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On Balance: General Casualty Co. v. Wozniak Travel, Inc.

Kenneth L. Port

Mitchell Hamline School of Law, ken.port@mitchellhamline.edu

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ON BALANCE: GENERAL CASUALTY CO. V. WOZNIAK TRAVEL, INC.

Professor Kenneth L. Port¹

On March 19, 2009, the Minnesota Supreme Court took a significant step in leveling the intellectual property playing field. In *General Cas. Co. v. Wozniak Travel, Inc.*,² the Court determined that trademark infringement falls within the scope of a commercial general liability (CGL) insurance policy and that it amounts to an advertising injury.³ As such, trademark infringement should fall within the scope of the insurance policy and the insurance company must defend the defendant.⁴

General Casualty derives from a suit filed in The District Court of Northern California by The Saul Zaentz company d/b/a Tolkien Enterprises (“Tolkien”) against Wozniak Travel, Inc. d/b/a Hobbit Travel (“Hobbit Travel”) alleging trademark infringement.⁵ Tolkien is a California corporation that holds trademarks and related licensing rights to late Professor J.R.R. Tolkien’s novels *The Hobbit* and *The Lord of the Rings* trilogy.⁶ Included in Tolkien’s trademark is the term HOBBIT which Tolkien created in the 1930’s to describe fictional, three-foot-tall human-like characters in his novels.⁷

Upon securing a trademark registration for the word HOBBIT, Tolkien established and presently maintains a worldwide licensing program that promotes, protects, and profits from those trademarks.⁸ Tolkien claims that the hobbit trademark is significantly associated with travel as it is an important theme in Tolkien’s books, and Tolkien even licensed the term HOBBIT to airlines, an online travel ticket service, and for travel products.⁹ In 2006, Tolkien learned of use by Hobbit Travel and subsequently filed suit.¹⁰

Hobbit Travel is a Minnesota based travel agency in operation under the Hobbit Travel name since 1976.¹¹

¹ Kenneth L. Port is the Director of the Intellectual Property Institute at William Mitchell College of Law.

² See 762 N.W.2d 572 (Minn. 2009).

³ See *id.*

⁴ See *id.*

⁵ See *id.* at 574 n.1 (citing Saul Zaentz Co. v. Wozniak Travel, Inc., No. C-06-5421, 2008 WL 2949423 (N.D. Cal. July 29, 2008)).

⁶ See *id.* at 574.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *Gen. Cas. Co.*, 762 N.W.2d at 574.

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Hobbit Travel maintains a website aimed at travel consumers within the United States. Hobbit Travel's website used the term "hobbit" in representing Hobbit Travel's name, special offers and on domain names.¹²

Tolkien sued Hobbit Travel in the District of Northern California alleging that Hobbit Travel wrongfully used the word "hobbit" in its name causing confusion.¹³ Tolkien sought injunctive relief, monetary damages, and attorney fees.¹⁴ Meanwhile, Hobbit Travel asked General Casualty, the issuer of its Commercial General Liability ("CGL") and Commercial Umbrella Liability ("CUL") policy to defend it in this litigation.¹⁵

General Casualty did agree to defend Hobbit Travel in this litigation. As a result, General Casualty filed a complaint for declaratory relief in the United States District Court of Minnesota.¹⁶ Both parties moved for summary judgment on whether Tolkien's allegations were consistent with the enumerated "advertising injuries" in General Casualty's policies, therefore, settling which party is responsible for defending Hobbit Travel against Tolkien's claims.¹⁷

The Minnesota District Court determined that there was no controlling case law on this issue in the State of Minnesota.¹⁸ Therefore, the court certified two questions for the Minnesota Supreme Court to answer, which the Minnesota Supreme Court agreed to decide.¹⁹

The Court for the Northern District of California dismissed all of the claims Tolkien asserted against Hobbit Travel based on Hobbit Travel's affirmative defense of laches.²⁰ Tolkien is in the process of appealing that decision. As General Casualty's complaint for declaratory relief in the United States District Court was still unresolved, the Minnesota Supreme Court still decided both certified questions.²¹

"The first certified question from the Federal District Court of Minnesota asks: Does trademark infringement fall within the scope of 'misappropriation of advertising ideas or style of doing business' or

¹² See *id.*

¹³ See *id.* (citing *Saul Zaentz Co. v. Wozniak Travel, Inc.*, No. C-06-5421, 2008 WL 2949423 (N.D.Cal. July, 29, 2008)).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *Gen. Cas. Co.*, 762 N.W.2d at 575.

