

THE DIRECTV CASES: APPLYING ANTI-SLAPP LAWS TO COPYRIGHT PROTECTION CEASE-AND-DESIST LETTERS

By *Lauren McBrayer*

As recently as four years ago, a digital reproduction of a major motion picture was “unwieldy, difficult to transfer, and of mediocre video and sound quality”¹—in other words, not worth the effort. Today, consumers can create and transfer theatrical quality digital copies worldwide within an hour.² Research suggests that anywhere from 300,000 to 350,000 pirated movies are downloaded on the Internet each day.³ According to the Motion Picture Association of America (MPAA), digital piracy⁴ costs the U.S. motion picture industry more than three billion dollars in potential worldwide revenue each year.⁵ Moreover, the problem is only getting worse: according to an international study conducted by an online research company, of those who have downloaded films, 58% say they will do so again and 17% of those who have not yet done so said they expect to start doing so within the year.⁶

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1. Christian John Pantages, Comment, *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 *TRANSNAT’L LAW* 155, 156 (2002).

2. See *id.* (citing Lee Gomes, *Web Piracy Is Hitting Hollywood Sooner Than the Studios Thought*, *WALL ST. J.*, July 17, 2000, at B1).

3. See Matthew C. Mousley, Note, *Peer-to-Peer Combat: The Entertainment Industry’s Arsenal in its War on Digital Piracy*, 48 *VILL. L. REV.* 667, 674 (2003).

4. Piracy is defined as “the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent or trademark law.” *BLACK’S LAW DICTIONARY* 1169 (7th ed. 1999).

5. MPA WORLDWIDE MKT. RESEARCH, 2003 PIRACY FACT SHEET OVERVIEW (2003), at <http://www.mpa.org/PiracyFactSheets/PiracyFactSheetOverview.pdf>.

6. MOTION PICTURE ASS’N OF AM. & ONLINE TESTING EXCH., *WORLDWIDE INTERNET PIRACY 1* (2004), available at <http://www.mpa.org/MPAAPress/index.htm>; see Pantages, *supra* note 1, at 156 (noting that “unless immediate efforts are made to stifle Internet motion picture piracy, every product churned out by this multi-billion dollar industry risks ending up as pirates’ booty”).

Meanwhile, piracy continues to plague the music industry. The Recording Industry Association of America (RIAA) estimates annual domestic revenue losses in excess of 300 million dollars.⁷ It is the same story in the software industry: 36% of the software installed worldwide in 2003 was pirated, representing a loss of almost 29 billion dollars.⁸

Digital technology poses a serious threat to the entertainment industry,⁹ and the problem shows no sign of abating. As one commentator points out, "while notable scholars have written extensively about digital intellectual property protection, their efforts fall short of creating a concrete, definite solution"¹⁰ As such, the entertainment industry has been left with the task of developing practical ways to safeguard its rights in a world that generally tolerates copyright infringement.¹¹

Rising to the challenge,¹² entertainment companies have launched aggressive enforcement campaigns at individuals.¹³ While some have called this tactic a public relations disaster, it has been an overwhelming success

7. Recording Indus. Ass'n of Am., *What the RIAA Is Doing About Piracy*, at <http://www.riaa.com/issues/piracy/riaa.asp> (last visited Mar. 5, 2005).

8. BUSINESS SOFTWARE ALLIANCE & IDC GLOBAL SOFTWARE, FIRST ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY 1 (2004), available at <http://www.bsa.org/globalstudy>.

9. Kevin Michael Lemley, Comment, *Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 619-20 (2003).

10. *Id.* at 613.

11. *See id.*; see also Mousley, *supra* note 3.

12. *See* Motion Picture Ass'n of Am., *Anti-Piracy*, at <http://www.mpaa.org/anti-piracy> (last visited Mar. 12, 2005) (stating that in 2000, the Motion Picture Association, the international counterpart of the MPAA, launched more than 60,000 investigations into suspected pirate activities, and participated in over 18,000 raids against alleged pirate operations); see also *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1074 (9th Cir. 1999) (recognizing that "RIAA fights a well-nigh constant battle against Internet piracy, monitoring the Internet daily, and routinely shutting down pirate websites by sending cease-and-desist letters and bringing lawsuits").

13. In September 2003, the RIAA filed lawsuits against 261 individuals for "egregious" copyright infringement. By January 2004, the RIAA had obtained 233 settlements, totaling approximately \$699,000, from individuals accused of copyright infringement. Grace J. Bergen, *Litigation as a Tool Against Digital Piracy*, 35 MCGEORGE L. REV. 181, 200 (2004). The RIAA targeted an additional 1,000 individual users in the first two months of 2004. *Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 897 (2004) (statement of Professor Sonia Katyal, Fordham University School of Law). The RIAA launched a new wave of copyright infringement lawsuits against 754 individuals in December 2004. Press Release, Recording Industry Association of America, RIAA Files New Copyright Infringement Lawsuits Against 754 Illegal File Sharers (Dec. 16, 2004), at <http://www.riaa.com/news/newsletter/121604.asp>.

from a copyright protection perspective.¹⁴ For example, in the six months following the RIAA's initial litigation campaign against individual KaZaA users, KaZaA usage dropped forty percent.¹⁵

While entertainment companies employ a wide variety of strategies and approaches to recoup their losses from individual infringers, demand letters—a.k.a., cease-and-desist letters—remain the most widely-used tool in the enforcement arsenal.¹⁶ Indeed, companies send them “with reckless abandon.”¹⁷ Certainly, sending cease-and-desist letters can be an effective way to avoid litigation,¹⁸ but the assumption is that the sender has a good faith reason to believe that his rights are being violated. With the advent of “bots”—automated “robots” that crawl through the Internet to identify allegedly infringing activities¹⁹—the concern is that entertainment compa-

14. See Katyal, *supra* note 13, at 897.

15. Sean Byrne, *Music Fans Cut Back on Free File-Swapping, 40% Drop in KaZaA Usage*, CDFreaks.com, Oct. 1, 2003 (stating that between March and August of 2003, KaZaA usage dropped 40%), at <http://www.cdfreaks.com/news/8094>.

