at 5, *Big Cat Rescue Corp. v. Big Cat Rescue Entm’t Group* (No. 8:11-cv-2014), 2012 WL 7060122 (M.D. Fla. Nov. 2, 2012).

<sup>14</sup> Complaint at 4, *Big Cat Rescue Corp v. Big Cat Rescue Entm’t Group, Inc.* (No. 8:11-cv-02014), 2011 WL 4048458 (M.D. Fla. Sept. 2, 2011).

<sup>15</sup> Consent Final Judgment and Permanent Injunction at 2, *Big Cat Rescue Corp v. Big Cat Rescue Entm’t Group, Inc.* (No. 8:11-cv-02014), 2013 WL 867006 (M.D. Fla. Feb. 14, 2013).

(ISPs) remove the material pursuant to DMCA takedown notices filed by copyright owners. This can result in the suppression and censoring of speech and criticism without any judicial oversight.<sup>16</sup>

Just recently, the media reported an incident involving Dr. Drew's use of copyright to conceal and silence criticism over his earlier statements downplaying the seriousness of COVID-19. In February and March of 2020, media-personality and TV-doctor Drew Pinsky (Dr. Drew) repeatedly downplayed the severity of coronavirus on a number of media appearances, including on his show *Ask Dr. Drew* and podcast *Dr. Drew After Dark*.<sup>17</sup> During those media appearances, Dr. Drew "repeatedly suggested the coronavirus would be not as bad as the flu" and claimed that "the probability of dying of coronavirus was less than being hit by an asteroid."<sup>18</sup> On April 2, 2020, an online user with the pseudonym Dr Droops compiled a 5-minute video "of all of the inaccurate, contradictory things that Dr. Drew has said about coronavirus" and posted it on YouTube.<sup>19</sup> After a reporter tweeted a link to the video compilation, accusing Dr. Drew of being "a snake oil salesman" and "a disgrace,"<sup>20</sup> Drew Pinsky Inc. filed a DMCA takedown notice to have the video compilation taken-off YouTube based on copyright infringement.<sup>21</sup> In addition to filing a DMCA takedown notice, Dr. Drew threatened social media users who reshared the video compilation that "Infringing copywrite [sic] laws is a crime. Hang on to your retweets. Or erase to be safe."<sup>22</sup> In response to the DMCA takedown notice, YouTube took the video down. The video has since reappeared on the website and there have been no

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<sup>16</sup> Goldman & Silbey, *supra* note 4, at 947.

<sup>17</sup> *Dr. Drew Pinsky Apologizes for Coronavirus Comments: 'I got it Wrong'*, USA TODAY (April 7, 2020) [hereinafter, Pinsky Apologizes], <https://www.usatoday.com/story/entertainment/celebrities/2020/04/07/coronavirus-dr-drew-pinsky-addresses-covid-19-criticism/2960027001/> [https://perma.cc/BA8C-CHW4].

<sup>18</sup> *Pinsky Apologizes*, *supra* note 17; Kate Cox, *Dr. Drew Apologizes for Being COVID-19 Denier After Copyright Silliness*, ARS TECHNICA (April 6, 2020), <https://arstechnica.com/tech-policy/2020/04/dr-drew-coronavirus-supercut-restored-to-youtube-after-copyright-takedown/> [https://perma.cc/GMP5-WUGC].

<sup>19</sup> Dr Droop, *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/E9NR-9DR3].

<sup>20</sup> Cox, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

reported cases against any social media users who shared the video compilation.