¹⁸ See *id.* (citation omitted).

¹⁹ See *id.* ("[The Minnesota Supreme Court] may answer a question of law certified...by a court of the United States...if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.") (quoting Minn. Stat. § 480.065, subdiv. 3 (2008)).

²⁰ See *Gen. Cas. Co.*, 762 N.W.2d at 574 n.1.

²¹ See *id.*

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constitute ‘infringement of copyright, title, or slogan’ as set forth in the CGL policy?”²² “[I]f Tolkien’s alleged damages arose under one of [the] advertising-injury definitions,” then General Casualty would have to defend “every claim that ‘arguably’ falls within the scope of coverage.”²³

The court held that the allegations made by Tolkien “fall within the plain meaning of ‘infringement of title’ in General Casualty’s CGL policy.”²⁴ Tolkien’s claims specifically allege that Hobbit Travel is misusing the word “hobbit” in its name and advertisements, which infringe on its rights “to use and license others to use, marks related to the Tolkien works.”²⁵ Thus, the court did not need to decide “whether the allegations also fall within the scope of ‘infringement of copyright...or slogan’ or ‘misappropriation of advertising dies or style of doing business.’”²⁶

For the second question, the court adopted the definition of advertising set forth by the Wisconsin Supreme Court in *Acuity v. Bagadia*,²⁷ that it is “any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business.”²⁸ Hobbit Travel used the “hobbit” name on its website, which included as a purpose soliciting travel business. Therefore, the court found General Casualty had an obligation to provide coverage for Hobbit Travel, because the damages alleged arouse out of Hobbit Travels use of Tolkien’s “advertising idea,” the “hobbit” name.²⁹

Minnesota joins few States in America that find trademark infringement to be an advertising injury. In fact, now only two States, Minnesota and Wisconsin,³⁰ have reported cases from the respective supreme courts that find trademark infringement to amount to advertising injury and therefore an insured event. There are thirty-six total reported cases in the United States that come to such a conclusion.³¹ Six additional States

²² *Id.* at 578.

²³ *Id.* at 575-76.

²⁴ *Id.* at 578.

²⁵ *See id.*

²⁶ *Id.*

²⁷ 310 Wis. 2d 197, 750 N.W.2d 817, 828 (2008).

²⁸ *Gen. Cas. Co.*, 762 N.W.2d at 579 (citing *Acuity v. Bagadia*, 310 Wis. 2d 197, 750 N.W.2d 817, 828 (2008)).

²⁹ *See id.*

³⁰ *See General Cas. Co.*, 762 N.W.2d 572; *Acuity v. Bagadia*, 310 Wis. 2d 197.

³¹ *See Charter Oak Fire Ins. Co. v. Hedeem & Cos.*, 280 F.3d 730 (7th Cir. 2002), *reh'g and reh'g en banc denied* (Mar. 12, 2002) (applying Wisconsin law); *Gemmy Indus. Corp. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698 (N.D. Tex. Nov. 17, 1998), *aff'd without opinion*, 200 F.3d 816 (5th Cir. 1999) (applying Texas law); *Federated Mut. Ins. Co. v. Power Lift*, 152 F.3d 925 (9th Cir. 1998) (applying California law); *Rosco, Inc. v. TIG Ins. Co.*, No. C 96-1822 THE, 1996 WL 724896 (N.D. Cal. Dec. 5, 1996), *rev'd on other grounds*, 139 F.3d 907 (9th Cir. 1998) (applying California law); *Letro Prods., Inc. v. Liberty Mut. Ins. Co.*, 114 F.3d 1194 (9th Cir. 1997) (applying California law); *Flodine v. State Farm Ins. Co.*, No. 99 C 7466, 2001 WL 204786 (N.D. Ill. March 1, 2001) (apparently applying Illinois law); *CAT Internet Sys., Inc. v. Providence Wash. Ins. Co.*, 153 F. Supp. 2d 755 (E.D. Pa. 2001) (applying Pennsylvania law); *Platinum Tech., Inc. v. Fed. Ins. Co.*, No. 99 C 7378, 2000 WL 875881 (N.D. Ill. June 28, 2000) (applying Illinois law); *Am. Employers' Ins. Co. v. DeLorme Pub. Co., Inc.*, 39 F.