16. See Thomas C. Inkel, Comment, *Internet-Based Fans: Why the Entertainment Industries Cannot Depend on Traditional Copyright Protections*, 28 PEPP. L. REV. 879, 902 (2001); see also Steve Wilson, *Online Piracy Turns From Music to Movies*, N.Y. TIMES, July 29, 1999, at 1 (noting that after reports of pirated copies of *Star Wars, Episode I: The Phantom Menace*, attorneys for Lucasfilm immediately sent cease-and-desist orders to website operators who had posted infringing material on their sites).

17. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1421 (2004). Demand letters are an attractive option for several reasons. First, unlike civil complaints, demand letters need not meet the standards of Federal Rule of Civil Procedure 11. See *id.* While Rule 11 requires that any papers filed with the court be based on a reasonable inquiry and “well-grounded in fact, legally tenable, and not interposed for any improper purpose,” FED. R. CIV. P. 11, the allegations made in demand letters need only be based on a good faith belief that the client's rights are being violated, a standard that can be met without conducting an investigation. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (discussing the purpose of Rule 11); *Rossi v. Motion Picture Ass'n of Am., Inc.*, No. 02-00239BMK, 2003 U.S. Dist. LEXIS 12864, *9 (D. Haw. Apr. 29, 2003), *aff'd*, 391 F.3d 1000 (9th Cir. 2004) (construing 17 U.S.C. § 512(c)(3)(A)(v) and holding that a copyright holder must only “form a good faith belief of an alleged or “claimed” infringement prior to sending an ISP a notice”).

18. Many of the settlements the RIAA has reached with alleged copyright infringers were reached prior to the filing of a complaint. See Press Release, Recording Industry Association of America, 64 Individuals Agree to Settlements in Copyright Infringement Cases (Sept. 29, 2003) (stating that twelve of RIAA's reported settlements were with individuals who had been identified as infringers by the RIAA but had not yet been sued), available at <http://www.riaa.com/news/newsletter/092903.asp>.

19. These automated Web crawler programs continually crawl from one server to another, “compiling lists of Web addresses that offer unauthorized titles of copyrighted material” and generating cease-and-desist letters. Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. 297, 341 (2003); see also Frank Ahrens, “Ranger” vs. the Movie Pi-

nies are "sending out automatic take-down notices with no real research or double checks."²⁰ The fact that these programs frequently mistake legitimate files for copyrighted works means that the entertainment industry generates and sends hundreds of erroneous letters every day.²¹ While commentators denounce this "shoot-in-the-dark approach to copyright protection,"²² entertainment companies maintain that an aggressive strategy is the only way to enforce their rights.²³

Not all recipients of threatening cease-and-desist letters are willing to overlook false allegations and accept a mere apology for the mistake. False accusations and erroneous demands for monetary settlement can be devastating to the individuals and small businesses on the receiving end, and quite a few have begun to fight back in court. After DirecTV, the leading distributor of television broadcasts through encrypted satellite transmissions, sent nearly 170,000 demand letters to alleged purchasers of signal theft equipment without confirming whether the individuals ever used the equipment illegally, recipients of erroneous letters filed suit against DirecTV asserting several causes of action, including unfair and deceptive business practices, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and stubborn litigiousness.²⁴

rates: Software Is Studios' Latest Weapon in a Growing Battle, WASH. POST, June 19, 2002, at H1; *What's a Bot*, BOTSPOT, at http://www.botspot.com/common/whats_bot.html (last visited Mar. 5, 2005).

20. Brendon Chase, *Linux Group Rebuffs Hollywood Piracy Charge*, CNET NEWS.COM, Sept. 20, 2004, at http://news.com.com/Linux+group+rebuffs+Hollywood+piracy+charge/2100-1030_5374528.html?part=dh&tag=ntop. According to Pia Smith, President of Linux Australia, "organizations that participate in such behavior should be held accountable and forced to put at least some effort into researching the validity [of their allegations]." *Id.*

21. For example, the RIAA has mistakenly believed an astrophysics professor with the last name Usher illegally uploaded files by well known R&B artist Usher. Sonia K. Katyal, *A War on CD Piracy; A War on our Rights*, L.A. TIMES, June 27, 2003, at Cal. Metro, Part 2, at 17. Even though companies using automated technology to find pirates insist that they engage in due diligence to confirm evidence of infringement, the large margin of error associated with automated tracking programs makes it impossible for companies to catch everything. See Katyal, *supra* note 19, at 345.

22. See Chase, *supra* note 20 (quoting Pia Smith, President of Linux Australia).

23. See Benny Evangelista, *Digital Dupes; Movies, Music Industries Try to Keep Pirated Copies from Spinning Out of Control*, S.F. CHRON., Jan. 31, 2000 (quoting Jack Valenti, President of the MPAA as stating that "if we have to file a thousand lawsuits a day, we'll do it"), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/01/31/BU10659.DTL>.

24. See *DirectTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825, 830 (E.D. Mich. 2003); *DirectTV, Inc. v. Cephas*, 294 F. Supp. 2d 760 (M.D.N.C. 2003); *Buckley v. DirectTV, Inc.*, 276 F. Supp. 2d 1271, 1273 (N.D. Ga. 2003).

