Part II, Chapter 6

Deregulating Expressive Works*

Introduction

Copyright law regulates expression. Through it, copyright holders win the privilege of invoking state power to control how and what we communicate. The Copyright Act limits our freedom to reproduce, rework, publicly distribute, publicly perform, or publicly display protected works of authorship.[1] In many cases, even when the Act does not utterly prohibit an expression, the Copyright Office sets its price.[2] Copyright flows top-down, out of Washington, D.C., in detailed and non-negotiable terms.

Common law operates on very different principles. It grows bottom up, out of the decisions of manifold state courts, without relying on federal lawmakers, statutes, or administrative agencies. It follows a few simple principles, leaving details to particular cases, customary practices, and mutual consent. Common law thus offers a deregulatory alternative to copyright.

Should we seize that opportunity? Simple logic suggests the appeal of winning the benefits of copyright policy (access to authors' works) without incurring its costs (lost opportunities to use those works). The Constitution goes further; it demands that we abandon copyright if we discover better policy options. If copyright is not necessary and proper to promote the general welfare and progress in the useful arts and sciences, after all, it loses its sole justification.

Common law alone evidently suffices to stimulate some original expressions, to some degree. Consider perfumes, recipes, clothes designs, furniture, car bodies, and uninhabited architectural structures—all of which exhibit great innovation despite falling outside the scope of copyright, patent, or any like statutory privilege.[3] Perhaps common law could do still more if pressed into service more widely. Perhaps its fundamental principles of contract, property, and tort law could stimulate original expressive works even better than copyright can. Only by trying can we know.

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* This comes primarily from *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works,* 69 U. CIN. L. REV. 741, 794-98 (2001) and *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N. CAROLINA L. REV. 557 (1998).

[1] *See* 17 U.S.C. § 106 (defining exclusive rights of copyright holders).

[2] *See id*. § 801-03 (establishing powers and duties of copyright arbitration royalty panels). *See also id*. § 107 (effectively setting a price of zero for the fair use of copyrighted works).

[3] *See supra*, Chapter [[cite]].

We should thus promote policy experiments testing whether common law suffices to produce a socially optimal amount of expression. Copyright holders could help drive that discovery process by abandoning their statutory privileges. To encourage their participation, we should legislatively guarantee copyright holders that they will retain common law rights in works they dedicate to the public domain. That alone would probably not convince many copyright holders to abandon their statutory privileges, granted. Because it frees them from liability for opposing parties' attorneys' fees, however, abandonment already offers copyright holders a financial benefit. Clarifying that copyright abandonment leaves common law rights unaffected would strengthen that incentive.

Should we favor common law or a federal statute when it comes to controlling the creation, dissemination, and use of expressions? Commentators and courts largely agree on how to answer this question in First Amendment context. No such consensus exists in the context of copyright, however. Indeed, scarcely anyone even asks the question in those terms.[4] We should not only ask it, but answer it: "favor common law over copyright."

A. From Central Command to Decentralized Discovery

We should encourage and respect common law solutions to copyright's problems. Nobody—not lawmakers, not judges, and certainly not academics—can reliably dictate the single best means of regulating access to expressive works. The necessary information—information that would give policy-makers a shortcut to the future—hardly "wants to be free." To the contrary, such information cannot yet be had at any price. It must come from those who actually participate in the market for expressive goods and services, and it will appear in the mosaic of their diverse experiments. Only by patiently studying their evolved preferences, in the fine and in the aggregate, will we discover the best way to promote the general welfare and progress in the sciences and useful arts.

As copyright holders and users tinker with copyright's default rules, they will test a wide variety of methods for managing expressive works. To assess this exploratory and entrepreneurial process requires careful observations of actual results. The examples set by creative perfumes, recipes, clothes designs, furniture, car bodies, and uninhabited architectural structures—all of which flourish absent copyright protection—strongly suggest that common law can promote authorship.[5] A robust market in once-copyrighted works would prove more probative, granted. Perhaps because we lack clear ways of

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[4] Under extant Supreme Court jurisprudence, copyright qualifies at least as a content-neutral, time, place, or manner restriction subject to intermediate scrutiny under the First Amendment. I think that it more resembles a content-based restriction deserving of strict scrutiny, because copyright discriminates against non-original expressions. It not only accords them less value than original expressions; it punishes them. My opinion remains idiosyncratic, admittedly, but I daresay that shows custom facing off against logic.

[5] *See supra*, Chapter [[cite]].

designating such works, no one appears to have run that experiment yet. The next chapter discusses a way to remedy that deficiency.

