

## EQUITABLE ESTOPPEL AND INFORMATION COSTS IN CONTEMPORARY COPYRIGHT

by  
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*The failure of the contemporary copyright system to provide clear notice of the existence of copyrights and the identity of copyright owners leaves even the most well-meaning actors vulnerable to infringement actions and dire remedies. This Article describes how the doctrine of equitable estoppel has sometimes been deployed to address these information cost problems by requiring the actor in the best position to communicate about the existence of rights to do so. Renewed focus on equitable estoppel in the wake of the Supreme Court's decision in Petrella v. Metro-Goldwyn-Mayer, Inc., may present new opportunities to apply the doctrine in this useful way.*

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### INTRODUCTION

Equitable estoppel is a longstanding doctrine that protects parties in litigation from the unfair consequences of their opponents' changes in position. In copyright, the doctrine is primarily used to protect defendants from infringement liability where plaintiffs' past behavior led those defendants to reasonably believe that they

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would not be liable for copyright infringement.<sup>1</sup>

The doctrine's applicability to copyright disputes has been the focus of recent attention in the Supreme Court. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*,<sup>2</sup> the Court was faced with the question of whether the separate equitable defense of laches is available when a copyright plaintiff has unreasonably delayed bringing suit for damages that fall within the Copyright Act's three-year statute of limitations.<sup>3</sup> The Court held that laches is not an outright defense to such a claim,<sup>4</sup> basically concluding that the three-year statute of limitations defines unreasonable delay for purposes of damages under the Copyright Act.<sup>5</sup> In reaching that conclusion, the Court suggested that unfairness to defendants surprised by a copyright lawsuit could be addressed in some cases by equitable estoppel instead of laches: "[W]hen a copyright owner engages in intentionally misleading representations concerning his abstinence from suit, and the alleged infringer detrimentally relies on the copyright owner's deception, the doctrine of estoppel may bar the copyright owner's claims completely, eliminating all potential remedies."<sup>6</sup>

In his dissent, Justice Breyer was skeptical that equitable estoppel would go very far toward solving the problems he associated with the facts of the case: namely stale evidence and dashed expectations that arise not from misrepresentations but merely from the passage of time.<sup>7</sup> These problems can be considerable—despite the Copyright Act's relatively short three-year statute of limitations—because of what is

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<sup>1</sup> Copyright courts apply a different estoppel analysis to the specific problem of copyright owners representing that their work is factual, or that it was not the product of human authorship. See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.11[C] (Matthew Bender ed., 2017).

<sup>2</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014). See also Jordyn Ostroff, *Petrella v. Metro-Goldwyn-Mayer, Inc.: Is Equity in Copyright Law Down for the Count?*, 30 BERKELEY TECH. L.J. 965, 966 (2015).

<sup>3</sup> 17 U.S.C. § 507(b) (2012) provides that "[n]o civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued."

<sup>4</sup> Note that the Court held the door open for laches and other limitations to be invoked at the remedial stage: "As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff. And a plaintiff's delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the 'profits of the infringer . . . attributable to the infringement.' § 504(b)." *Petrella*, 134 S. Ct. at 1967.

<sup>5</sup> The Court's reasoning was that laches developed primarily to guard against unreasonable delay in cases where there was no statute of limitations; to apply it as a guard against delay where a specific statute of limitations exists would undermine Congress's choice of a limitations period: "[C]ourts are not at liberty to jettison Congress' judgement on the timeliness of suit." *Id.*

<sup>6</sup> *Id.* at 1977; see also *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 967 (2017) (citing *Petrella* and observing in the patent context that "equitable estoppel provides protection against . . . unscrupulous patentees inducing potential targets of infringement suits to invest in the production of arguably infringing products").

<sup>7</sup> *Petrella*, 134 S. Ct. at 1985 (Breyer, J., dissenting).

known as the “separate-accrual rule.”<sup>8</sup> Each instance of an unlawful exercise of a right reserved exclusively to the copyright owner—the right to reproduce the work in copies for example—is considered a separate infringement with its own limitations period.<sup>9</sup> If a defendant is engaged in an ongoing course of conduct that extends over decades (the repeated publication of a novel alleged to infringe a short story, for example), it is continuously vulnerable to a lawsuit based on the last three years of allegedly infringing activity. Although the damages sought are therefore fresh, the evidence (e.g. an oral agreement by the author granting the novelist permission to use the short story) may be very stale, and the defendant’s expectations may be long-established.

Justice Breyer expressed his skepticism about equitable estoppel as a solution to these problems through a rhetorical question for his colleagues: “Where due to the passage of time, evidence favorable to the defense has disappeared or the defendant has continued to invest in a derivative work, what misleading representation by the plaintiff is there to estop?”<sup>10</sup> Many lower courts will likely be faced with just that question, now that the defense of laches is unavailable for defendants as a defense to actions for damages within the statute of limitations. And so the time is ripe to document courts’ application of the doctrine to copyright disputes and its likely application to future cases.

There is another reason to focus attention on equitable estoppel as a solution to dilemmas in contemporary copyright. The failure of the copyright system to provide parties with clear notice of the existence of copyrights and with practical means to identify and communicate with copyright owners leaves even the most well-meaning actors vulnerable to infringement actions, crippling damages (including statutory damages), and injunctions.<sup>11</sup> Actors who are generally aware of these risks may be chilled altogether from socially beneficial activities.<sup>12</sup> As I will describe below, equitable estoppel has in some instances been deployed to address these types

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<sup>8</sup> *Id.* at 1964.

<sup>9</sup> “[W]hen a defendant commits successive violations; the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs. In short, each infringing act starts a new limitations period.” *Id.* at 1969.

