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# Small Fry in Copyright Litigation

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In two of my earlier entries in this series, I discussed the results of an empirical study of copyright cases that I have been doing with my colleague Chris Cotropia. One of those entries focused on how hard the parties in copyright lawsuits fightagainst each other, and the other focused on the role of major media companies in copyright litigation.

In this entry, I will continue to talk about the parties that we observed in our study, but instead of discussing major media companies, I will concentrate on the other end of the spectrum: the individual as a party. This is an important topic, because sometimes copyright law and copyright lawmakers romanticize the individual; they envision authorship as a solitary pursuit, with copyright as the mechanism that keeps artists from becoming starving artists. On the other hand, copyright law sometimes demonizes the individual, accusing legions of file-sharers and mash-up artists of free-riding on the hard work of the truly creative.

Let's start with the latter: individuals as alleged infringers. More than half the cases we sampled from 2005 through 2008 were filed by the recording industry (and occasionally by the film industry) against individuals, accusing them of illegal file-sharing. These were cookie-cutter cases, with complaints that varied from one another only in the names of the parties and the identity of the copyrighted works at issue. Fewer than one in every eight defendants even bothered to answer the complaint, and the file-sharing plaintiffs prevailed almost four times as often as plaintiffs in non-file-sharing cases. Indeed, no defendant won any of these cases.

If we set aside the file-sharing cases and other cookie-cutter litigation,[1] individuals appear as the primary defendant a lot less frequently – only 13.3% of the time.[2] But they appear on the other side of the case caption more frequently, comprising the primary plaintiff in more than one out of every five cases. What is most interesting, however, is the impact that individual plaintiffs had on the outcome of cases. For example, when the primary plaintiff was an individual, the chances that the cases would end in an adversarial ruling (rather than a voluntary dismissal or settlement) increased by a factor of 3.41.[3] Of course, that finding alone does not tell us which party prevails, but a separate regression reveals that when the primary plaintiff is an individual, the chances that the defendant wins outright increase six-fold.[4] This was an unsurprising finding once one realizes that individual plaintiffs are likely to be outgunned; when an individual filed a case, he or she was facing a bigger defendant (either a small firm or a Fortune 1000 company) about 85% of the time, and a disparity of resources would presumably follow.

There is, however, another possible explanation for the lack of success of individual plaintiffs: They may be too attached to the copyrighted work and thus may fail to dispassionately evaluate their chances of success in litigation. Research suggests that when individuals own the copyright to a work, they experience an endowment effect that causes them to value the copyright at a level higher than an objective assessment would merit – and this inflated value is due, at least in part, to an ownership bias.[5] The presence of non-individuals in the plaintiff group may help mute any such tendency, resulting in fewer bad cases being filed.

One final variable helps us explore the endowment effect theory: whether the author of an allegedly infringed work is one of the plaintiffs (not necessarily the largest), which occurs in

18.28% of these lawsuits. Regression analysis shows that the presence of this factor decreases the chances that the plaintiff will prevail by almost 75%.[6] This finding is consistent with research that finds an even stronger endowment effect for those who create copyrighted works, as opposed to those who merely own them.[7] In the end, then, romanticized authors may prove to be too romantic about their own creations.



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1. The other large category of cookie-cutter litigation featured the owners of musical works filing suit against food and drink establishments for violating public performance rights. Those cases were fewer in number, and they also differ from the file-sharing cases in that they presumably continue to be filed outside the four-year time frame that we studied. In contrast, the file-sharing cases were part of a one-time litigation campaign that wound down in late 2008 (the tail end of our study's timeframe).

2. We coded only the largest defendant in each case, so what I mean by "primary defendant" is that there was no defendant larger than an individual – *i.e.*, no major media company or even small firm. Same goes for my usage of "primary plaintiff."

3. Valid at a 99% confidence level. Note, however, that adversarial terminations were rare to begin with, so this increase may not be large in an absolute sense.

4. The relative risk ratio is 5.96 and the confidence level is 99%. Again, keep in mind that the chances of a defendant win are small to begin with, so a six-fold increase may not be large in an absolute sense.

5. *See* Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 Cornell L. Rev. 1, 27 (2010). Note, however, that the potency and validity of endowment effects generally have recently come under fire. *See* Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. Rev. 2 (2013).

6. Again, remember that the chances of a plaintiff win are always small, so a 75% decrease may not be as large as it first appears.

7. *See* Christopher Buccafusco & Christopher Sprigman, *The Creativity Effect*, 78 U. Chicago L. Rev. 31, 39-40 (2010).