DirecTV claims it should be immune from suit. The company argues that because sending cease-and-desist letters is a form of constitutionally protected “petitioning activity,” any cause of action arising from that activity should be considered an impermissible Strategic Lawsuit Against Public Participation, a so-called “SLAPP” suit.²⁵ Developed to protect citizens from meritless lawsuits filed by large private interests with the intent to discourage the citizens’ exercise of their constitutional rights,²⁶ anti-SLAPP laws provide absolute immunity from tort claims arising out of constitutionally protected speech and petitioning activity. While anti-SLAPP laws were designed to prevent corporate entities with deep pockets from using their resources to quash constitutionally protected speech and petitioning activity,²⁷ the deep pockets themselves now use these protections as a means to preserve their “right” to use unsubstantiated demand letters as a scare tactic.

Part I of this Note provides general background on SLAPP suits and the legislation designed to target them. Part II examines four of the lawsuits filed against DirecTV and discusses the company’s request for anti-SLAPP immunity. Part III argues that in light of the legislative purpose behind anti-SLAPP laws, DirecTV should not have been considered a SLAPP target and thus should not have been able to avail of anti-SLAPP immunity. The Part suggests that extending anti-SLAPP protection to cease-and-desist letters represents not only a misapplication of the laws and a perversion of their First Amendment purpose, but also a misguided approach to rights enforcement. Finally, Part IV argues that the best way for the entertainment industry to handle its mistakes is not to seek immunity, but rather to accept responsibility: the industry should stop relying on anti-SLAPP laws as a shield from liability and instead focus on maintaining the industry’s legitimacy, both in the eyes of the court and in the eyes of consumers.

25. See, e.g., *Buckley*, 276 F. Supp. 2d at 1273-74.

26. See Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 968 (1999).

27. *Id.* (stating that the term “SLAPP” applies when “public or corporate entities with deep pockets use litigation to inhibit or retaliate against those who exercise their constitutionally protected rights of speech and petition in ways that threaten the entities’ interests”).

I. PRESERVING THE RIGHT TO PETITION: STATE ANTI-SLAPP PROTECTIONS AND THE *NOERR-PENNINGTON* DOCTRINE

A. SLAPP Suits

A "Strategic Lawsuit Against Public Participation"²⁸ (SLAPP) is the name used to describe a meritless legal action brought against individuals or groups with the intention of "silencing [the] opponents, or at least . . . diverting their resources."²⁹ By definition, SLAPPs are "generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so."³⁰ Specifically, a SLAPP suit interferes with the target's past or future exercise of his First Amendment right to free speech and to petition the government for the redress of grievances.³¹ For example, the paradigmatic SLAPP case involves a group of activists petitioning the government to stop a development; the developer then sues the activist group, alleging one or more of the following causes of action: defamation, interference with economic advantage, judicial process abuse, civil rights violations by the activists, conspiracy, and/or nuisance.³²

In light of the myriad causes of action used by SLAPP filers and the difficulty in defining the scope of protected petitioning activity, SLAPP suits can be difficult to recognize.³³ Regardless of the cause of action in

28. Professor George W. Pring of the University of Denver first coined this term. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989). In his seminal article, Professor Pring identifies a SLAPP suit as: 1) a civil complaint or counterclaim (for monetary damages, and/or injunction), 2) filed against non-governmental individuals, and/or groups, 3) because of their communications to a government body, official, or the electorate, 4) on an issue of some public interest or concern. *Id.* See generally GEORGE PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

29. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993).

30. *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 450 (Ct. App. 1994); see also Braun, *supra* note 26, at 968.

31. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary Of and Commentary On Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802-03 (2000). See generally Noah P. Peeters, *Don't Raise That Hand: Why, Under Georgia's Anti-SLAPP Statute, Whistleblowers Should Find Protection From Reprisals For Reporting Employer Misconduct*, 38 GA. L. REV. 769, 780 (2004) (describing the paradigmatic SLAPP suit).

32. See Braun, *supra* note 26, at 984.

33. See Laura J. Ericson-Siegel, Comment, *Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a 'Solution' for Florida*, 20 FLA. ST. U. L. REV. 487, 492 (1992); see also Barker, *supra* note 29, at 403 (noting that a SLAPP filer, by definition, has improper motives).

which they are framed, SLAPP lawsuits are not filed to vindicate legitimate legal claims, but rather to intimidate and discourage opposition from their targets.³⁴ Indeed, unlike a typical plaintiff, the SLAPP filer “expects to lose and is willing to write off litigation expenses (and even the defendant’s attorney’s fees where necessary) as the cost of doing business.”³⁵ Typically, the filer is better equipped to handle litigation than its target, possessing more financial resources and more knowledge about the legal process. By contrast, many SLAPP targets have no prior experience in the judicial arena and often lack the kinds of resources necessary to mount a sophisticated defense.³⁶ While the filer may have little to no chance of succeeding on the merits of his claim, he nevertheless succeeds if his suit, which his target cannot afford to defend, has the effect of silencing the target’s petition activity. Although some commentators argue that targets can fight back with requests for sanctions or countersuits for abuse of process or malicious prosecution, these tactics are costly and unlikely to intimidate the filer.³⁷

In the face of widespread use of SLAPPs in the 1970s and 1980s, courts and state legislatures began to look for concrete solutions to the SLAPP problem.³⁸ Remedies ranged from judicial solutions fashioned from existing procedural forms to statutory solutions aimed specifically at SLAPPs.³⁹

B. Statutory Solutions: State Anti-SLAPP Laws

In 1989, Washington became the first state to enact an anti-SLAPP statute.⁴⁰ Since then, twenty-four states have passed similar legislation.⁴¹ Eleven states have recently or are currently considering anti-SLAPP

34. See Peeters, *supra* note 31, at 779; see also PRING & CANAN, *supra* note 28, at 9-10 (adopting terms “target” and “filer” to identify parties to SLAPP litigation). Because SLAPPs often emerge in the context of cross-claims and counterclaims, using the standard terminology of plaintiff and defendant can be confusing. For the purpose of clarity, this Note identifies plaintiffs of SLAPP suits as “filers” and defendants as “targets.”