<sup>10</sup> *Id.* at 1985 (Breyer, J., dissenting); see also Daniel Sheerin, “*You Never Got Me Down, Delay*”: *Petrella v. Metro-Goldwyn-Mayer, Inc., and the Availability of Laches in Copyright Infringement Claims Brought Within the Statute of Limitations*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 851, 903 (2014) (“Short of construing a plaintiff’s failure to file a claim with knowledge of infringing acts as a misleading representation that he will never file, this element appears absent in cases where the defendant would have invoked laches. In carving out the “little place” for laches in copyright claims, the Court, thinking another equitable doctrine might fit, measured too small.”).

<sup>11</sup> See generally R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 *COLUM. J.L. & ARTS* 133–34 (2007).

<sup>12</sup> See, e.g., U.S. COPYRIGHT OFFICE, *REPORT ON ORPHANWORKS* 15 (2006), <https://www.copyright.gov/orphanworks/>

of information cost problems, by requiring the party in the best position to communicate about the existence of rights to do so. Renewed focus on the doctrine may present new opportunities to apply it in this useful way.<sup>13</sup>

This Article explores the use of equitable estoppel in the copyright context, paying special attention to the doctrine's relevance to information cost problems and its potential to put the responsibility for information production on the party in the best position to bear it. In Part II, I lay out the basic elements of the defense as they have been recited and applied in leading copyright cases. I also observe how courts and commentators have described the rationales for the doctrine, and describe some typical factual scenarios in which the doctrine has been applied. In Part III, I focus on cases that demonstrate how the doctrine has been applied to address information cost dilemmas. In Part IV, I conclude with observations about the problems within copyright practice and policy that equitable estoppel may help to solve.

## II. DOCTRINAL ELEMENTS, RATIONALES, AND TYPICAL FACT PATTERNS

### A. *Doctrinal Elements*

The Supreme Court's only discussion of equitable estoppel in the copyright context occurred in *Petrella*. I will start my doctrinal overview with that recent articulation of the doctrine:

[W]hen a copyright owner engages in intentionally misleading representations concerning his abstention from suit, and the alleged infringer detrimentally relies on the copyright owner's deception, the doctrine of estoppel may bar the copyright owner's claims completely, eliminating all potential remedies . . . The gravamen of estoppel . . . is misleading and consequent loss . . .<sup>14</sup>

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copyright.gov/orphan/orphan-report.pdf ("In the situation where the owner cannot be identified and located . . . the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use . . . Concerns have been raised that in such situation, a productive and beneficial use of the work is forestalled—not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license—but merely because the user cannot locate the owner.").

<sup>13</sup> I am not alone in recognizing this potential. See, e.g., Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 34 (2011) (suggesting that "[b]y applying the doctrine of equitable estoppel to cases where the owner of an orphan work ultimately makes himself known, a court could grant a monetary relief and deny an injunction on the grounds that the defendant acted reasonably in relying on the absence of the owner"). Cf. Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CAL. L. REV. 1, 4 (2009) (proposing a modified version of equitable estoppel to protect adopters of standards from unforeseen patent liability).

<sup>14</sup> *Petrella*, 134 S. Ct. at 1966. The Nimmer treatise describes the doctrine in more general terms:

Despite his disagreement with the majority regarding the utility of the defense, Justice Breyer's description of the doctrine is roughly similar: "The 'gravamen' of estoppel is a misleading representation by the plaintiff that the defendant relies on to his detriment."<sup>15</sup>

This formulation echoes that of the Second Circuit in *Marvel Characters, Inc. v. Simon*, which articulated two elements to the defense: "(1) the party makes a misrepresentation of fact to another party with reason to believe that the other party will rely on it; (2) the other party relies on the misrepresentation to his detriment."<sup>16</sup> These *Marvel* factors are quoted in the *Patry on Copyright* treatise, upon which both the majority and dissent in *Petrella* rely.<sup>17</sup>

Elsewhere, both the Second and Ninth Circuits have articulated 4-element versions of the test,<sup>18</sup> as in the widely-cited *Hampton v. Paramount Pictures Corp.*:

Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.<sup>19</sup>

I will return below to application of these elements to typical and challenging factual scenarios. For now, a few observations: either formulation of the doctrine (and other slight variations)<sup>20</sup> contemplates that the party to be estopped has engaged in some behavior that the other party has relied on to its detriment. As we

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The defense of estoppel is clearly available, if the plaintiff has aided the defendant in the acts of alleged infringement, or has induced or caused the defendant to perform such acts. But even short of such overt acts, a holding out sufficient to raise an estoppel may be accomplished by silence and inaction, particularly if prolonged.

1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 13.07[A] (Matthew Bender ed., 2017).

<sup>15</sup> *Petrella*, 134 S. Ct. at 1985 (Breyer, J., dissenting).

<sup>16</sup> *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 292 (2d Cir. 2002).

<sup>17</sup> *Petrella*, 134 S. Ct. at 1977, 1985.

<sup>18</sup> See generally Brief of Douglas Laycock, Mark P. Gergen, and Doug Rendleman as Amici Curiae in Support of Neither Side at 21, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, (2014) (No. 12-1315) ("The essence of estoppel is that one party is misled by the other and relies to his detriment. There are six-part formulations, four-part formulations, three-part formulations, and even one-sentence formulations, but all reduce to the same basic elements: misleading and detrimental reliance.").

<sup>19</sup> *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); see also *Dallal v. The New York Times Co.*, No. 05-2924, 2006 WL 463386, at \*1 (2d Cir. Feb. 17, 2006) (reciting four factors and citing *Hampton*).