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have reached this conclusion at a lower level than the Supreme Court.

Although easily said, this outcome has some very important ramifications.

In part, this is because Intellectual Property has grown in stature in the public mind. It has now become a mature subject matter in law schools.³² On average, ABA-accredited law schools offer over six different core IP classes per year.³³ Only six of those 198 ABA-accredited law schools do not offer at least one course on IP.³⁴ Some law schools offer up to sixteen core IP courses.³⁵ IP is now a principal component of most law schools, rather than a “new” subject matter.³⁶

Supp. 2d 64 (D. Me. 1999) (applying Maine law); Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co., 61 F. Supp. 2d 611 (S.D. Tex. 1999) (applying Texas law); Arnette Optic Illusions, Inc. v. ITT Hartford Group, Inc., 43 F. Supp. 2d 1088 (C.D. Cal. 1998) (applying California law); Indus. Molding Corp. v. Am. Mfrs. Mut. Ins. Co., 17 F. Supp. 2d 633 (N.D. Tex. 1998), *order vacated pursuant to settlement*, 22 F. Supp. 2d 569 (N.D. Tex. 1998) (applying Texas law); Energex Sys. Corp. v. Fireman's Fund Ins. Co., No. 96 CIV. 5993(JSM), 1997 WL 358007 (S.D. N.Y. June 25, 1997) (applying New York law); Mass. Bay Ins. Co. v. Penny Preville, Inc., No. 95 Civ. 4845 (RPP), 1996 WL 389266 (S.D. N.Y. July 10, 1996) (applying New York law); Union Ins. Co. v. Knife Co., Inc., 897 F. Supp. 1213 (W.D. Ark. 1995) (applying Arkansas law); Am. Econ. Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246 (N.D. Cal. 1994), *reconsideration denied* (June 22, 1995) (applying California law); Poof Toy Prods., Inc. v. U.S. Fid. and Guar. Co., 891 F. Supp. 1228 (E.D. Mich. 1995) (applying Michigan law); Ben Berger & Son, Inc. v. Am. Motorist Ins. Co., 36 U.S.P.Q.2d (BNA) 1105, 94 CIV. 3250 (DC), 1995 WL 386560 (S.D. N.Y. June 29, 1995) (applying New York law); A Touch of Class Imps., Ltd. v. Aetna Cas. and Sur. Co., 901 F. Supp. 175 (S.D. N.Y. 1995), *adhered to on reargument* (Jan. 12, 1996) (apparently applying New York law); Dogloo, Inc. v. N. Ins. Co. of New York, 907 F. Supp. 1383 (C.D. Cal. 1995) (applying California law); Swfte Intern., Ltd. v. Selective Ins. Co. of Am., Civ. A. No. 94-44-SLR, 1994 WL 827812 (D. Del. Dec. 30, 1994) (applying Delaware law); J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Mass. Bay Ins. Co., 818 F. Supp. 553 (W.D. N.Y. 1993), *decision vacated pursuant to settlement*, 153 F.R.D. 36 (W.D. N.Y. 1994) (applying New York law); Nortek, Inc. v. Liberty Mut. Ins. Co., 858 F. Supp. 1231 (D. R.I. 1994) (applying Rhode Island law); Indus. Indem. Co. v. Apple Computer, Inc., 95 Cal.Rptr.2d 528 (Cal. Ct. App. 1999); Lebas Fashion Imps. of USA, Inc. v. ITT Hartford Ins. Group, 50 Cal. App. 4th 548, 59 Cal. Rptr. 2d 36 (Cal. Ct. App. 1996), *as modified on denial of reh'g* (Nov. 27, 1996); First State Ins. Co. v. Alpha Delta Phi Fraternity, 39 U.S.P.Q.2d (BNA) 1905, 1995 WL 901452 (Ill. App. Ct. 1995); B.H. Smith, Inc. v. Zurich Ins. Co., 676 N.E.2d 221 (Ill. App. Ct. 1996) (applying New York law); Carnival Brands, Inc. v. Am. Guar. and Liab. Ins. Co., 726 So. 2d 496 (La. Ct. App. 1999), *writ denied*, 740 So. 2d 636 (La. 1999); Am. States Ins. Co. v. Hayes Specialties, Inc., No. 97-020037 CK 4, 1998 WL 1740968 (Mich. Cir. Ct. March 6, 1998); Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc., 762 N.W.2d 572 (Minn. 2009); Williamson v. N. Star Cos., 1997 WL 53029 (Minn. Ct. App. Feb. 11, 1997); Allou Health & Beauty Care, Inc. v. Aetna Cas. and Sur. Co., 703 N.Y.S.2d 253 (N.Y. App. Div. 2000); Am. Mfrs. Mut. Ins. Co. v. Quality King Distribs., Inc., 731 N.Y.S.2d 234 (N.Y. App. Div. 2001); Westfield Ins. Co. v. Factfinder Mktg. Research, Inc., 860 N.E.2d 145 (Ohio Ct. App. 2006); Super Duper Inc. v. Penn. Nat. Mut. Cas. Ins. Co., No. 26717, 2009 WL 2948516 (S.C. Sept. 14, 2009); Acuity v. Bagadia, 750 N.W.2d 817 (Wis. 2008); Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 660 N.W.2d 666 (Wis. 2003).