35. See Tate, *supra* note 31, at 805.

36. See Peeters, *supra* note 31, at 781 (citing PRING & CANAN, *supra* note 28, at 11).

37. *Id.* at 782 (citing Barker, *supra* note 29, at 406).

38. *Id.*

39. Braun, *supra* note 26, at 984.

40. See WASH. REV. CODE ANN. §§ 4.24.500 to .520 (West 1999).

41. Other States: Statutes and Cases, California Anti-SLAPP Project, at <http://www.casp.net/menstate.html> (last updated Feb. 25, 2005) (detailing reach of legislative responses to SLAPPs in California, Delaware, Florida, Georgia, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, and West Virginia).

bills.⁴² These existing anti-SLAPP statutes offer varying degrees of protection for speech and petition rights through procedural hurdles that make it more difficult for a SLAPP filer to pursue its claims. The core provisions common to many of these statutes include: the establishment of a process for motions to dismiss or strike claims targeting public participation; the expedited hearing of such motions and suspension or significant curtailment of discovery until the court rules on the motion; and a cost-shifting award of attorneys fees and costs payable by the filer to the target when the target prevails on its motion to dismiss.⁴³

California enacted its anti-SLAPP remedy in 1992. At the time of its enactment, it was “the most ambitious and far-reaching of all the state anti-SLAPP laws,”⁴⁴ providing SLAPP targets with an accelerated motion to strike a complaint or cause of action if it arose “from any act in furtherance of the . . . right of petition or free speech . . . in connection with a public issue.”⁴⁵ Under California’s anti-SLAPP statute, protection extends to any act “in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech,” as long as the constitutional activity is done “in connection with a public issue or an issue of public interest.”⁴⁶

In 2003, the California legislature enacted California Civil Procedure Code § 425.17 to limit the application of the anti-SLAPP special motion to strike in order to curb the “disturbing abuse” of the anti-SLAPP motion by “the same types of businesses who used the SLAPP action.”⁴⁷ Under the

42. *Id.* These states include Arizona, Arkansas, Colorado, Connecticut, Illinois, Kansas, Michigan, New Hampshire, New Jersey, Texas, and Virginia.

43. *See* Peeters, *supra* note 31, at 782.

44. Jerome I. Braun, *California’s Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 732 (2003).

45. CAL. CIV. PROC. CODE § 425.16 (West 2004). The statute protects: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Id.

46. *Id.* § 425.16(e).

47. *Blanchard v. DirectTV, Inc.*, 20 Cal. Rptr. 3d 385 (Ct. App. 2004); *see* CAL. CIV. PROC. CODE § 425.17. Subdivision (b) of § 425.17 makes the anti-SLAPP procedure

newly enacted § 425.17(b), public interest lawsuits are specifically excluded from the reach of anti-SLAPP special motions to strike.⁴⁸

C. Judicial Remedies: The *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine got its name from two antitrust cases in which the Supreme Court established that antitrust laws could not be used to penalize genuine political activity.⁴⁹ Although initially designed strictly to provide immunity from federal antitrust claims and not as a SLAPP remedy, courts have expanded the doctrine to prevent civil liability for any petitioning activity as long as the petitioning is not a “sham.”⁵⁰

While some commentators have criticized its use outside of the antitrust context,⁵¹ “some courts have read *Noerr-Pennington* as establishing an absolute, constitutional privilege against tort claims for bona fide petitioning activity.”⁵² West Virginia was the first state to apply *Noerr-Pennington* immunity to a SLAPP target. In what some call “the most ex-

inapplicable to “any action brought solely in the public interest or on behalf of the general public.”

48. CAL. CIV. PROC. CODE § 425.17(b).

49. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (recognizing petition immunity); see also Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1254 (1984). Under the *Noerr-Pennington* doctrine, petitioning activity is immune from antitrust liability. See Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977).

50. See Zauzmer, *supra* note 49, at 1256; see, e.g., *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1532 (9th Cir. 1991) (“[A]n antitrust plaintiff must make a two-part showing to support a finding of sham: (1) that the suit is baseless—a legal question . . . and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation—a question of fact.”) (internal citation omitted).

51. See Timothy P. Getzoff, Comment, *Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the Noerr-Pennington Doctrine*, 67 U. COLO. L. REV. 675, 689 (1996); see also Zauzmer, *supra* note 49, at 1259 (“[T]he *Noerr-Pennington* doctrine has been applied in a multitude of situations far from the Supreme Court’s narrow antitrust application. Further, these cases, like their antitrust counterparts, define the sham exception so narrowly as to protect virtually any actual political or litigious behavior from civil liability.”).

52. Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts’ Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1003 (1992) (noting that “the most vigorous application of the [*Noerr-Pennington*] doctrine outside of antitrust has occurred in SLAPP suits, where the right to petition is raised as a defense to tort claims”).

pansive application of *Noerr-Pennington* in any context,"⁵³ the West Virginia Supreme Court held in *Webb v. Fury* that the *Noerr-Pennington* doctrine "rests upon solid First Amendment grounds rather than upon a limited construction of the Sherman Act."⁵⁴

In contrast, the Fifth and Tenth Circuit Courts of Appeals have expressly rejected the characterization of *Noerr-Pennington* immunity as a "principle of constitutional law," asserting that "*Noerr* was based on a construction of the Sherman Act [and] was not a first amendment decision."⁵⁵ In light of the fact that the *Noerr* and *Pennington* decisions establish only that a plaintiff harmed by petitioning activity may not recover under the Sherman Act,⁵⁶ many commentators, and indeed some courts, find the application of the doctrine in non-antitrust cases inappropriate and "inconsistent with the Supreme Court's first amendment jurisprudence."⁵⁷

II. THE DIRECTV CASES

While legal access to DirecTV's satellite television programming requires that customers purchase a DirecTV access card and receiver, there are devices available that can circumvent DirecTV's signal-scrambling technology, allowing users to view DirecTV's programming without subscribing to DirecTV's service and without making payment to the company.⁵⁸ While these 'unscrambling' devices are often pre-configured to pirate DirecTV's signal,⁵⁹ researchers and innovators use many such de-

53. *Id.* at 1023.