<sup>20</sup> E.g., *Carson v. Dynegy, Inc.*, 344 F.3d 446, 453 (5th Cir. 2003) ("(1) the plaintiff must know the facts of the defendant's infringing conduct; (2) the plaintiff must intend that its conduct shall be acted on or must so act that the defendant has a right to believe that it is so intended; (3) the defendant must be ignorant of the true facts; and (4) the defendant must rely on the plaintiff's

will see, the behavior can take the form of an express misstatement of fact. It can also take the form of a course of conduct that has the effect of communicating a misstatement of fact. And it can even take the form of silence and inaction if, under the circumstances, silence and inaction lead the other party reasonably to believe a false fact. In most cases, the ultimate false fact at issue is: “if you keep doing what you are doing you are not going to get sued.”

### B. *Rationales*

Courts and commentators have offered multiple rationales for the equitable estoppel doctrine.<sup>21</sup> Some of these rationales focus on denying the estopped party the benefit of duplicitous behavior and opportunism.<sup>22</sup> Others focus instead on fairness to the party raising the defense.<sup>23</sup> Most discussions of the doctrine address multiple concerns. For example, in her general study of the development of the equitable estoppel doctrine, T. Leigh Anenson describes the policy rationale behind the doctrine in a way that alludes both to disciplining two-faced litigants and protecting innocent adversaries and the courts: “The inequity addressed by equitable estoppel concerned the contradictory conduct of litigants that worked to their advantage in a case or to the disadvantage of the adverse party.”<sup>24</sup> She elaborates that “[c]ourts created equitable estoppel in order to avert a litigant’s contradictory arguments advanced at the expense of judicial integrity and the rights of other litigants.”<sup>25</sup>

Most interesting for my purposes, some sources stress institutional concerns about the efficiency of the legal system, suggesting that the law should not come to the aid of a plaintiff who could have saved everyone some trouble by communicating

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conduct to its injury.)

<sup>21</sup> See generally Mark P. Gergen, *Towards Understanding Equitable Estoppel*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW* 319 (C.E.F. Rickett & Ross Grantham, eds., 2008) (discussing the “moral framework of estoppel”).

<sup>22</sup> E.g., *Washington Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004) (“[T]he doctrine of estoppel prevents a party from “having it both ways.”); Christopher M. Newman, “*What Exactly Are You Implying? The Elusive Nature of the Implied Copyright License*,” 32 *CARDOZO ARTS & ENT. L.J.* 501, 522 (2014) (“[Equitable estoppel] seeks to identify places where equity should intervene to prevent owners from engaging in opportunism enabled by someone’s failure to understand their lack of a license. Usually this means that the owner has deliberately fostered the defendant’s lack of understanding by conduct calculated to induce justified reliance.”).

<sup>23</sup> E.g., *Associated Press v. Meltwater U.S. Holdings*, 931 F. Supp. 2d 537, 565 (S.D.N.Y. 2013) (“The doctrine of equitable estoppel applies ‘where the enforcement of the rights of one party would work an injustice upon the other party due to the latter’s justifiable reliance upon the former’s words or conduct’”).

<sup>24</sup> T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 *REV. LITIG.* 377, 380 (2008).

<sup>25</sup> *Id.* at 384.

her rights clearly to the defendant before their dispute came to a head.<sup>26</sup> I return to this intriguing argument in Part III.

### C. *Typical Equitable Estoppel Scenarios*

Equitable estoppel has been described as a “drastic remedy.”<sup>27</sup> The Patry treatise reports that “[s]uccessful claims of equitable estoppel are few and far between.”<sup>28</sup> Nonetheless, the defense is raised—sometimes successfully—in a set of recurring factual scenarios.

The Supreme Court’s description of the doctrine in *Petrella* focuses on one scenario: “[w]hen a copyright owner engages in intentionally misleading representations concerning his abstention from suit.”<sup>29</sup> But “abstention from suit” is only one of many facts that a party in a copyright suit can be estopped from later denying.

Many cases involve misunderstandings about ownership. For example, a user of a copyrighted work may have been led to believe mistakenly that it owned the relevant copyright, or that someone who granted it permission was the copyright owner. If the true owner behaved in a way that contributed to such a misunderstanding, the owner could be estopped from later asserting the copyright.<sup>30</sup>

Related to questions of ownership, another set of cases considers disputes over whether an employer, client, or other type of collaborator may continue to use a

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<sup>26</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 894 cmt. e (AM. LAW INST. 1975) (“The rule stated in this Subsection is based upon the principle that the law will not aid those who choose not to use the means at their disposal to protect their own interests, if the giving of the aid would be at the expense of those who are innocent of intent to do wrong.”).

<sup>27</sup> *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 948 (S.D.N.Y. 1997).

<sup>28</sup> 6 WILLIAM F. PATRY, *PATRY ON COPYRIGHT*, 20:58 (Thomson Reuters 2014).

<sup>29</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014).

<sup>30</sup> Cases considering misunderstanding over ownership include: *Carson v. Dynege, Inc.*, 344 F.3d 446, 448 (5th Cir. 2003) (dispute over ownership and license); *Fahmy v. Jay-Z*, No. CV 07-5715 CAS (PJWx), 2013 WL 4500435, at \*12–\*13 (C.D. Cal. Aug. 15, 2013) vacated on other grounds (competing claims of ownership raised factual questions regarding estoppel); *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F. Supp. 531, 535 (S.D.N.Y. 1977), *aff’d*, 592 F.2d 651, 655 (2d Cir.1978) (disputed assignment, but no estoppel because no misrepresentation by plaintiff or reliance by defendant); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 731 (S.D.N.Y. 1974), *reversed on other grounds* (dispute regarding ownership of assigned rights following renewal, no estoppel for multiple reasons).