³² See *infra* text accompanying notes 32-34.

³³ Mitchell Report on Intellectual Property Curricula, <http://www.wmitchell.edu/intellectual-property/Mitchell-Report-on-IP-Curriculum/> (last visited February 3, 2010) (click “ABA-Approved”; then add the course category totals from “Number of selected schools offering,” which totals 1,261 courses; then divide 1,261 courses by 198 law schools, for an average of 6.37 courses per ABA-Approved law school).

³⁴ *Id.* (click “ABA-Approved”; then scroll to the bottom of “Categories Satisfied” to find six schools offer no IP courses).

³⁵ *Id.* (click “ABA-Approved”; then scroll to the top of “Categories Satisfied”).

³⁶ See *supra* text accompanying notes 32-34.

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Prior to 1985, IP was largely relegated to patent law specialists, engineers and scientists, who would toil great hours to obtain a patent for a client; however, when the patent holder sued a third party for patent infringement, that patent was very rarely enforced. The primary reason the patent was not enforced was the fact that IP rights have long been balanced against Antitrust law. That is, a patent (or to a lesser extent other IP) is essentially a monopoly. Antitrust law had been focused on finding, disclosing and rooting out monopolies.³⁷ America used to abhor monopolies. Today, we merely redefine “monopoly” to claim that a patent is not a legal or economic monopoly because every patent is not a monopoly and every patent does not confer market power.³⁸

America no longer hates monopolies, especially when they are in the form of IP. One no longer hears of the antitrust counter-claim that used to routinely be brought in response to IP infringement. The Antitrust laws have not been amended; their application clearly has.³⁹ Antitrust laws are applied much less frequently than they were prior to 1985.⁴⁰ Therefore, the balance that used to be recognized between antitrust laws on one hand (preventing monopolies) and IP on the other hand (supporting monopolies) has gone away. We are left with IP rights being recognized and enforced without much consideration to the Antitrust issues that used to be raised by attempting to enforce IP rights.

This has had a huge impact on both the consuming public and on corporate America. It has impacted the consuming public because people now have to pay more for IP protected goods and services. It has impacted corporate America because these entities now understand that IP can and does significantly add to the bottom line of a corporation’s net worth. A significant portion of the value of Microsoft, for example, is in goodwill and intangible assets.⁴¹ It is said the value of Microsoft is 95% IP and 5% physical holdings.⁴² Corporations like Microsoft only become possible in a very pro-IP atmosphere. If a very small percentage of Microsoft’s IP rights were being found valid and infringed, it is unlikely that it could have grown into the large corporation it is with the market share it now commands.

Although getting American courts to recognize valid IP rights is a good thing, we have now become concerned that the old balance is getting skewed in favor of IP holders at the expense of both the consuming public and third parties who want to compete. Therefore, Microsoft became the most active trademark plaintiff in the years 2001-2005. In that time, they filed more than 235 law suits alleging trademark

³⁷ See Richard A. Posner, *Antitrust Law* 9-15 (2d ed. 2001).

³⁸ See Robert L. Harmon, *Patents and the Federal Circuit* § 1.4(b), at 22-23 (8th ed. 2007).

³⁹ See Posner, *supra* note 36.