54. 282 S.E.2d 28, 36 (W. Va. 1981); *id.* at 37 ("Clearly, the *Noerr-Pennington* doctrine is a principle of constitutional law which bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying causes of action asserted by the plaintiff."); see Waldman, *supra* note 52, at 1024.

55. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 890 (10th Cir. 2000) (en banc) (quoting *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364-54 (5th Cir. 1983)) (footnote omitted). The Fifth Circuit specifically noted in *Coastal States* that the "petitioning immunity" granted by the *Noerr-Pennington* doctrine extends beyond the guarantees of the petition clause: "We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly." *Coastal States*, 694 F.2d at 1366; see also Zauzmer, *supra* note 49, at 1266 (arguing that "to the extent that *Webb v. Fury* found an absolute immunity in the first amendment for [malicious or knowingly false] statements, it was simply wrong").

56. Zauzmer, *supra* note 49, at 1250. See generally *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

57. Zauzmer, *supra* note 49, at 1250.

58. *DirecTV, Inc. v. Cephas*, 294 F. Supp. 2d 760, 762 (M.D.N.C. 2003).

59. These pre-configured devices include bootloaders, unloopers, and blockers. See *What's Going on Here?*, DirecTVDefense.org, at <http://www.DirecTVDefense.org> (last

vices for other non-infringing purposes: specifically, to secure computer networks, enable user-based identification, and further scientific discovery.⁶⁰ However, individuals who use these unscrambling devices to gain unauthorized access to DirecTV's programming do so in violation of the Digital Millennium Copyright Act (DMCA), which makes it unlawful to circumvent technology that limits access to copyrighted work, or to sell a device that will perform that task.⁶¹

In the spring of 2001, DirecTV obtained the sales records of several companies engaged in the sale of various pirate access devices⁶² and initiated a program called the End User Development Group ("EUDG") to track the individuals listed in the records.⁶³ In 2002, EUDG sent 100,000 "nearly identical" demand letters to consumers who had acquired various electronic devices that could be used to tamper with DirecTV access cards in order to receive free programming.⁶⁴ The demand letters accused the individuals of violating various federal statutes by possessing and/or using signal theft equipment, and informed the recipients that DirecTV intended to pursue legal action against them but would refrain from filing a complaint if a settlement could be reached.⁶⁵ These demand letters further stated that DirecTV would settle the matter if the individual surrendered his illegal equipment, promised in writing not to obtain similar equipment in the future, and paid an unspecified monetary sum.⁶⁶ EUDG sent a follow-up letter to the recipients who did not respond to the initial letter. This follow-up letter reiterated the initial accusation and threatened a lawsuit if

updated Mar. 5, 2005). DirecTV Defense is a joint effort of the Electronic Frontier Foundation and The Stanford Center for Internet and Society Cyberlaw Clinic.

60. *Id.* ("[S]mart card readers and their various derivatives are capable of so much more: they secure computer networks, enable user-based identification, and further scientific discovery.").

61. *See* 17 U.S.C. § 1201 (2000). Section 1201(a)(2) provides that "no person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title. *Id.* § 1201(a)(2).

62. *Buckley v. DirecTV, Inc.*, 276 F. Supp. 2d 1271, 1273 n.2 (N.D. Ga. 2003) ("DirecTV obtained the identities of these individuals from customer lists seized pursuant to civil writs of seizure issued by United States District Court judges authorizing United States Marshals and DirecTV representatives to seize and impound products and related business records from individuals and companies designing, manufacturing, or trafficking in such equipment.").

63. *See* *DirecTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825, 830 (E.D. Mich. 2003); *Cephas*, 294 F. Supp. 2d at 762; *Buckley*, 276 F. Supp. 2d at 1273.

64. *Cavanaugh*, 321 F. Supp. 2d at 830.

65. *Buckley*, 276 F. Supp. 2d at 1273.

66. *Cephas*, 294 F. Supp. 2d at 762.

the recipient did not immediately contact DirecTV regarding a settlement.⁶⁷ After sending hundreds of thousands of demand letters to individuals all over the country, DirecTV filed nearly 24,000 lawsuits against alleged signal pirates.⁶⁸

While DirecTV insists that its actions were warranted in light of evidence of rampant piracy of the company's satellite signals, its zealous enforcement campaign prompted a wave of retaliatory litigation. While the causes of action differ, the four cases discussed below have two features in common: in each case the claims against DirecTV arose out of the company's demand letters and in each case DirecTV argued that the letters constituted a protected exercise of the company's First Amendment rights. The fact that DirecTV prevailed on two of its four motions demonstrates the lingering judicial uncertainty regarding the applicability of anti-SLAPP protections to demand letters.

A. *Buckley v. DirecTV, Inc.*

In Georgia, six recipients of demand letters from DirecTV filed suit against the company asserting several causes of action, including unfair and deceptive business practices, RICO violations, and stubborn litigiousness.⁶⁹ DirecTV moved to dismiss the plaintiffs' complaint under Georgia's Anti-SLAPP statute,⁷⁰ arguing that the pre-litigation demand letters were protected under the anti-SLAPP statute as an exercise of the company's First Amendment rights.⁷¹ The plaintiffs claimed that the statute did not apply because DirecTV's demand letters did not involve an "issue of public interest or concern."⁷²

Relying on a California case interpreting a similar statute, the district court held that statements made "in connection with or in preparation of litigation," including pre-litigation demand letters, were protected as part of the First Amendment right to petition.⁷³ The court found the plaintiff's argument, that the demand letters did not involve an issue of public interest or concern, unpersuasive in light of plaintiffs' complaint, which made several references to the defendants' impact on "members of the general public."⁷⁴ The court pointed out that "the facts establish that the demand

67. *Buckley*, 276 F. Supp. 2d at 1273.