As the #MeToo movement began exposing the sexual misconducts and exploitations of public men in power, some of those men attempted to use copyright law to conceal information or facts about their bad behaviors and silence criticism of their misconducts. In Ronan Farrow's book *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS*, Farrow describes the hurdles The Weinstein Company (TWC) and his own employer, NBCUniversal News Group (NBC), placed in his way to silence victims and suppress the information Farrow was gathering and planning to publish about Harvey Weinstein's sexual exploitations and misconducts.<sup>23</sup> In one particular instance, Farrow describes receiving a cease and desist letter asserting that copyright to all of the interviews that he conducted with Weinstein's victims "are the property of NBC and do not belong to you, nor are you licensed by NBC to use any such interviews."<sup>24</sup> The letter demanded that Farrow "turn over all of your work product relating to TWC . . . to . . . NBC Universal."<sup>25</sup> The letter further threatened any other media outlet that Farrow may be working with on his investigation and story about Weinstein's sexual misconducts that they were placed "on notice of [the] legal claims against them."<sup>26</sup> After consulting with an attorney, Farrow continued his investigation and eventually published the bombshell story in *The New Yorker* exposing Weinstein and his sexual assault and harassment of multiple women.<sup>27</sup>

Instances of copyright silencing can also occur during election season where political-candidates attempt to use copyright law to conceal harmful statements that they made in the past or to censor criticism of their past behaviors.<sup>28</sup> In 2010, Tea Party-favorite Republican-candidate Sharron Angle

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<sup>23</sup> See RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* (2019).

<sup>24</sup> FARROW, *supra* note 23, at 234. 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 best argument would have likely been under the copyright work made for hire doctrine.

<sup>25</sup> *Id.* at 235.

<sup>26</sup> *Id.*

<sup>27</sup> See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, *THE NEW YORKER* (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/33RF-XAB7>].

<sup>28</sup> Cathay Y. N. Smith, *Political Fair Use*, 62 *Wm. & Mary L. Rev.* \_\_ (forthcoming 2021).

challenged incumbent Democratic U.S. Senator and Majority Leader Harry Reid in the United States Senate election in Nevada.<sup>29</sup> During the Republican primary, Angle ran and won on an ultra-conservative platform, advertising on her campaign website her controversial stances on abolishing the Department of Education and Energy and phasing out Social Security.<sup>30</sup> After winning the Republican nomination, Angle took down her ultra-conservative website and replaced it with a more moderate website to win over moderate and independent voters.<sup>31</sup> The Reid campaign saved the old version of Angle's website and shared it on a website called "The Real Sharron Angle."<sup>32</sup> The Angle campaign sent Reid a cease-and-desist letter asserting that Reid's conduct infringed Angle's copyright in her website.<sup>33</sup> Angle threatened "to pursue all available legal remedies" against Reid and his campaign, claiming that "Your 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>34</sup> In spite of Angle's threat, there is no record that Angle pursued any legal action against Reid.

These are just a few recent or notable examples of copyright owners using copyright for the purpose of silencing criticism and suppressing information. Other instances include doctors and lawyers asserting copyright to erase negative consumer reviews of their services on Yelp and Ripoff Report,<sup>35</sup> religious organizations asserting copyright to

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<sup>29</sup> Eduardo M. Peñalver & Sonia Katyal, *The Fair Use Senator*, SLATE (July 9, 2010), <https://slate.com/news-and-politics/2010/07/can-harry-reid-post-sharron-angle-s-old-web-site.html> [<https://perma.cc/WW6L-MRFL>].

<sup>30</sup> Max Fisher, *Inside Harry Reid and Sharron Angle's Internet War*, THE ATLANTIC (July 7, 2010), <https://www.theatlantic.com/politics/archive/2010/07/inside-harry-reid-and-sharron-angle-s-internet-war/344953/> [<https://perma.cc/SAD4-BFWT>].

<sup>31</sup> Peñalver & Katyal, *supra* note 29; Eric Kleefeld, *Angle Sends Cease-And-Desist To Reid—For Reposting Her Own Website*, TALKING POINTS MEMO (July 5, 2010), <https://talkingpointsmemo.com/dc/angle-sends-cess-and-desist-to-reid-for-reposting-her-own-website> [<https://perma.cc/DB2T-7NDC>].

<sup>32</sup> Kleefeld, *supra* note 31.

<sup>33</sup> Peñalver & Katyal, *supra* note 29.

<sup>34</sup> 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/V9QC-6VWD>]; Peñalver and Katyal, *supra* note 29.