work after the collaborative relationship with the copyright owner has ended.<sup>31</sup> *Carson v. Dynegy, Inc.*,<sup>32</sup> a widely-cited case articulating the Fifth Circuit's version of the doctrine,<sup>33</sup> considered such a dispute and adopted a rule that "prohibits an alleged copyright owner from maintaining an infringement claim against his employer, after permitting that employer to use his creation to adapt existing procedures or systems."<sup>34</sup>

An overlapping set of cases involves misunderstandings about the terms or existence of a license.<sup>35</sup> For example, *Dallal v. New York Times* was a suit by a freelance photographer who argued that he had authorized the Times to publish his photographs in its print edition but not to subsequently publish those photographs on its

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<sup>31</sup> *E.g.*, *Boardman v. County of Spokane*, 61 F.3d 909, \*3 (9th Cir. 1995) (unpublished) (finding estoppel where plaintiff made misrepresentations that caused defendant to believe he was an employee of the company the defendant hired and explaining that "[h]aving participated in the misrepresentations made to the County, Boardman is estopped from disavowing them now in order to assert independent copyright ownership against the County"); *Sedosoft, Inc. v. Mark Burchett Ltd.*, 221 F. Supp. 3d 195, 201 (D. Mass. 2016) (software developer plaintiff estopped from bringing infringement action against former client and subsequent developer where plaintiff gave source code to defendants and encouraged them to continue to develop it); *DeCarlo v. Archie Comic Publ'ns, Inc.*, 127 F. Supp. 2d 497, 499 (S.D.N.Y. 2001) (plaintiff alleged he owns characters he created for comic books, defendant says work for hire); *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 753 (E.D. Mich. 1998).

<sup>32</sup> *Carson*, 344 F.3d at 454–55.

<sup>33</sup> *Carson* articulates a slight variation on the *Hampton* factors: "(1) the plaintiff must know the facts of the defendant's infringing conduct; (2) the plaintiff must intend that its conduct shall be acted on or must so act that the defendant has a right to believe that it is so intended; (3) the defendant must be ignorant of the true facts; and (4) the defendant must rely on the plaintiff's conduct to its injury." *Id.* at 453.

<sup>34</sup> *Id.* at 454–55 (adopting rule from *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 753 (E.D. Mich. 1998)).

<sup>35</sup> *E.g.*, *Kramer v. From the Hearth Productions, Inc.*, 300 Fed. App'x. 555, \*\*1 (9th Cir. 2008) (unpublished) (estoppel based on plaintiffs encouraging defendant to make a film and representing that synchronization license would be granted for musical compositions); *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 875 (11th Cir. 2005) (breach of contract defendant was estopped from argument based on copyright infringement where it had intentionally misled the other party into believing that it could legally purchase Microsoft software from reseller); *Hong Kong TV Video Program, Inc. v. May Kong Market & Video Rental*, 934 F.2d 324, \*6 (9th Cir. 1991) (unpublished) (upholding district court's application of estoppel where confusion lead defendant to believe it had authority to rent copyrighted video tapes and plaintiff was aware that defendant operated under that misconception); *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947–48 (S.D.N.Y. 1997) (refusing to find as a matter of law that implied license had not been revoked, but finding estoppel where plaintiff's predecessor in interest knew of defendant's use of software, was silent in the face of that knowledge, and assisted the defendant when it had questions about the software).



website.<sup>36</sup> The district court held that Dallal was estopped from asserting this copyright claim because he continued to accept assignments from the Times after learning about the Internet republication and trying without success to convince the Times to pay him additional compensation for electronic use.<sup>37</sup> The Second Circuit agreed that “[t]o the extent Dallal could have been clearer as to the limits of his authorization, the Times certainly has a viable estoppel claim,” but it remanded for further factual development of the question.<sup>38</sup>

*Dallal* also belongs to a set of cases in which a copyright owner initially objected to the defendant’s behavior, but then behaved in a way that led the defendant to believe the objection had been withdrawn. For example, the court in *Watermark Publishers v. High Technology Systems, Inc.*,<sup>39</sup> held a plaintiff estopped where it did not pursue a claim for three years after the defendant replied to the plaintiff’s objection to inclusion of a copyrighted map in a visitor center’s electronic information station by removing what the defendant understood to be the infringing map and replacing it with an independently created one.

Note that most of these scenarios involve parties who have had a long-standing relationship with each other, and who have communicated about the works and activities that were eventually at issue in the case. The estoppel defense was based upon misunderstandings that resulted from those communications.

There is another set of cases in which the parties were previously strangers to each other—or at least not in direct communication. Here, the estoppel claim is often based not on express communication but instead on silence—silence that the defendant claims to have understood as acquiescence by the copyright owner or as acknowledgement of the validity of the defendant’s competing claims. Because these are the cases most relevant to my concern with information costs and poorly-noticed copyrights, I consider them separately in Part III.

### III. ESTOPPEL AND INFORMATION COSTS

The most challenging and interesting cases considering the equitable estoppel defense are those in which the plaintiff’s “misrepresentation” or “conduct” amounted to a mere passive (apparent) acquiescence in the defendant’s behavior. Although a finding of estoppel is rare under such circumstances, courts have recognized the possibility in the copyright context and more generally.<sup>40</sup> Many of these

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<sup>36</sup> *Dallal v. The New York Times Co.*, 2006 WL 463386, at \*2 (2d Cir. Feb. 17, 2006).

<sup>37</sup> *Dallal v. New York Times*, 386 F. Supp. 2d 319, 323 (S.D.N.Y. 2005).

<sup>38</sup> *Dallal*, 2006 WL 463386, at \*2.