68. *Id.*

69. *Id.*

70. See GA. CODE ANN. § 9-11-11.1 (1998).

71. *Buckley*, 276 F. Supp. 2d at 1273-74.

72. *Id.* at 1274.

73. *Id.* (citing *Kashian v. Harriman*, 120 Cal. Rptr. 2d 576, 588 (Ct. App. 2002)).

74. *Id.* at 1275.

letters were sent to tens of thousands of people in connection with an issue that affects millions [and] . . . any action involving such a large number of people is, by definition, a matter of public interest and concern.”⁷⁵

In response to the plaintiffs’ claims that DirecTV did not conduct an adequate investigation before sending the demand letters and that the letters contain false, misleading, or deceptive statements, the court stated that the plaintiffs’ remedy for these wrongful acts would be to first obtain a dismissal on the merits of any lawsuit filed against them by DirecTV and then pursue sanctions under Rule 11 or an action for malicious prosecution.⁷⁶ In barring the plaintiffs’ claims, the court illuminated the central problem: according to the court, DirecTV’s demand letters warranted the same level of protection as a civil complaint; yet, as the court acknowledged, demand letters, unlike civil complaints, cannot trigger Rule 11 sanctions.

B. *DirecTV, Inc. v. Cephias*

DirecTV offered the same immunity argument in *DirecTV, Inc. v. Cephias*, this time in a motion to dismiss the defendant’s counterclaims for unfair and deceptive trade practices under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA).⁷⁷ The defendant argued that DirecTV had violated the statute by falsely accusing him of a crime, representing that it had the power of law enforcement, and threatening to take action not permitted by law.⁷⁸ In its motion to dismiss, DirecTV argued that the *Noerr-Pennington* doctrine immunized its demand letters and thus the letters could not provide a basis for the defendant’s claim.⁷⁹

75. *Id.*

76. *Id.*

77. N.C. GEN. STAT. § 75-16 (2003). To state a claim under the Unfair and Deceptive Trade Practices Act (UDTPA), Cephias was required to show that (1) DirecTV committed an unfair or deceptive act or practice; (2) in or affecting commerce; and that (3) the defendant “‘suffered actual injury as a proximate result of [DirecTV’s] misrepresentations’ or unfair conduct.” *DirecTV, Inc. v. Cephias*, 294 F. Supp. 2d 760, 765 (M.D.N.C. 2003) (citing *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 507 S.E.2d 56, 63 (N.C. Ct. App. 1998) (quoting *Ellis v. Smith-Broadhurst, Inc.*, 268 S.E.2d 271, 273-74 (N.C. Ct. App. 1980))).

78. Cephias, the defendant, was among the individuals who received a demand letter from DirecTV, accusing him of purchasing and using illegal signal theft equipment. When Cephias replied with a letter denying the accusations, DirecTV sent a second letter, this time stating that Cephias would be given ten additional days to pursue a settlement with the company before it retained counsel and filed suit. Cephias did not respond within this ten-day period. Two months later, DirecTV filed suit. *Cephias*, 294 F. Supp. 2d at 762.

79. *Id.* at 766.

Recognizing that petition clause immunity was “designed to protect petitions to the government when suits based on those petitions would have the effect of deterring them,” the court held that pre-litigation demand letters should be protected only if allowing the letters to become the basis of a lawsuit would discourage future meritorious litigation.⁸⁰ In the present context, the court reasoned that “[because] parties bringing or threatening to bring meritorious, good faith claims cannot by definition be subject to liability [for unfair and deceptive trade practices],” claims brought under the UDTPA simply do not have a chilling effect on good faith litigation.⁸¹ Noting that parties who threaten consumers with non-meritorious litigation should be subject to liability, the court concluded that petition clause immunity was inappropriate in this context and thus did not bar the defendant’s claims.⁸²

C. *DirectTV, Inc. v. Cavanaugh*

In a similar ruling, a federal district court in Michigan held that statements made in a letter threatening litigation were not absolutely protected by the petition clause of the First Amendment and therefore could become the basis of a lawsuit.⁸³ The court found it

difficult to see how subjecting DirectTV to liability under the [Michigan Consumer Protection Act] would chill its right to petition the government and seek redress, [considering that] at issue in this motion is not DirectTV’s right to use demand letters as a means of encouraging settlement, but rather its use of false or misleading statements in the demand letters.⁸⁴

The court pointed out that if DirectTV did, in fact, use false and misleading statements, “[then] punishing DirectTV will not deter future use of demand letters. At best, it will encourage the company to investigate carefully its accusations and to be precise in the language it uses when attempting to settle with suspected signal pirates.”⁸⁵

D. *Blanchard v. DirectTV, Inc.*

In the most recent DirectTV decision, a California court of appeal went the other way, finding that DirectTV’s demand letters were “absolutely

80. *Id.* at 767.

81. *Id.*

82. *Id.*

83. *DirectTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825, 830 (E.D. Mich. 2003).

84. *Id.* at 842.

85. *Id.*

privileged”⁸⁶ under California’s anti-SLAPP statute as “‘protected communications’ [sent] in furtherance of DirecTV’s right of petition under the United States and California Constitutions.”⁸⁷ According to the court, the plaintiffs’ unfair business practice claim⁸⁸ “would establish no ringing declaration of the rights of all pirating-device purchasers, nor . . . lead to a wholesale change in the practice of sending demand letters.”⁸⁹ As a result, the claim against DirecTV could not be considered a “public interest action,” and thus was not entitled to heightened protection from the anti-SLAPP special motion to strike.⁹⁰ Interestingly, while the *Buckley* court found that DirecTV’s demand letters were “by definition, a matter of public interest and concern,”⁹¹ the *Blanchard* court held that an action filed in response to the very same demand letter campaign could not be considered a public interest action.⁹²

III. THE INAPPLICABILITY OF ANTI-SLAPP PROTECTIONS TO CEASE-AND-DESIST LETTERS

As the *DirecTV* cases clearly demonstrate, the procedural safeguards enacted to protect citizens from SLAPP suits are being used by intellectual property owners as part of larger digital rights enforcement campaigns; specifically, entertainment companies rely on anti-SLAPP laws to protect not only their right to file lawsuits but also their right to send cease-and-desist letters to suspected infringers, often without any evidence of actual infringement.

