he Costly Impact of High-Volume Copyright Litigation

Zahr Said
Santa Clara University School of Law

In the past decade, a set of high-volume litigation tactics have arisen in copyright litigation over photographs. Lawyers involved in these lawsuits have deployed strategic pleading practices and, at times, such lawyering has contributed to undermining or skewing copyright law's purposes. Much of this litigation has only been glancingly discussed as such in scholarly literature thus far, despite its increasing volume in at least 2-3 circuits. I hypothesize about why the phenomenon has been comparatively underreported, and trace the growth of this practice to a particular turning point in the case law, and a single precedent that high-volume litigants appear to have systematically exploited in the years since. In particular, several recurring lawyering moves by plaintiffs—both remedial and pleading practices—give cause for alarm, in that these are permitted or overlooked by courts despite contravening settled case law and long-standing interpretation of the Copyright Act. The risks posed by this high-volume lawyering may seem theoretical because many of the complaints in this dataset are uncontested and result in default judgments. Yet the cases are often cited as precedent—regardless of their status as default judgments—and thus contribute to building precedential momentum and, ultimately, distorting the operation of copyright law. I argue that courts can and should ensure that copyright's requirements and longstanding principles are heeded to minimize the incentives to bring this form of high-volume rent-seeking lawsuit. This style of lawyering exerts significant negative effects beyond the individual disputes in which it features, and a correction is overdue.