<sup>39</sup> *Watermark Publishers v. High Tech. Sys., Inc.*, No. 95-3839-IEG (CGA), 1997 U.S. Dist. 1997 WL 717677, at \*7–8 (S.D. Cal. June 18, 1997).

<sup>40</sup> *See, e.g.*, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 565 (S.D.N.Y. 2013) (“Silence alone is rarely a basis for finding equitable estoppel, but ‘where a party has a legal duty to speak, silence can constitute an affirmative ‘misrepresentation.’”); *Am. Registry*

cases cite the leading Ninth Circuit case, *Hampton v. Paramount*.<sup>41</sup>

The defendants in *Hampton* purchased a copy of the silent film “The Covered Wagon” from Kodascope, who had acquired from Paramount’s predecessor in interest a license to reproduce the film for “non-theatrical exhibitions.” The copy that Kodascope sold to defendants had a copyright notice on it (identifying Paramount as the owner), but no notice of the non-theatrical use restriction. Defendants exhibited the film for profit at their Hollywood theater for over twelve years before Paramount objected on the grounds of copyright infringement.<sup>42</sup> When Paramount sued, the defendants argued that because Paramount remained silent in the face of their open use and advertising of “The Covered Wagon” (and other Paramount films), it should be estopped from enjoining exhibition of the film.<sup>43</sup>

As noted above, the court articulated a 4-part test for estoppel:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury.<sup>44</sup>

The court referred to the type of conduct that might satisfy the second element as a “holding out” that led the party asserting estoppel to change its position, explaining that “[a] holding out may be accomplished by silence and inaction.”<sup>45</sup> But Paramount was not silent, the court concluded. It had expressly asserted its copyright via the notice printed on the film:

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of *Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 713 (W.D. Tex. 2013) (“Estoppel may also ‘be accomplished by a plaintiff’s silence and inaction.’”); *Lego A/S v. Best-Lock Constr. Toys, Inc.*, 874 F. Supp. 2d 75, 83 (D. Conn. 2012) (“It is established in this circuit that in some circumstances a copyright holder’s silence or inaction can support estoppel.”); *Interscope Records v. Time Warner, Inc.*, CV 10-1662 SVW (PJWx), 2010 U.S. Dist. 2010 WL 11505708, at \*12 (C.D. Cal. June 28, 2010) (“A copyright holders’ silence or inaction in the face of an infringement can give rise to an estoppel defense, particularly where such inaction is prolonged.”); *Merchant v. Lymon*, 828 F. Supp. 1048, 1064 (S.D.N.Y. 1993) (“Although in some instances, silence and inaction may induce justifiable reliance on the part of the defendant, those circumstances are not present when the defendant is in a position to ascertain the extent of the competing claim.”) *Cf.* *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1028 (Fed. Cir. 1992) (patent case explaining that estoppel-triggering conduct “may include specific statements, action, inaction, or silence where there was an obligation to speak”). Outside of the intellectual property context, see, e.g., *Kirk v. Hamilton*, 102 U.S. 68, 79 (1880) (estoppel of party who “was silent when good faith required him to put the purchaser on guard”). See generally *Gergen*, *supra* note 21, at 322 (“[I]t is well-established that an estoppel may lie when an actor silently misleads another.”).

<sup>41</sup> *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960).

<sup>42</sup> *Id.* at 102.

<sup>43</sup> *Id.* at 104.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Paramount had the right to assume that this printed assertion of right, which was flashed on the screen every time the film was shown, provided ample notice to Hampton of Paramount's interest in the film. Being charged with this notice, Hampton could easily have ascertained the facts by making inquiry of Paramount.<sup>46</sup>

Although the estoppel defense was not successful in *Hampton*, the court's analysis suggests that estoppel might be deployed as a doctrinal solution to notice problems that could otherwise impose unfairness on copyright defendants. This was not a case of such unfairness, the court concluded. But in explaining why not, it provided some useful clues about when such a case might arise:

The doctrine of equitable estoppel does not erase the duty of due care and is not available for the protection of one who has suffered loss solely by reason of his own failure to act or inquire. . . . The real cause of Hampton's trouble was not his lack of knowledge of Paramount's interest. Rather, it was his unwarranted reliance on the assertion of a third party and his failure to use the means at hand to ascertain the extent of the interest asserted.<sup>47</sup>

The court faults Hampton for failing to "use the means at hand." Those means were different then than they are now. *Hampton*, decided in 1960, belongs to an era in U.S. copyright law in which proper notice on published copies was a prerequisite for federal copyright protection, renewal formalities filtered out many low-value copyrights and provided refreshed information about those to which protection applied, and the players in the copyright system tended to be industry insiders of some sort—not unsophisticated individuals.

Following changes enacted by the Copyright Act of 1976 and the Berne Convention Implementation Act of 1988, U.S. copyright law imposes no notice or renewal requirements and produces no comprehensive source of information about copyright owners.<sup>48</sup> It is therefore much more likely that a user of copyrighted works will have few "means at hand" for ascertaining what rights (and whose) her actions might be violating. It is also more likely that, despite taking all reasonable "due care," she will nonetheless be faced with a surprise lawsuit.<sup>49</sup> These possibilities loom

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

<sup>47</sup> *Id.* at 104–05.