Courts disagree as to whether and to what extent state anti-SLAPP statutes and the federal *Noerr-Pennington* doctrine extend to demand letters.⁹³ In a recent landmark decision, the Tenth Circuit held that “a letter from one private party to another private party simply does not implicate the right to petition, regardless of what the letter threatens.”⁹⁴ Relying on

86. *Blanchard v. DirecTV, Inc.*, 20 Cal. Rptr. 3d 385, 390 (Ct. App. 2004).

87. *Id.* (citing CIVIL CODE § 47(b) (West 2004)).

88. *See* CAL. BUS. & PROF. CODE § 17200 (West 1997).

89. *Buckley*, 20 Cal. Rptr. 3d at 393.

90. *Id.* at 394.

91. *Buckley v. DirecTV, Inc.*, 276 F. Supp. 2d 1271, 1275 (N.D. Ga. 2003).

92. *See Buckley*, 20 Cal. Rptr. 3d at 394.

93. For the remainder of this Note, I will use the term “Anti-SLAPP Protections” to refer to both state anti-SLAPP statutes and the *Noerr-Pennington* doctrine.

94. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885, 892 (10th Cir. 2000) (en banc) (citing PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTI-TRUST LAW 237, § 205e (rev. ed. 1997), and pointing out that “even the antitrust text cited by the panel majority notes that ‘a mere threat directed at one’s competitor to sue or to seek administrative relief does not involve or ‘petition’ the government . . .”).

“the plain language of the First Amendment,” which “protects only those petitions which are made to ‘the Government,’” the Tenth Circuit determined that “purely private threats of litigation” do not fall within the definition of petitioning activity.⁹⁵

Other circuits may have begun to follow the Tenth Circuit’s lead: although the Eleventh Circuit has extended antitrust immunity to pre-litigation threats,⁹⁶ a recent district court decision in that circuit expressly limited this holding to the antitrust context, stating that “given the absence of authority from the Eleventh Circuit, the court will assume to be persuasive the reasoning of the Tenth Circuit that the *Noerr-Pennington* doctrine does not immunize parties from liability based on claims arising out of purely private communications outside the context of litigation.”⁹⁷

In contrast, some courts have held that pre-litigation correspondence is entitled to anti-SLAPP protection as communication preliminary to an official proceeding.⁹⁸ The Fifth Circuit has held that “mere threats of litigation” qualify for immunity, on the grounds that “it would be absurd to hold that [the petition clause] does not protect those acts reasonably and normally attendant upon effective litigation.”⁹⁹

Echoing these sentiments, the dissent in *Cardtoons* argued that “in order to provide breathing space to the First Amendment right to petition the courts, further the interests that right was designed to serve, and promote the public interest in efficient dispute resolution,” cease-and-desist letters should be afforded “the same level of immunity from tort liability as a complaint making the same allegations.”¹⁰⁰ This notion—that pre-

95. *Id.* at 893.

96. *See* *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (holding “threats, no less than the actual initiation of litigation” qualify for antitrust immunity).

97. *Porsche Cars N. Am., Inc. v. Lloyd Design Corp.*, No. 1:99-CV-1560A-JEC, 2002 U.S. Dist. LEXIS 9612 (D. Ga. Mar. 28, 2002).

98. *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Repr. 2d 830, 835 (Ct. App. 1996). In *Dove Audio*, a recording company sued a law firm for defamation for alleging the record company had failed to pay royalties to certain charities; the law firm brought a special motion to strike under California’s anti-SLAPP statute. The court affirmed the defendants’ motions, finding that the law firm’s letter to celebrities who had participated in the recording was protected from defamation liability under California’s anti-SLAPP statute as a communication “preparatory to or in anticipation of the bringing of an action or other official proceeding.” *Id.*; *see also* *Am. Broad. Co. v. Maljack Prod., Inc.*, 34 F. Supp. 2d 665, 675 (N.D. Ill. 1998) (fifty cease-and-desist letters sent by alleged owner of copyright in footage of Princess Diana’s funeral were privileged when not sent in bad faith and did not form basis for intentional interference).

99. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983).

100. *Cardtoons*, 208 F.3d at 899 (Lucero, J., dissenting).

litigation threats do not constitute petitioning activity but nonetheless deserve protection—is echoed in *Areeda & Hovenkamp*: “Although a mere threat directed at one’s competitor to sue or to seek administrative relief does not involve or ‘petition’ the government, it would be anomalous and socially counterproductive to protect the right to sue but not the right to threaten suit.”¹⁰¹

It may indeed be socially productive to protect the right to threaten suit in addition to the right to file suit, but it is dangerous to protect the former *at the expense* of the latter. Anti-SLAPP protections were designed to protect specific political rights and apply only when those rights were exercised in connection with a public issue. While the First Amendment offers broad protection for speech and petitioning activity, anti-SLAPP laws offer a more narrow protection: in most states, anti-SLAPP immunity is only available where a citizen has exercised her constitutional rights “in connection with a public issue.”¹⁰² Thus, even if sending a demand letter does constitute speech or petitioning activity, anti-SLAPP protections only apply if the letters were sent in connection with a public issue.