<sup>35</sup> See, e.g., Eric Goldman, *The Latest Insidious Tactic to Scrub Online Consumer Reviews*, FORBES (July 23, 2013), <https://www.forbes.com/sites/ericgoldman/2013/07/23/the-latest-insidious-tactic-to-scrub-online-consumer-reviews/#4b9648373e1e> [<https://perma.cc/9J6M-B8LC>] (describing a Massachusetts attorney asserting copyright law to remove negative reviews of his legal services from Ripoff Report);



takedown videos critical of their practices or beliefs,<sup>36</sup> soldiers asserting copyright in photographs to hide their abuses of prisoners,<sup>37</sup> public figures asserting copyright to erase their prior published or recorded hateful or racist comments,<sup>38</sup> and more. None of the copyright owners in the scenarios above were trying to protect their economic or market interests in their copyrighted works. These instances also did not involve copyright owners using copyright to protect their privacy interests or even their dignity interests in their works. The sole purpose of copyright owners asserting copyright in these examples was to silence criticism, bury facts, or suppress and eliminate public dissemination of information. This type of behavior can damage legitimate copyright claims, distort copyright rules, erase history, and impair free speech and critical public discourse.

## II

### COPYRIGHT SILENCING HARMS SOCIETY

Asserting copyright to suppress information, erase facts, and censor criticism is detrimental to free speech and public discourse, and contrary to the purpose of copyright law to encourage the dissemination of information. Copyright is an “engine of free expression” because it “supplies the economic incentive create and disseminate ideas.”<sup>39</sup> Asserting copyright

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John Tehranian, *The New ©ensorship*, 101 IOWA L. REV. 245, 253 (2015) (describing a doctor using copyright law to remove negative consumer reviews of his services on Yelp).

<sup>36</sup> See, e.g., Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube*, ELECTRONIC FRONTIER FOUNDATION (Sept. 5, 2008), <https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube> [<https://perma.cc/SUX4-GCDV>] (4000 DMCA takedown notices filed within 12 hours asserting copyright claims against videos with content critical of Church of Scientology); Nate Anderson, *Scientology Fights Critics with 4,000 Takedown Notices*, ARS TECHNICA (Sept. 8, 2008), <https://arstechnica.com/uncategorized/2008/09/scientology-fights-critics-with-4000-dmca-takedown-notices/> [<https://perma.cc/7H4T-47NK>].

<sup>37</sup> See *Four Navy SEALs v. Associated Press*, 413 F.Supp.2d 1136, 1141–42 (S.D. Cal. 2005) (Navy SEALs assert copyright infringement against the Associated Press for publication of photographs the SEALs shared evidencing abuse of Iraqi prisoners).

<sup>38</sup> See, e.g., *Savage v. Council on Am.-Islamic Relations, Inc.*, 2008 WL 2951281, at \*1 (N.D. Cal. July 25, 2008) (claimant asserts copyright to remove organization’s posting of audio-clips of claimant making hateful and Islamophobic statements on radio station shows, including *Savage Nation*); *Caner v. Autry*, 16 F.Supp.3d 689, 692 (W.D. Va. 2014) (born-again Christian asserts copyright in order to remove online videos of speeches where he made false claims to have “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”).

<sup>39</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558

in order to silence and suppress the dissemination of ideas and facts contradicts copyright's purpose.

Copyright silencing can also distort copyright rules and harm legitimate copyright claims. In Jeanne Fromer's article *Should the Law Care Why Intellectual Property Rights Have Been Asserted*, Fromer describes instances where copyright owners use copyright to protect interests other than marketplace harm.<sup>40</sup> Some of these instances include, for example, "an individual's concern to maintain privacy of personal communication (or information), an heir's interest in preserving his or her predecessor's reputation, a person's interest in keeping private sexually explicit or suggestive materials, a religious organization's ambition to keep its materials restricted, and an author's desire to avoid criticism."<sup>41</sup> Fromer argues that using copyright to protect these non-economic or non-market interests can "distort the intellectual property system, causing harm to society."<sup>42</sup> One of the harms is the imposition of "an additional cost on society because they will be imposing restrictions on market interests outside of the copyright . . . system in addition to those within."<sup>43</sup> Another harm Fromer identifies is the distortion of copyright law, including fair use, where courts implicitly consider the non-economic motivations of copyright owners to articulate rules that are mismatched when applied to archetypical copyright infringement claims.<sup>44</sup> Andrew Gilden describes an example this type of distortion in *Market Gibberish* where courts in copyright infringement cases use the language of economic incentive and market harm to protect copyright owners' non-economic and non-market interests in their privacy, reputation, or sexual autonomy.<sup>45</sup> This results in what Gilden terms "market gibberish," which "hides the true motivations behind a copyright lawsuit as well as courts' resolution of the dispute, thereby masking the interests actually at stake . . . ."<sup>46</sup>