⁴⁰ See *id.* at 35-36. From the *Trade Regulation Reporter Transfer Binder* by Commerce Clearing House and noting data, by decade, of the number of antitrust cases filed by the U.S. Justice Department from 1890-1999). For example, from 1960-1969, 402 cases were filed; from 1970-1979, 419; from 1980-1989, 741; and from 1990-1999, only 609. *Id.* at 36.

⁴¹ Microsoft Corporation Annual Report, http://www.microsoft.com/msft/reports/ar09/10k_fr_bal.html (last visited January 22, 2010).

⁴² See *id.*

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infringement.⁴³ The Recording Industry Association of America (RIAA) obtained a \$222,000 judgment against a woman in Duluth, Minnesota.⁴⁴ Although the jury verdict was overturned and is now being retried, the very fact that the RIAA would pursue this law suit to this extent knowing well that the defendant was judgment proof demonstratively proves their strategy. Whether this person is able to pay this judgment or not, the RIAA has sent a very clear message about music downloading: watch out. This year, RIAA is reported to have filed over 560 such law suits per month all over America against a variety of individuals alleging copyright infringement.⁴⁵ Apple went ahead and launched the use of “iPhone” even though they did not own the rights to that trademark and knew it. Cisco, the owner of that trademark registration at the time, filed suit and they soon came to a settlement.⁴⁶ Google makes copyrighted books and magazines available for reading and searching in their database.⁴⁷ There is little doubt that this amounts to copyright infringement. However, Google has successfully negotiated a settlement that awaits court approval⁴⁸ where it and agreed to pay very small sums of money to have access to thousands of books.⁴⁹

Our society today is ripe with examples of IP rights that have lost touch with the very balance that made the rights possible in the first place.

We used to have and recognize a very healthy public domain.⁵⁰ Things that were claimed as protected by IP routinely fell into the public domain either by a short term of protection or some misstep by the holder. Today, fewer and fewer things are falling into the public domain. Where Copyrights used to be protected for 28 years⁵¹ and were rarely renewed for that additional 28 years,⁵² today the copyright term is

⁴³ See Michael Barbaro & Julie Creswell, *With a Trademark in Its Pocket, Levi's Turns to Suing Its Rivals*, N.Y. Times, Jan. 29, 2007, at A1.

⁴⁴ See *Capitol Records Inc. v. Thomas*, 06-CV-01497 (D. Minn. Oct. 5, 2007).

⁴⁵ See Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, And Other Good Targets For The Recording Industry's File Sharing Litigation*, 4 Nw. J. Tech. & Intell. Prop. 133, 134 (2006).

⁴⁶ See Brad Stone, *Settlement Lets Apple Use 'iPhone,'* N.Y. Times, Feb. 21, 2007, at C1, available at, <http://www.nytimes.com/2007/02/22/technology/22apple.html>.

⁴⁷ See Google Books, <http://www.books.google.com/books> (last visited Nov. 8, 2009).

⁴⁸ See Miguel Helft, *Google Books Settlement Delayed Indefinitely*, Bits, Sep 24, 2009, <http://bits.blogs.nytimes.com/2009/09/24/google-books-settlement-delayed-indefinitely/>.

⁴⁹ See Jessica E. Vascellaro & Jeffrey A. Trachtenberg, *Digital-Rights Signatories Revisit Google's Deal: After Justice Department Files Objections, and Possible Remedies, Groups Express Confidence on Addressing Issues*, Wall St. J., Sept. 21, 2009, at B3; see also *Google Books Settlement Agreement*, <http://www.books.google.com/googlebooks/agreement> (last visited Jan. 19, 2009) (highlighting the terms of the settlement agreement between Google and various publishers and authors).

⁵⁰ See generally, James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (2008).

⁵¹ See 17 U.S.C. § 24 (1909 Act) (amended 1976).

⁵² See *Orphan Works*, 70 Fed. Reg. 3739, 3740-41 (Jan. 26, 2005) (noting the low renewal rate of copyrights under the Copyright Act of 1909).