Would protecting fixed expressive works only with common law protect the general welfare, too? It seems likely to do so at least as well as copyright does. Common law's decentralized and adaptable structure gives it ready access to tacit and local knowledge, driving gains in efficiency. Even if they wanted to, federal lawmakers could not to tap that inchoate, fluctuating, and widely distributed information.

Common law offers equity advantages over copyright, too. Insofar as copyright law represents a "bargain" between the various private and public interests it affects—a popular fiction[6]—it epitomizes the type of take-it-or-leave-it offer that foes of adhesion contracts so dislike.[7] Neither authors nor their audiences have much real say in how lawmakers distribute rights to expressive works.[8] If you don't care for click-wrap licenses limiting access to fixed expressive works, you should especially disdain the one-sided and non-negotiable terms of federal legislation.

When and if copyright holders and users exit from federal statute to local common law, we can pretty safely assume they have found it mutually beneficial to do so. Granted, sometimes licensing practices and terms go too far. Contract law already has in place ample safeguards against such abuses, however. And, granted, consumers might sometimes find technical locks and chains bothersome. But if we don't like the way a merchant packages his wares, we remain free to shop elsewhere, offer a lower price, or ask for something different. Such common law arrangements thus deserve a presumption of enforceability.

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[6] *See supra*, chapter [[cite to "indelicate imbalancing" discussion]].

[7] Indeed, one seminal analysis of adhesion contracts criticized them on grounds that they *too greatly* resembled legislation. *See* Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943) (describing adhesion contracts as "private legislation"). The "private legislation" metaphor tends to mislead, however, because it over-emphasizes citizens' power to shape legislation, underestimates the power of consumers to choose between and thus shape contracts, and ignores the fact that so-called "private legislation" does not fundamentally rely on coercive state power. *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) (arguing that contrary to "private legislation" arguments, "freedom of contract and private property . . . define domains in which individuals may establish both the means and the ends for themselves, to pursue as they see fit (so long as they do not infringe upon the rights of third parties)," and that "[p]rivate property is an institution that fosters individualized, if not eccentric, preferences; it does not stamp them out").

[8] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is *Congress* that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." (emphasis added)).

B. Abandoning Copyright

We saw earlier why copyright and common law might combine to threaten the general welfare, over-regulating the use of expressive works, and why, in that event, we should reform copyright and respect common law.[9] We then discussed how copyright's misuse doctrine impliedly follows that policy, and how codifying the doctrine might clarify and improve it.[10] Copyright abandonment offers similar but more permanent exit from copyright to common law. Whereas misuse opens a revolving door between copyright and common law, in other words, abandonment opens a one-way exit.

Courts[11] and commentators[12] agree that a copyright holder can abandon the Copyright Act's protections.[13] Because such an abandonment of copyright happens only rarely—and sees defining litigation even less frequently—some interesting (to copyright

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[9] *Supra*, chapter [[chapter before prior chapter]].

[10] *Supra*, chapter [[prior chapter]].

[11] *See* Pacific & S. Co. v. Duncan, 572 F. Supp. 1186, 1196 (N.D. Ga. 1983) (finding that television station abandoned copyright in news broadcasts because evinced intent to do so by destroying copies thereof), aff'd in relevant part, 744 F.2d 1490, 1500 (11th Cir. 1984); Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1399 (C.D. Cal. 1990) (finding that notice limiting copyright to a two-day period effectuated abandonment after that time); *see also* National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 598 (2d Cir. 1951) (asserting in dicta that copyright's holder may abandon it "by some overt act which manifests his purpose to surrender his rights in the 'work,' and to allow the public to copy it"), *modified*, 198 F.2d 927 (2d Cir. 1952).

[12] U.S. DEPT. OF COMMERCE, INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT ON THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 16 (1995) ("Those creators who wish to dedicate their works to the public domain may, of course, do so notwithstanding the availability of protections under the Copyright Act."); Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 92 (1993) ("[A]bandonment of copyright can be done explicitly or implicitly.") (footnotes omitted); Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 292 n.119 ("Copyright owners may relinquish their property interest and put their works in the public domain."); *see also* 2 GOLDSTEIN, [[cite to most recent edition]] 217, § 9.3 (describing how abandonment functions as a defense to copyright infringement); 4 NIMMER & NIMMER, [[cite to most recent edition]] § 13.06 (same).