Copyright silencing also causes harm to public discourse

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(1985).

<sup>40</sup> Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUSTON L. REV. 549 (2016).

<sup>41</sup> *Id.* at 557.

<sup>42</sup> *Id.* at 587.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 588–90.

<sup>45</sup> Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019 (2019).

<sup>46</sup> *Id.* at 1022.

by, for instance, suppressing the most credible evidence of factual information. Even if there are alternative ways to express or explain what happened in history or what someone has said, the “inability to use the most evocative expression possible diminishes the power of a speaker’s message.”<sup>47</sup> For instance, the most credible evidence that Dr. Drew dismissed the severity of the coronavirus are video and audio recordings of Dr. Drew dismissing the severity of coronavirus. If Dr. Drew can assert copyright to those video or audio recordings to prevent uses that are critical of him, he effectively removes from public discourse the most persuasive evidence that he made those statements. By “remov[ing] the most credible evidence to validate or contest those facts and ideas,” copyright silencing “creat[es] opportunities to undermine the search for truth in the first place.”<sup>48</sup>

Finally, copyright silencing can effectively erase history and artificially influence social thought. In their article *Copyright’s Memory Hole*, Eric Goldman and Jessica Silbey describe scenarios where copyright owners assert copyright to remove embarrassing published content, including photographs and images, and suppress dissemination of critical or negative online comments and reviews.<sup>49</sup> Goldman and Silbey argue that using copyright to suppress information and facts can create “memory holes” in society by “relegat[ing] the facts and ideas those works contain to persisting only in people’s memories.”<sup>50</sup> This allows facts or ideas to “fade out of circulation—and eventually fade away altogether.”<sup>51</sup> Goldman and Silbey argue that this harms society “[b]y facilitating the selective suppression of information for private benefit . . . shap[ing] how society thinks.”<sup>52</sup>

In spite of these harms to society, copyright silencing subsists. So why is it so difficult to stop owners from asserting copyright to silence and suppress information and facts?

### III

#### PRACTICAL AND LEGAL HURDLES TO FIGHTING COPYRIGHT

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<sup>47</sup> 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*, 32 B.C.L. Rev. 1, 9–10 (2000).

<sup>48</sup> Goldman & Silbey, *supra* note 4, at 935.

<sup>49</sup> See generally *id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 935–36.

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It is difficult to defeat copyright silencing because this behavior frequently goes unnoticed or undetected, because it is hard to determine the motivation of copyright owners and motivations to suppress information and censor criticism may overlap with motivations to protect privacy and intimate information, and because there are practical limitations on legal solutions that appear to fight copyright silencing, such as fair use, copyright misuse, and anti-SLAPP laws.

Copyright silencing can be difficult to defeat because much of it occurs out of the public eye, when putative infringers silently remove their offending works after threatened with legal action,<sup>53</sup> or ISPs take the works down in response to copyright owners' DMCA notices.<sup>54</sup> Unless these disputes are picked-up by journalists or publicized on social media, they can go unnoticed and undetected. This allows copyright silencing to succeed through mere assertion of copyright, and allows copyright silencing to "effectively suppress content without any judicial oversight."<sup>55</sup> Additionally, it can be difficult to accurately determine a copyright owner's motivation for asserting their copyright. Fromer acknowledges that requiring courts to "accurately ascertain[] a plaintiff's motivation in asserting intellectual property and then sifting the proper from the improper motivations" would be both expensive and technically difficult.<sup>56</sup>

This difficulty is further complicated by the fact that copyright owners can have more than one motivation for asserting their copyright. Copyright owners who assert copyright to silence may primarily be motivated to suppress information and criticism, but this motivation can overlap with the desire to protect their privacy or prevent public dissemination of private and intimate information.<sup>57</sup> For

<sup>53</sup> *Id.* at 16.