<sup>48</sup> See generally, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

<sup>49</sup> See Reese, *supra* note 11, at 134 ("The features of copyright law that made it easy for most users to determine whether their use would fall within a copyright owner's exclusive rights and whether the work they sought to use was indeed protected by copyright have mostly been eliminated, thus making it more difficult to treat an infringer as one who had at least constructive knowledge that her acts were prohibited. And at the same time, other features of copyright law that excused innocent infringers where they could not have been expected to have known about their infringement through reasonable investigation have also been eliminated."); Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1028 (2016).

large in a copyright environment in which rights are numerous, fragmented, widely-distributed, poorly-noticed, expansive, and murky; and the actors directly implicated by them include every individual with a computer and an internet connection.<sup>50</sup>

In the era in which proper notice on published copies was a requirement for federal copyright protection, and it was reasonable to hold a defendant responsible for failure to inquire regarding the copyright owner's rights, the logic of *Hampton* meant that the defense of equitable estoppel was not generally available to defendants who claimed to have been prejudiced merely by the plaintiff's inaction. Or, to put it another way, a finding of inaction sufficient to trigger the defense was typically foreclosed by the fact that the plaintiff had in fact acted by affixing a copyright notice on published copies of the work. If the plaintiff had not done so, copyright would have been lost due to failure to satisfy the notice requirement and the question of estoppel would have been moot.

So how have cases in the post-Berne era grappled with copyright owner silence? In some cases, courts have concluded that copyright owners were not in fact silent because, as in *Hampton*, they provided notice of their rights (even though, unlike in *Hampton*, such notice was not a prerequisite for protection).<sup>51</sup> But in cases where the plaintiffs did not provide notice, at least some courts have been willing to entertain an estoppel defense.<sup>52</sup>

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<sup>50</sup> See generally JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010); Reese, *supra* note 11, at 134; Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 601 (2010).

<sup>51</sup> *E.g.*, *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 723 (9th Cir. 1984) ("In view of the clear copyright notices at the end of the Lone Ranger tapes, . . . the records of the copyrights and their transfer in the Copyright Office, and the other evidence presented in support of summary judgment, Program Radio's arguments of estoppel and unclean hands lack merit."); *Lego A/S v. Best-Lock Constr. Toys, Inc.*, 874 F. Supp. 2d 75, 85 (D. Conn. 2012) (reading the caselaw to "suggest[] that pure inaction does not create estoppel in the face of an affixed copyright notice."); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1184 (W.D.N.Y. 1982) ("[T]he notice of copyright appearing in all of plaintiffs' works precludes [defendant's] defense of estoppel."). The Nimmer treatise finds this logic surprising:

An early view was that such passive holding out to warrant estoppel could rarely be established in statutory infringement actions. The rationale for that conclusion was that the mere affixation of a copyright notice on copies of the work, if seen by defendant, was considered a sufficient assertion of plaintiff's right as to counter estoppel based on a passive holding out. Nonetheless, that rationale loses force over time, given that copyright notice has not served as a prerequisite for copyright protection since 1989. Nonetheless, in line with the earlier viewpoint, a 2010 decision reached the surprising result that Lego's inaction for the 13 years during which its competitor sold 18 million allegedly infringing minifigures at 50,000 stores failed to constitute the necessary inaction giving rise to estoppel.

1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.07 (Matthew Bender, ed., 2017).

<sup>52</sup> *But cf.* Thomas P. Arden, *The Questionable Utility of Copyright Notice: Statutory and*

For example, in *Taylor Holland LLC v. MVMT Watches, Inc.*,<sup>53</sup> the court addressed an estoppel defense raised by a MVMT, a watch company that had posted on its website a photograph of fashion influencer Demi Marchese that Marchese had provided to MVMT for that purpose. Unbeknownst to MVMT, professional photographer Taylor Holland had taken the photograph and given Marchese written permission to use it only for certain purposes.<sup>54</sup> Although MVMT removed the photograph from its website after Holland complained to the company, he brought an infringement action alleging willful infringement and seeking \$150,000 in statutory damages.<sup>55</sup>

The district court denied both parties' motions for summary judgment on the issue of equitable estoppel:

The Court finds that the case is distinguishable from *Hampton* and presents a genuine dispute of material fact. Unlike in *Hampton*, the Photograph contained no visible copyright information that would have put MVMT on notice that Marchese might not have held the copyright to the underlying work. . . . Because there was no copyright notice affixed to the image of the Photograph, MVMT cannot be considered to have inquiry notice of Holland's copyright in the sense that Hampton had inquiry notice of Paramount's claim. Thus, MVMT's equitable estoppel defense is not barred, as a matter of law, due to its failure [to] verify that Marchese controlled the copyright to the Photograph.

But, equally, MVMT has not established that it is entitled to a judgment in its favor as a matter of law. There remains a triable issue of fact regarding the nature of communication between Marchese and Holland surrounding the Photograph and Holland's intent for MVMT to use the Photograph. . . . [T]here remains a genuine factual dispute regarding Holland's intent and MVMT's right to believe that he would not assert a copyright claim against them.<sup>56</sup>

Note the court's reference to "inquiry notice," the idea that a party can be treated as if it had notice of a fact if a reasonable person would have investigated

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*Nonlegal Incentives in the Post-Berne Era*, 24 LOY. U. CHI. L.J. 259, 277 (1993) ("Since notice is irrelevant to the copyright status of a work, the lack of a notice should not *contribute* to a defendant's reliance on an author's inaction. In cases in which the copyright in a work is registered, absence of a copyright notice should have even less significance, as registration should provide the same continuing notice of rights.").

<sup>53</sup> Taylor Holland LLC v. MVMT Watches, Inc., 2:15-cv-03578-SVW-JC, 2016 U.S. Dist. 2016 WL 6892097, at \*2 (C.D. Cal. August 11, 2016).

<sup>54</sup> *Id.* at \*3.

<sup>55</sup> Complaint at \*6, Taylor Holland LLC v. MVMT Watches, Inc., 2:15-cv-03578-SVW-JC, 2016 U.S. Dist. 2016 WL 6892097 (W.D. Cal. May 13, 2015).