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life of the author plus 70 years.⁵³ Where trademarks used to be protected in America only to the extent the holder used the marks, today the new doctrine of trademark dilution has become recognized⁵⁴ and so Budweiser was able to enjoin the use of “Buttwiser” for use on T-shirts⁵⁵ and Porsche was able to enjoin the use of “Manny’s Porshop” (as opposed to “Proshop”).⁵⁶

This balance is, in part, what made America great. The United States is the leading IP producing society in the world. This was made possible by this balance. In other countries, IP rights appear more as a monopoly owned by an individual.⁵⁷ In America, we have long recognized that the author or inventor is protected only as a vehicle to a larger economic and Constitutional good. Article 1, Section 8, Clause 8 of the U.S. Constitution allows Congress to protect patents and copyrights so that the “progress of the sciences and useful arts” might be recognized. That is, it is the dissemination of information that the American system found important, not only the granting of monopolistic rights to individuals. A lofty goal, but one that has served the United States very well for over 200 years. No other developed nation has such an IP clause to their Constitution.

The Internet has both greatly exacerbated infringement of IP rights and, at the same time, lead to enormous wealth, freedom and new forms of expression. While the IP laws were all drafted decades prior to the advent of the Internet, the IP laws are called upon to respond to technologies no one could have envisioned when the IP laws were drafted.

Today, many youths engage in downloading copyrighted songs, videos or movies, merging them in some creative way with their own expression, and uploading these merged works on Youtube, Myspace or Facebook. The act of expropriating someone else’s copyrighted work and using it in these merged expressions is, simply put, copyright infringement. Some arguments regarding fair use may prevail in some cases, but fair use is an affirmative defense to infringement.⁵⁸ We do not address fair use until and unless infringement is established.

Therefore, although some of this conduct might be forgiven, to the extent that a copy is made, the content

⁵³ See 17 U.S.C. § 302(a) (2006).

⁵⁴ See 15 U.S.C. § 1125(c) (2006).

⁵⁵ *Anheuser-Busch, Inc. v. Andy's Sportswear, Inc.*, 1996 U.S. Dist. LEXIS 15583, at *1 (N.D. Cal. August 28, 1996).

⁵⁶ See *Porsche Cars North America, Inc. v. Manny's Porshop, Inc.*, 972 F. Supp. 1128, 1132 (N.D. Ill. 1997) (enjoining defendant from using the slogan “Manny’s Porshop” in its advertisements on the grounds that such term is confusingly similar to the trademark “Porsche” owned by the famous automaker).

⁵⁷ Moral rights and resale rights in France are a good example of this personal orientation of intellectual property rather than the American economic orientation to intellectual property rights. See generally, Cyril P. Rgamonti, *The Conceptual Transformation of Moral Rights*, 55 Am. J. Comp. L. 67 (2007); Jane Ginsburg, *Moral Rights in a Common Law System*, in *Moral Rights Protection In A Copyright System* 18 (Peter Anderson & David Saunders eds., 1992).

⁵⁸ See Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 Ohio St. L.J. 849, 855 (2001) (“The ambit of fair use has receded; its contours ever more uncertain”).

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industry⁵⁹ would argue that an infringement has occurred. The youth that posted a video of Bob Dylan apparently singing a Britney Spears song has, in the eyes of the content industry, infringed Bob Dylan's copyright to the video footage and Spears' copyright to the musical work.⁶⁰ From the youth's perspective, they've done something cool that their computer allowed them to do. If the computer let me do it, how am I liable to Spears and Dylan for statutory damages that may exceed \$200,000? Besides, everyone is doing it. How or why will they just catch me?

Therefore, because IP laws are becoming unbalanced and because the computer has become ubiquitous, a very significant gap has been created between the content industry on one hand and the very consumers of that content on the other.

Let me make this very clear: I am not advocating for anyone to be able to wholesale copy someone else's expression and face no consequences. To do that would be to ignore the rule of law which would ultimately result in social chaos.

Rather, I am advocating for balance. When there was balance in our system, the public domain was kept well fed. Things fell into the public domain all the time. Other artists or inventors could then borrow from the public domain to paint another *Starry Night* or invent a new artificial sweetener. As the IP laws became unbalanced in favor of inventors or the content industry, the public domain is starved. New creations of a *Starry Night* or new ways to sweeten our food without paying the caloric price are harder and more expensive to create.

This is not good for Microsoft, 3M, IBM, etc., and it is not good for you and me. We need an IP system that is as good for the RIAA as it for you and me. Currently, thousands upon thousands of IP infringements simply go unpunished. We need a system that responds to reality. In virtually every other area of the law the norm is compliance. In IP, the norm is non-compliance. Thousands upon thousands of IP infringements go unpunished. Enforcing these rights might be too expensive, it might take too much time or detection may simply not be likely or possible.