<sup>54</sup> Tehranean, *supra* note 35, at 282–83 (“The censorious use of copyright occurs both extra-judicially and through the litigation process. Reform efforts should therefore focus on remedying both the abuse of DMCA takedown notifications for suppressive purposes and the disingenuous use of copyright litigation to punish one's ideological adversaries for their speech on matters of public import.”).

<sup>55</sup> Goldman & Silbey, *supra* note 4, at 947.

<sup>56</sup> Fromer, *supra* note 40, at 590.

<sup>57</sup> See further discussions of this overlap in: Tehranean, *supra* note 35, 280–82 (recognizing that “motivation can be difficult to indecently determine,” but attempting to distinguish dignitary concerns from censorious motives by examining whether use of the work “strongly advances the expression of basic facts or commentary on matters of public concern”); Shyamkrishna Balganeshe,

instance, in the pending litigation *Neighbors v. Monger*, Slade Neighbors asserted copyright infringement against his ex-partner Veronica Monger for her publication of Neighbors' private text messages and emails to her.<sup>58</sup> Monger published these text messages and emails on a website as "evidence [of] the alleged physical and mental abuse" that Neighbors inflicted upon Monger during their relationship, and to provide support and resources for other victims of domestic abuse.<sup>59</sup> Neighbors registered his text messages and emails with the Copyright Office and filed a copyright claim against Monger for her unauthorized reproduction, distribution, and public display of his text messages and emails.<sup>60</sup> In this case, Neighbors is clearly using copyright to silence Monger, to suppress the dissemination of abusive text messages and emails he sent to her, and to censor her public criticism of his conduct. At the same time, Neighbors may also be motivated by protecting his privacy and the public dissemination of his private and intimate correspondence to his former partner. Is this case similar to Weinstein's attempt to use copyright to suppress sexual assault and harassment allegations against him? Or is it similar to an ex trying to use copyright to prevent public dissemination of her intimate photographs as non-consensual pornography? Both of these situations involve copyright owners asserting copyright to prevent non-economic or non-market harms, and both involve the suppression of private information, but one is an egregious attempt to silence victims and censor criticism and the other a sympathetic attempt at self-protection. Commentators may argue that, to resolve this overlap, copyright should not be the legal solution to protect any interests that are unrelated to economic or market harm.<sup>61</sup> However, until privacy laws create viable solutions to protect private and intimate information such as non-consensual pornography, copyright law will continue to be an effective and

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*Privative Copyright*, 73 VAND. L. REV. 1 (2020) (examining privative copyright claims to protect dissemination of unpublished personal works); Goldman & Silbey, *supra* note 4, at 962–70 (examining the overlap between privacy values and "proper copyright claims").

<sup>58</sup> Milord A. Keshishian, *Using Copyright Law to Silence Alleged Abuse Victim? Fair Use Defense?*, L.A. INTEL. 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/V5RB-3K4Y].

<sup>59</sup> *Id.*

<sup>60</sup> Complaint for Monetary Damages and Injunctive Relief, *Slade Neighbors v. Veronica Monger*, 2:20-cv-04146 (May 6, 2020). This case is ongoing.

<sup>61</sup> See Balganes, *supra* note 57, at 21 n.65 (surveying scholarship critical of using copyright to protect dignitary or privacy interests).

efficient legal solution to suppress the public dissemination of private information, and courts will continue to distort copyright in order to generate solutions for these sympathetic copyright claimants.<sup>62</sup> Therefore, because privacy interests and copyright silencing may overlap, it can be difficult to identify and focus solutions against copyright owners that assert copyright for the primary purpose of silencing.