<sup>56</sup> *Taylor Holland LLC*, 2016 WL 6892097, at \*11.

further.<sup>57</sup> In other words, inquiry notice is a legal fiction that reflects a policy judgment about when it is reasonable to expect a party to bear the cost of obtaining relevant information. Under the circumstances of *Hampton*, the court thought it reasonable to require the Hamptons to investigate Paramount's claims (signaled by the express copyright notice); whereas in *Taylor Holland* the court was less convinced that MVMT should be expected to investigate the claims of an unknown photographer of an image that was presented to MVMT by its subject for the purpose of public display.

Other cases are even more explicit about their assignment of the information cost obligation, and under what circumstances equitable estoppel might work to impose that obligation on copyright owners instead of on users of copyrighted works. Take, for example, *Associated Press v. Meltwater U.S. Holdings, Inc.*, where the court summarized the doctrine this way:

The doctrine of equitable estoppel applies "where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." . . . Essential to any finding of estoppel is "detrimental reliance on the adverse party's misrepresentations." . . . Reliance is not justifiable if the party invoking estoppel "had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means."<sup>58</sup>

The court in *Meltwater* refused to shift the information cost obligation from the defendant—who redistributed excerpts of AP news stories and argued that AP was estopped from complaining because it did not restrict online access to its stories or object to the defendant's activities before bringing suit.<sup>59</sup> The court suggested that it was the defendant, not the plaintiff, who failed to act with due diligence by failing to obtain information that it could have obtained without too much difficulty.<sup>60</sup> Similarly, the court in *Merchant v. Lymon*, explained: "Although in some instances, silence and inaction may induce justifiable reliance on the part of the defendant, those circumstances are not present when the defendant is in a position to ascertain the extent of the competing claim."<sup>61</sup>

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<sup>57</sup> *Inquiry Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Notice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further . . .").

<sup>58</sup> *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 565 (S.D.N.Y. 2013).

<sup>59</sup> *Id.* at 566.

<sup>60</sup> *Id.* at 565 ("Nor has Meltwater shown that it acted with the diligence required to assert this defense.").

<sup>61</sup> *Merchant v. Lymon*, 828 F. Supp. 1048, 1064 (S.D.N.Y. 1993); see also *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1184 (W.D.N.Y. 1982) ("[Defendant's] failure to inquire of the plaintiffs about authorized reproduction of these works—which they could

Consider, by contrast, *DeCarlo v. Archie Comic Publications*.<sup>62</sup> There the plaintiff, DeCarlo, claimed to own copyrights in comic book characters (Josie and the Pussycats) that the defendant had been exploiting based on its understanding that it owned them as works for hire.<sup>63</sup> The defendant had been publishing comic books with a copyright notice asserting its ownership, whereas plaintiff had remained silent.<sup>64</sup> As the court explained:

ACP's copyright notice on the Josie periodicals read "Cover and content protected by copyright throughout the world," indicating that ACP indeed did believe that it possessed the rights not only to the composite work but also to the individual works within it. The fact that plaintiff never attempted to register or renew a copyright in any work that included any Josie character would indicate to ACP that plaintiff had no claim to the Josie characters, or at least never intended to pursue such a claim. And plaintiff did nothing to refute that assumption. In short, DeCarlo's failure ever to voice a complaint or make a competing claim in the face of numerous opportunities to do so . . . gave ACP the right to rely on his silence.<sup>65</sup>

Under these circumstances—where the defendant had used the means at hand to assert its claim and plaintiff had not—the court held that silence was sufficient to trigger estoppel.

Perhaps the most striking example of this approach is in *Field v. Google*, where equitable estoppel was one of the many bases on which the court rejected a copyright infringement suit brought by a website owner who objected to Google's practice of providing users with access to cached copies of websites.<sup>66</sup> Key to the court's analysis was the fact that Field could easily have used standard technical measures to inform Google of its objections but instead remained silent:

Field was aware of steps he could take to ensure that his web site would not be archived and not included in Google's cache. . . . Field could have informed Google not to provide "Cached" links by using a "no archive" meta-tag or by employing certain commands in robots.txt file. Instead, Field chose to remain silent knowing that Google would automatically interpret that silence as permission to display "Cached" links.<sup>67</sup>

An intriguing aspect of *Field* is how it suggests that the emergence of a standard practice can—by changing the information cost calculus—shift the responsibility

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have easily ascertained—cannot be construed as 'custom' authorizing the videotape copying of these copyrighted works.").

<sup>62</sup> *DeCarlo v. Archie Comic Publ'ns, Inc.*, 127 F. Supp. 2d 497 (S.D.N.Y. 2001).

<sup>63</sup> *Id.* at 499.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 511.

<sup>66</sup> *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1109 (D. Nev. 2006).

<sup>67</sup> *Id.* at 1117.

for communicating about copyrights (and copyright owner preferences).

These approaches to silence by a plaintiff who could easily have nipped an infringement dispute in the bud (and, by contrast, to cases in which the defendant could easily have investigated further) are consistent with the Restatement of Torts, which provides this as one form of estoppel:

If one realizes that another because of his mistaken belief of fact is about to do an act that would not be tortious if the facts were as the other believes them to be, he is not entitled to maintain an action of tort for the act if he could easily inform the other of his mistake but makes no effort to do so.<sup>68</sup>

The commentary explains:

The rule stated in this Subsection is based upon the principle that the law will not aid those who choose not to use the means at their disposal to protect their own interests, if the giving of the aid would be at the expense of those who are innocent of intent to do wrong. This principle frequently operates to prevent a person from claiming property from another who has taken it innocently; its application sometimes also prevents one from claiming that an act was tortious when he did not object to it at the time it was done. Under these conditions silence has the legal effect of a misrepresentation.<sup>69</sup>

Note that the Restatement also contemplates that formal notice may obligate a non-owner to inquire further, even where the owner is otherwise silent:

When the plaintiff's title or other interest is recorded in compliance with the terms of a statute requiring the recording as protection against transfers by one not the owner, the fact that a person knows that another is contemplating the purchase of the property from a third person does not of itself create a duty on the plaintiff's part to inform the other. The plaintiff can normally assume either that the other knows of the record or that before the purchase is completed he will inform himself of it or that he will otherwise protect

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<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 894 (AM. LAW INST. 1975); RESTATEMENT (SECOND) OF TORTS § 894 cmt. e (AM. LAW INST. 1975).