[13] Notwithstanding that consensus, it bears noting that the Copyright Act nowhere specifically permits abandonment and perhaps even impliedly disavows it. *See* Kreiss, supra note 269, at 98. Professor Kreiss offers five powerful arguments, however, why no one can reasonably take the Act to forbid abandonment, see id. at 98-101, 117-18, one of which proves especially relevant the argument that we should allow an exit from copyright: "[P]ersonal freedom, including the freedom to control or dispose of one's own property . . . underlies the notion that an author can abandon his copyrights." Id. at 100.

geeks, at any rate) questions remain unresolved. Can a copyright's holder abandon only some of the Act's protections and, to divide things still more finely, abandon them for only a certain period of time?[14] Do the Copyright Act's termination provisions[15] limit the effectiveness of an abandonment made prior to the vesting of any contingent reversionary rights?[16] But how one answers those questions at most affects only the means by which

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[14] *Compare* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc., 1981 Copyright L. Dec. (CCH) ¶ 25,314 (N.D. Ga. 1981) (rejecting concept of "limited abandonment" of copyright), Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998) (quoting *Showcase*), Richard Feiner & Co. v. H.R.I. Indus., 10 F. Supp. 2d 310, 313 (S.D.N.Y. 1998) (quoting *Showcase* and NIMMER & NIMMER), and 4 NIMMER & NIMMER, *supra* note [[cite]], § 13.06, at 13-274 ("The law does not recognize a limited abandonment, such as an abandonment only in a particular medium, or only as regards a given mode of presentation."), *with* Micro Star v. Formgen, 154 F.3d 1107, 1114 (9th Cir 1998) (suggesting that copyright rights may be partially abandoned), 2 Goldstein, *supra* note [[cite]], § 9.3, at 9:12-1 (citing *Micro Star*), *and* Kreiss, supra note [[cite]], at 96 (arguing for allowing abandonment of select copyright rights and for select periods).

[15] *See* 17 U.S.C. § 203 (1994) (providing that any grant, other than by will, of a transfer or license made on or after January 1, 1978 of a copyrighted work not made for hire may be terminated by the author upon certain conditions notwithstanding any agreement to the contrary); id. § 304(c) (providing much the same with regard to any grant of a transfers or license of a renewal of copyright or any right under it executed prior to January 1, 1978). In effect, these provisions make it impossible for an author to give an enforceable promise to not terminate a transfer or license of copyright.

[16] Professor Kreiss gives that question extensive consideration, *see* Kreiss, *supra* note [[cite]], at 111-23, and answers it with a qualified, "Yes." But at the same time he defends abandonment in general as a matter of personal freedom and autonomy, *see id*. at 100-01, principles with which the Act's termination provisions, embodying as they do a paternalistic restraint on authors' freedom of contract, directly conflict. Kreiss defends his interpretation on grounds that in particular circumstances the termination provisions protect authors from the hazards of imbalanced negotiations with copyright grantees, *see id*. at 114- 15. Policy considerations in fact argue against extending termination's scope, however. Firstly, whatever the benefits of termination in traditional contexts, it generally proves useless to authors considering abandonment. The public to whom such authors "grant" their works does not, after all, enjoy overwhelming bargaining power. Kreiss would, in all fairness, bar only abandonment of contingent reversionary rights effectuated under bargaining pressure and in conjunction with a grant of present rights. *See id*. at 121-23. But even that goes too far because, secondly and more fundamentally, termination in fact hurts most authors by decreasing the present value of their grants and erodes their bargaining power by denying them the right to credibly offer non- terminable grants. Kreiss apparently has a zero-sum view of bargains between authors and grantees: "If a copyright grantee receives a grant and also negotiates for the abandonment of other copyrights, one can presume that the abandonment is designed for the benefit of the grantee." Id. at 123. But we can also presume that such an abandonment benefits the

copyright holders abandon their works—not whether they can abandon them at all.[17] Abandonment remains an option.

Would courts respect common law restrictions on abandoned works? Whoever asserts such restrictions would have to frame their causes of action so as to avoid preemption under § 301 of the Copyright Act, of course, but that should pose a relatively easy task.[18] Nor does the doctrine of copyright misuse appear likely to inhibit such claims, given that the doctrine aims to limit the power of statutory and common law rights acting in concert. Indeed, as discussed above, courts have invoked copyright misuse to limit statutory rights even as they let stand coincident common law ones.[19]

How a court would apply Supremacy Clause preemption to common law claims left standing after abandonment of copyright looks less certain. In all likelihood, the question would never arise. Content to rely on § 301,[20] courts generally resist invoking implied conflicts preemption under the Supremacy Clause to determine the scope of preemption of a common law claims to fixed works of authorship.[21] Courts prefer to avoid those sorts of abstract constitutional questions.