The youth who made the Youtube video of Bob Dylan lip synching a Britney Spears song will continue to engage in this conduct because he is doing it for fun. No matter how much you teach him about current IP laws, it will not change his conduct. That is, education of the current system will not change the conduct of many. Most importantly, threatening this youth with jail time will not change his/her conduct either.

Therefore, the best hope for a society where the preponderance of people comply with the preponderance of the laws is to seek balance. There is no question that IP content owners have made this a much more enjoyable planet to live on. They deserve their just desserts. They just don't deserve all of the dessert. Society has played a very important role in recognizing how funny it would be to have Dylan lip-

⁵⁹ A term of art that has sprung up in the literature on intellectual property that has an interesting negative connotation denoting those large corporations that create copyrightable content be it music, film, etc.

⁶⁰ See Michael Katz, *Recycling Copyright: Survival and Growth in the Remix Age*, 13 *Intell. Prop. Law. Bull.* 21, 28-29 (2008). ("In response to DJ Drama's arrest, Brad Buckles, executive vice president of the RIAA's Anti-Piracy Division in Washington, D.C., stated, '[a] sound recording is either copyrighted or it's not.' 'Whether it's a mixtape or a compilation or whatever it's called, it doesn't really matter: If it's a product that's violating the law, it becomes a target.'") (internal citations omitted).

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synching a Britney Spears song. Additionally, everyone knows both Dylan and Spears. Yet, to say that a new expression combining these two would be illegal, seems to go too far.

One way to achieve this balance is to provide a systematic way for defendants to defend themselves against overly aggressive intellectual property owners. The Minnesota Supreme Court provides this systematic methodology by making insurance companies defend against infringement.⁶¹

We now live in what is known as a “permission culture.”⁶² This is a culture that is created because people have come to fear litigation. The threat of litigation alone is enough for many smaller entities to change their conduct. What might be the result if the smaller entity would not go out-of-pocket to defend the law suit? This may be an extremely effective way to reign in overly aggressive intellectual property owners and get back to the balance that made America the largest exporter of intellectual property the world has ever known.

In *General Casualty Co. v. Wozniak Travel*, the Minnesota Supreme Court fashions one way to get closer to balance. There is a growing disparity in reported trademark cases between the number of initial law suits filed and the number that end with a trial on the merits.⁶³ Today, in fact, 1.3% of all trademark cases filed reach a trial on the merits.⁶⁴ In 2007, there were 49 trademark trials in all of America.⁶⁵ There is also a significant drop in the average damage awarded the plaintiff, the amount of attorney fees that are obtained and the total volume of infringements found.⁶⁶

I have argued elsewhere that this is because trademark owners are adept at filing claims and defendants are risk averse.⁶⁷ In this climate, defendants change their trademark rather than litigating.

To be sure, one way of accomplishing balance is to encourage trademark defendants to stay in the fight. As they are not currently, trademark plaintiffs prevail, file more lawsuits, and obtain fewer damages because so many cases are settling rather than reaching a trial on the merits.⁶⁸ The Minnesota Supreme Court has it right. Trademark litigation defendants would be encouraged to stay in the fight if their CGL insurance

⁶¹ See Gen. Cas. Co., 762 N.W.2d at 573.

⁶² See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 192-93, 227 (2004) (“Now that technology enables us to rebuild the library of Alexandria, the law gets in the way. And it doesn't get in the way for any useful copyright purpose, for the purpose of copyright is to enable the commercial market that spreads culture.”).

⁶³ See Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 Wash. & Lee L. Rev. 585, 618 (2008) (updated and revised 2009).

⁶⁴ See *id.* at 619.

⁶⁵ See *id.* at 618.

⁶⁶ See *id.* at 614-619.

⁶⁷ See *id.* at 622.

⁶⁸ See *id.*

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policies also covered trademark infringement. That is, by covering trademark infringement, trademark litigation defendants are less likely to simply capitulate when threatened with a lawsuit. They are more likely to stay in and fight the litigation and, as the data makes clear, the defendant prevails nearly 50% of the time.⁶⁹

Therefore, in what appears to be a simple insurance case on the surface, *General Casualty Co. v. Wozniak Travel* has some very important ramifications when the big picture is considered. It may be able to contribute to the balance that is needed in our intellectual property system.

⁶⁹ *See id.*