In addition to practical hurdles, there are limitations to the legal solutions that, theoretically, should fight copyright silencing. As a preliminary matter, courts do not typically engage in separate First Amendment analyses in copyright infringement claims.<sup>63</sup> Therefore, even though copyright silencing clearly involves the suppression of speech, courts will not generally apply an additional layer of First Amendment protection or separate test in copyright infringement cases.<sup>64</sup> Instead, courts rely on “copyright’s built-in free speech safeguards,” including the fair use doctrine, to address these types of overreaching copyright claims.<sup>65</sup>

Copyright fair use guarantees “breathing space within the confines of copyright.”<sup>66</sup> It excuses otherwise infringing uses of copyrighted works for the purposes of criticism, comment, news reporting, teaching, scholarship, research, and other transformative uses.<sup>67</sup> While the fair use doctrine theoretically might allow a putative infringer to defeat most, if not all, of the copyright silencing scenarios described above, defending fair use can be costly and can produce uncertain results. For instance, in the *Tiger King* copyright litigation described in the introduction of this Essay, even though Joe Exotic’s fair use defense survived summary judgment and, by most accounts, was a “strong fair use defense,”<sup>68</sup> by that point in the litigation,

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<sup>62</sup> See Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, in *VISIONS OF PRIVACY IN THE MODERN AGE* (Marc Rotenberg, ed., 2015), 191–99 (discussing cases where plaintiffs have used copyright as a tool for protecting privacy interests).

<sup>63</sup> *Harper & Row*, 471 U.S. at 556–60.

<sup>64</sup> *Harper & Row*, 472 U.S. at 555–56, 560 (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 National Committee*, 369 F.Supp.3d 1053, 1062 n.4 (D. Mont. 2019).

<sup>65</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). See also *Harper & Row*, 471 U.S. at 560; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001); *Peterman*, 369 F.Supp.3d at 106 n.4 (“the fair use defense is itself a ‘built-in First Amendment accommodation’”).

<sup>66</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>67</sup> 17 U.S.C. Section 107.

<sup>68</sup> Brian L. Frye, *The King of Tragicomedy*, *JURIST* (May 9, 2020), <https://www.jurist.org/commentary/2020/05/brian-frye-tiger-king/>

the case was likely too costly and time-consuming for Exotic to continue defending, leading him to capitulate to a permanent injunction and consent decree. The fair use doctrine also does not protect putative infringers on the receiving end of demand letters or DMCA takedown notices who are unaware of or unwilling to fight copyright silencing. Undeniably, it is often less expensive, less time-consuming, and less uncertain for putative infringers to simply cease distributing or remove offending material from the Internet than engage in DMCA counter-notice filings and potential federal copyright lawsuits.

The copyright misuse defense also appears to be a promising theory to fight copyright silencing. Copyright misuse is an equitable defense in copyright law based on the concept of unclean hands.<sup>69</sup> It grew out of the analogous doctrine of antitrust-based patent misuse.<sup>70</sup> While still evolving, copyright misuse has traditionally been applied in cases involving copyright owners who use copyright in ways that violate federal antitrust law.<sup>71</sup> Some courts, however, recognize the potential for copyright misuse to also apply to “attempts to extend . . . copyright beyond the scope of the exclusive rights granted by Congress in a manner that violates the public policy embodied in copyright law.”<sup>72</sup> The court in *Video Pipeline v. Buena Vista Home Entertainment* acknowledged that copyright misuse “might operate beyond its traditional anti-competition context” and could be applied in cases where copyright owners attempt to use copyright to restrict critical speech.<sup>73</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

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[<https://perma.cc/C3LV-RL93>]; See also Mike Masnick, *From Tiger King to Censorship King: Copyright Lobbyist Cheers On SLAPP Copyright Suit Featured in Tiger King*, TECH DIRT (April 24, 2020), <https://www.techdirt.com/articles/20200421/17395744350/tiger-king-to-censorship-king-copyright-lobbyist-cheers-slapp-copyright-suit-featured-tiger-king.shtml> [<https://perma.cc/J72Q-N6N8>] (“there’s no way the use in question was not fair use”); Lamel, *supra* note 11 (“[O]ut of nowhere, I found myself screaming at the television, ‘That’s a fair use!’”).