Suppose, though, that a court tested Supremacy Clause preemption against a common law claim to an expressive works. What should the court rule? Rather than finding such claims preempted, it should return to fundamental constitutional principles, recognize that copyright represents an extraordinary exception to common law's default rules, and favor the latter over the former. Given the uncertainties surrounding abandonment, a relatively untested legal tool, courts might benefit from a reminder along those lines. The next section offers legislation to do just that.

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grantor! Termination makes no economic sense even in traditional contexts, much less in the context of abandonment. We should thus as a matter of policy strongly disfavor it.

[17] On the arguments above, *supra* note [[cite]], a copyright holder should be able to effectuate complete, immediate, and permanent abandonment--even prior to the vesting of any contingent reversionary rights--by placing into the public domain both all copyright rights and any contingent reversionary rights.

[18] *See* Bell, Escape from Copyright, Part IV.A. (discussing such legal strategies).

[19] *See supra*, chapter [[cite]].

[20] *See* 1 NIMMER & NIMMER, *supra* note [[cite]], § 1.01[B], at 1-8 (explaining that courts have had little need to refer to the Supremacy Clause because they "may simply turn to the explicit statutory language"); 3 GOLDSTEIN, *supra* note [[cite]] § 15.3.3, at 15:35-36 ("Arguably, section 301 has entirely displaced constitutional preemption doctrine under the supremacy clause in cases involving state protection of copyright subject matter.").

[21] The Court's discussion in Goldstein v. California, 412 U.S. 546, 567-71(1973), of Supremacy Clause preemption proves unhelpful, as that case concerned solely a California criminal statute and not a common law claim. *But see* Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 483 (5th Cir. 1981) (dictum) ("It is possible to hypothesize situations where application of particular state rules of [contract] construction would so alter rights granted by the copyright statutes as to invade the scope of copyright or violate its policies."); Bell, *supra* note [[cite to *Dastar* article]], arguing that the *Dastar* Court unwittingly revived implied Supremacy Clause copyright preemption).

C. Safeguarding Common Law Rights

To deregulate expressive works, we must let them escape from the Copyright Act into common law. While a promising way to promote that policy, the doctrine of copyright misuse has only temporary effect. Copyright abandonment, in contrast, works permanently. Even less case law illustrates the effect of abandonment than of misuse, however. It is thus not clear whether and to what extent common law rights survive copyright abandonment. This section thus proposes adding to § 301 of the Copyright Act[22] a provision ensuring that common law rights will always remain an option for protecting works of authorship:

> (g) Nothing in this title annuls or limits any common law restriction on the use of a fixed work of authorship if that work has been dedicated to the public domain.

Proposed § 301(g) guarantees an exit from copyright to common law by assuring anyone who abandons the former that the can take refuge in the latter. Notably, it merely *offers* that escape route; § 301(g) does not *force* copyright holders to give up their statutory privileges. Nor does anything else in the Copyright Act or Constitution appear likely to do so. As described more fully below,[23] however, the prospect of paying opposing parties' attorneys' fees might convince some copyright holders to abandon their statutory rights and rely on the common law rights protected by § 301(g).

Does proposed § 301(g) have any chance of becoming law? Federal lawmakers have already has made explicit their willingness, in the context of the first sale doctrine, to force copyright holders to decide between contract law and copyright law.[24] Section 301(g) would merely make that Hobson's choice more generally available.

Do lawmakers have authority to pass § 301(g) into law? The Constitution hardly mandates that they maximize copyright power; to the contrary, it limits them to necessary and proper means of promoting the general welfare and the progress of science and the

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[22] 17 U.S.C. § 301.

[23] *See infra* [[cite to next section]].

[24] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, at 79 (first sale doctrine set forth in § 109 "does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright." *See also*, American Int'l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) ("first sale" does not make first or subsequent buyer an infringer, but copyright holder retains right to sue for breach of contract accompanying sale); United States v. Wise, 550 F.2d 1180, 1187 (9th Cir.) (after first sale, vendee violating agreement with vendor "may be liable for the breach but he is not guilty of infringement"); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908) (expressing willingness to uphold valid contract claim despite applicability of the first sale doctrine).

useful arts. Nor would the recent Supreme Court decision in *Dastar Corp. v. Twentieth Century Fox Film Corp*[25] bar § 301(g). The Court there expressly limited only the scope of federal statutory unfair competition law with regard to works in the public domain.[26] The Court did not speak to the proper scope of common law protections of such works.[27]

Why would any one want § 301(g) to become law? The copyright lobby would probably welcome it as offering a legal option not now clearly respected. The rest of us would lose nothing by that clarification; rather, we would benefit from the discovery of better alternatives to copyright. Far-seeking politicians might disfavor the proposed § 301(g), granted, as too likely to decrease their rent-seeking opportunities by removing some expressive works from the scope of the Copyright Act. That crass rationale should hardly sway the rest of us, though. Policymakers therefore should interfere with private arrangements only on proof of imminent peril to the public interest, and provide the freedom to exit from the special regulatory privileges of copyright into good, old, regular common law.