<sup>69</sup> RESTATEMENT (SECOND) OF TORTS § 894 cmt. e (AM. LAW INST. 1975); *Wanlass v. Gen. Elec. Co.*, 148 F.3d 1334, 1339 (Fed Cir. 1998).

In *Wanlass*, Judge Mayer's majority opinion uses a similar approach to a patent dispute but under the doctrine of laches instead of equitable estoppel:

GE's open and notorious sale of easily testable products gave him [Wanlass] the opportunity to discover the alleged infringement earlier. . . . Allocating the burden to patentees to seek out infringers is proper, furthermore, because compared to potential infringers, they are in the *best* position to know the scope of their patent protection and, therefore, also to know likely places to find infringement. This superior knowledge generally allows them to incur comparatively lower costs in investigating potentially infringing activities than competitors would incur conducting patent searches on every aspect of their products and notifying the patentee of their results.

*Wanlass*, 148 F.3d at 1339.



himself against loss.<sup>70</sup>

This is consistent with the logic of those copyright cases that have emphasized the presence or absence of copyright notice. It is also consistent more generally with the idea that owners and users have obligations to use reasonable measures to foster clear communications about copyrighted works and their use and that the obligations can shift depending on the available legal and technical infrastructure supporting that communication.<sup>71</sup>

#### IV. APPLYING ESTOPPEL TO SPARE THE INNOCENT, RESCUE THE ORPHANS, AND REHABILITATE CONTEMPORARY COPYRIGHT

In *Petrella*, the Supreme Court recognized the continued validity of the defense of equitable estoppel, even in cases brought within the statute of limitations and regardless of the remedy sought. But the Court's brief discussion of the doctrine, focused on sneaky plaintiffs and their duplicitous ways,<sup>72</sup> gives short shrift to the doctrine's potential to solve contemporary copyright dilemmas.<sup>73</sup> In addition to punishing plaintiffs for their intentionally misleading behavior, estoppel can operate as one of the doctrinal tools available to protect innocent infringers in an era in which accidental infringement is easier than ever before.<sup>74</sup>

Equitable estoppel could also be used to effectuate proposals to protect good faith users of orphan works who use the tools readily available to alert copyright owners to their activities and give them an opportunity to object.<sup>75</sup> It could also be used—as it was in *Field v. Google*—to nudge copyright toward a sort of opt-in system in cases in which opting-in is a reasonable burden to bear in light of relevant technology, customs, and practices.<sup>76</sup>

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<sup>70</sup> RESTATEMENT (SECOND) OF TORTS § 894 cmt. e (AM. LAW INST. 1975).

<sup>71</sup> See generally Bracha & Goold, *supra* note 49, at 1044 (explaining how “[i]n many cases copyright owners can take their own preventive measures to avoid or at least reduce the risk of accidental infringement”); Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 95–96 (2011) (“In accident law terminology, when the rights-owner is the cheapest cost avoider she should bear the consequences of the infringement.”).

<sup>72</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014) (referring to “intentionally misleading representations” and “deception”).

<sup>73</sup> Estoppel does not depend on intentional deception by the estopped party. See generally Gergen, *supra* note 21.

<sup>74</sup> See generally Bracha & Goold, *supra* note 9, at 1026; Reese, *supra* note 11, at 134; John Tehrani, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 3 UTAH L. REV. 537, 548 (2007).

<sup>75</sup> E.g. Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1470 (2012); U.S. COPYRIGHT OFFICE, *supra* note 12, at 13.

<sup>76</sup> See generally Oren Bracha, *Standing Copyright Law On its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1802 (2007); Edward Lee,

Equitable estoppel is of course not the only doctrinal tool for addressing these issues. Laches will still be available and relevant to some of these cases.<sup>77</sup> Courts have also turned to fair use to forgive defendants with good faith and without clear notice of the plaintiff's rights and objections.<sup>78</sup> Future work could compare these doctrinal tools now that equitable estoppel has been more clearly placed in the copyright toolbox.

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*Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1466–67 (2008); Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008). *But cf.* Brad A. Greenberg, *More than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1031 (2012).

<sup>77</sup> Ostroff, *supra* note 2, at 966.

<sup>78</sup> *See, e.g.*, *Brammer v. Violent Hues Prods., LLC*, 1-17-CV-01009, 2018 U.S. Dist. 2018 WL 2921089, at \*2 (E.D. Va. June 11, 2018); *Brammer v. Violent Hues Prods., LLC*, 1-17-CV-01009, 2018 U.S. Dist. 2018 WL 2921089, at \*2 (E.D. Va. June 11, 2018) (noting in fair use analysis the defendant's good faith: "The record indicates that Mr. Mico, Violent Hues' owner, found the photo online and saw no indication that it was copyrighted. Mr. Mico attests that he thus believed the photo was publically available. This good faith is further confirmed by the fact that as soon as Violent Hues learned that the photo may potentially be copyrighted, it removed the photo from its website."); *Field v. Google*, 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006).