<sup>69</sup> Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 902 (2004).

<sup>70</sup> Olson, *supra* note 1, at 570.

<sup>71</sup> Judge, *supra* note 69, at 903.

<sup>72</sup> *Id.* at 903–04.

<sup>73</sup> *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 206 (3d Cir. 2003). See also Deepa Varadarajan, *THE USES OF IP MISUSE*, 68 EMORY L. J. 739, 761–62 (2019); Olson, *supra* note 1, 581.

dissemination to the public of creative activity.”<sup>74</sup> Similarly, the *Omega S.A. v. Costco Wholesale Corp.* court affirmed 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>75</sup> Copyright silencing, by asserting 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>76</sup> and copyright misuse may, in the future, serve as a viable legal solution to fight copyright silencing. For now, however, it is limited by some practical issues: the Supreme Court has yet to adopt misuse as a valid defense to copyright infringement claims, and a number of federal jurisdictions continue to narrowly apply misuse to anticompetitive behavior only.<sup>77</sup>

Finally, state anti-SLAPP laws seem like they should be a helpful tool to fight copyright owners that use copyright to suppress information and censor critics. SLAPP stands for Strategic Lawsuit Against Public Participation and anti-SLAPP laws “provide breathing space for free speech on contentious public issues.”<sup>78</sup> Anti-SLAPP laws are aimed at “decreas[ing] 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>79</sup> While theoretically, anti-SLAPP laws should be a valuable shield to fight copyright silencing, there are legal and practical problems. The first and most critical problem is courts’ findings that state anti-SLAPP laws do not apply to federal law causes of action.<sup>80</sup> A number of federal jurisdictions, including the Fifth,<sup>81</sup> Eleventh,<sup>82</sup> D.C. Circuits,<sup>83</sup> and, even this past July, the Second Circuit,<sup>84</sup> also hold that state anti-SLAPP statutes, including California’s, are inapplicable in federal courts because they conflict with

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<sup>74</sup> *Video Pipeline, Inc.*, 342 F.3d at 205–06.

<sup>75</sup> *Omega S.A. v. Costco Wholesale Corp.*, 2011 WL 8492716, at \*2 (C.D. Cal. Nov. 9, 2011).

<sup>76</sup> *Omega S.A.*, 776 F.3d at 699 (Wardlaw, J. concurring) (citing *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990)).

<sup>77</sup> Olson, *supra* note 1, at 582–83.

<sup>78</sup> *La Liberte v. Reid*, 966 F.3d 79, 85(2d Cir. July 15, 2020) (citing *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015)).

<sup>79</sup> *La Liberte*, 966 F.3d at 85 (citing EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 118 (5th ed. 2014).).

<sup>80</sup> See, e.g., *Hilton v. Hallmark Cards*, 559 F.3d 894, 901 (9th Cir. 2010).

<sup>81</sup> *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019).

<sup>82</sup> *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018).

<sup>83</sup> *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015).

<sup>84</sup> *La Liberte*, 966 F.3d at 87(2d Cir. July 15, 2020).



Federal Rules of Civil Procedure 12 and 56. There is no federal anti-SLAPP law and, with the exception of California and a small handful of states, most states' anti-SLAPP laws appear to narrowly protect the exercise of the right to petition government bodies.<sup>85</sup> Because of these hurdles, it is no surprise that Goldman and Silbey found no copyright actions that have been judged a SLAPP.<sup>86</sup>

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Copyright silencing is a growing threat in copyright law. The ability to use copyright to suppress information and censor critics is harmful to society and public discourse, and undermines the very purpose of copyright law to increase, rather than decrease, the dissemination of publicly valuable ideas and information. Copyright silencing can also distort copyright rules, erase history, and artificially influence social thought. In spite of copyright silencing's harm on society, it is difficult to defeat. While there are legal solutions that, theoretically, appear to be promising measures to combat this misuse of copyright, they suffer from practical deficiencies making them impracticable against copyright silencing.

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<sup>85</sup> 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).

<sup>86</sup> Goldman & Silbey, *supra* note 4, at 994.