D. Copyright Abandonment for Fun and Profit

Why would copyright holders choose to abandon their statutory rights and rely solely on their common law ones? A few "blockheaded" authors might do so non-monetary reasons, of course.[28] Thanks to the combined effect of copyright misuse and § 505 of the Copyright Act, however, even crassly profit-maximizing copyright holders might find abandonment financially attractive.

Under § 505, courts may in their discretion award attorney's fees to the prevailing party in copyright litigation. The Supreme Court has interpreted that provision to benefit copyright plaintiffs and defendants alike.[29] The Court suggested that, among other factors, courts should base an award of attorney's fees under § 505 on "'frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of

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[25] 539 U.S. 23 (2003).
[26] *See id*. at 37: "[T]he phrase 'origin of goods' in [§ 43(a) of] the Lanham Act . . . refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do."
[27] *But see* Tom W. Bell, *Misunderestimating Dastar: How the Supreme Court Unwittingly Revolutionized Copyright Preemption,* 65 MARYLAND L. REV. 101 (2005) (explaining that lower courts have read *Dastar* more liberally, and that the exact boundaries of the implied preemption doctrine unwittingly revived by *Dastar* remain uncertain).
[28] *See infra*, chapter [[cite]].
[29] Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

compensation and deterrence.'"[30] Those factors could easily describe a typical case of copyright misuse. Not surprisingly, then, courts have found that defendants who suffered copyright misuse[31]—or even something less than misuse[32]—deserve an award of attorney's fees under § 505.[33]

Common law, like U.S. law generally, takes a very different approach to attorney's fees. Under the so-called "American Rule," each party in civil litigation—even the winner—must pay for its own legal representation.[34] Section 505 of the Copyright Act represents a rare and notable exception to that rule.

Here, then, the common law treats authors better than copyright law does. The Copyright Act offers many benefits to copyright holders, of course, such as strict liability and statutory damages. Overzealous copyright holders might find that the doctrine of misuse denies those benefits, however, and that § 505 imposes the costs of paying for an opposing party's attorney. For some copyright holders, those combined effects might suffice to render abandonment a financially attractive option. That would hold especially true if copyright holders could count on their common law rights to survive abandonment and if entrepreneurs continue to develop private alternatives to the statutory protection of expressive works.

Conclusion

To the extent that copyright holders and copyright users opt to manage expressive works solely by contract and other common law devices, they will deregulate expressive works. Their various private arrangements would then supplant the allocation of rights

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[30] *Id*. at 535 n. 19 (quoting Lieb v. Topstone Industries, Inc., 788 F.2d 151,156 (3rd Cir. 1986)).

[31] Garcia-Goyco v. P.R. Highway Auth., 275 F. Supp. 2d 142 (D.Ct. Puerto Rico 2003) (awarding attorney's fees under § 505 due to copyright misuse), *affirmed on other grounds*, 428 F.3d 14 (1st Cir. 2005). Although the lower court never expressly invoked misuse doctrine, the court of appeals explained, "We understand the district court to have held that [attorney's] fees were justified because (1) the plaintiffs misused the copyright . . . ." *Id*. at 21.

[32] Assessment Tech. of WI, LLC v. Wire Data, Inc., 361 F.3d 434, 437 (7th Cir. 2004) (holding attorney's fees appropriate under § 505 where plaintiff's conduct "came close" to copyright misuse).

[33] The only court to evidently find otherwise, Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (6th Cir. 1990) (denying award of attorneys' fees to defendant successfully asserting copyright misuse defense), in fact offers the exception proving the rule. Because *Lasercomb* largely pioneered the copyright misuse defense, it declined to award attorney's fees under § 505 because of the "obscurity" of the defense. *Id*. at 979 n. 22. Now that the defense has become more well known, that particular reason for denying an award of attorney's fees carries much less weight.

[34] *See* Fogerty v. Fantasy, Inc., 510 U.S. at 533 ("[I]t is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees.").

that the Copyright Act defines as mere defaults. We should encourage that sort of experimentation, as it offers both a more efficient and more equitable option than the Copyright Act's centrally planned statutory privileges. Proposed § 301(g) would help that effort by clarifying what case law and sound theory already suggest: those who abandon their copyright rights preserve their common law ones. Thus reassured, and eager to escape liability for paying opposing parties' attorneys' fees, copyright holders might find abandonment an attractive option.