In light of the fact that all civil lawsuits arguably involve a matter of public concern “in that they invoke laws or ask for change in the law,”¹⁰³ civil complaints by definition qualify for anti-SLAPP protection. It remains unclear, however, whether and to what extent pre-litigation communications are similarly protected.¹⁰⁴ If every “valid effort to influence governmental action” involves a matter of public concern, then the relevant question is whether demand letters in fact represent an effort to influence government action.¹⁰⁵ Since demand letters are often sent in order to

101. *AREEDA & HOVENKAMP*, *supra* note 94, at 237, § 205e.

102. *E.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2004); *see also, e.g.*, R.I. GEN. LAWS § 9-33-2 (1997).

103. Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 B.Y.U. L. REV. 1, 83; *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 676 (“[E]ven a civil tort complaint against one’s neighbor raises some issues of public concern. It asks for an application, and sometimes an outright change, in the law that can impact all citizens. A civil complaint, no matter how common, therefore is not the equivalent of private speech between private parties.”).

104. Before the emergence of anti-SLAPP laws, it was widely accepted that cease-and-desist letters could provide the basis for tort liability. In a case predating the emergence of state anti-SLAPP legislation, the Second Circuit held that Universal City Studios tortiously interfered with Nintendo’s contractual relations by sending cease-and-desist letters to Nintendo’s licensees. *See Universal City Studios, Inc. v. Nintendo Co.*, 797 F.2d 70, 74-75 (2d Cir. 1986).

105. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988).

avoid the need for governmental involvement, the argument that these letters by definition represent an attempt to influence the government seems tenuous at best. Furthermore, while demand letters and other pre-litigation communications by attorneys may fall within a state's litigation privilege,¹⁰⁶ this does not resolve the anti-SLAPP question.

Moreover, in light of the fact that demand letters are a tool favored by big companies and are rarely sent by the proverbial "little guys," the extension of anti-SLAPP laws to cover demand letters seems a perversion of their purpose. Take the *DirectTV* cases for example: courts are favoring a private company's right to pursue its private business interests over a citizen's right to initiate litigation. While there may be policy reasons to protect demand letters, it is "anomalous and socially counterproductive" to do it on First Amendment grounds.¹⁰⁷

Indeed, the argument that allowing claims based on demand letters would chill sincere efforts to settle disputes without litigation ignores the fact that a demand letter could only become the basis of a claim if the letter contained false or misleading statements. Thus, to allow claims based on erroneous demand letters would not impair the use of demand letters generally, but rather would only encourage senders "to investigate carefully [their] accusations and to be precise in the language [they] use."¹⁰⁸ Preciseness of language is the key here: a company could arguably make the same underlying claims in its demand letters without risking liability simply by modifying its language. *DirecTV* did not end up in court merely because it sent demand letters to innocent consumers, but rather because it made false and misleading statements in those demand letters. Thus, *DirecTV* arguably could have avoided liability by sticking to the truth.

IV. IN PURSUIT OF A HAPPY MEDIUM

Certainly, the proliferation of free, illegal copies of film, music, and software on the Internet pose a serious threat to the entertainment industry, but the industry's response to this threat must be managed in such a way as to minimize—or at least account for—its mistakes.¹⁰⁹ If the entertainment industry wants the freedom to vigorously enforce its intellectual

106. *Rubin v. Green*, 847 P.2d 1044, 1047-48 (Cal. 1993).

107. *AREEDA & HOVENKAMP*, *supra* note 94, at 237, § 205e.

108. *DirectTV, Inc. v. Cavanaugh*, 321 F. Supp. 2d 825, 842 (E.D. Mich. 2003).

109. *See* Katyal, *supra* note 19, at 367 (noting that "piracy surveillance methods are calibrated to be overbroad by design in order to deter the widest possible breadth of infringement"); S.E. Oross, *Fighting the Phantom Menace: The Motion Picture Industry's Struggle to Protect Itself Against Digital Piracy*, 2 VAND. J. ENT. L. & PRAC. 149, 158 (2000).

property rights, then it must be willing to pay a price for its vigor. In short, the industry must be willing to compromise. Considering the high margin of error associated with automated tracking systems, without proper safeguards, personal liberty will become a casualty of the war on piracy and entertainment companies will lose the public sympathy they have worked so hard to gain.

Existing legislation is insufficient. By zeroing in on individuals, the industry has changed the stakes of the game. The law must adjust to ensure the proper balance between the copyright owners' proprietary interests and the individual's speech and privacy rights. While the DMCA establishes a good faith standard for ISP take-down notices (specifically, the statute provides recourse if the copyright holder "knowingly" and "materially" misrepresents that copyright infringement has occurred),¹¹⁰ these protections extend only to ISPs, leaving individual consumers out in the cold. The "good faith" standard¹¹¹ may be sufficient, but it must extend beyond ISPs to cover private individuals.

Casting a wide net may seem like a smart strategy in the short run—after all, it garnered immediate results for the recording industry. But "an overuse of heavy-handed tactics . . . will eventually backfire on the industry."¹¹² "Rather than using every weapon in its arsenal,"¹¹³ the industry should focus on maintaining its legitimacy, both in the eyes of the court

110. 17 U.S.C. § 512(f).

"Knowingly" means that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations. "Material" means that the misrepresentation affected the ISP's response to a DMCA letter.

Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. 2004) (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

111. A district court has held that the DMCA permits a copyright holder to send a cease-and-desist letter to a suspected infringer without conducting an investigation to establish actual infringement. See *Rossi v. Motion Picture Ass'n of Am., Inc.*, No. 02-00239BMK, 2003 U.S. Dist. LEXIS 12864, at *9 (D. Haw. Apr. 29, 2003) (construing 17 U.S.C. § 512(c)(3)(A)(v) and holding that a copyright holder must only "form a good faith belief of an alleged or 'claimed' infringement prior to sending an ISP a notice"). The court found that the MPAA had "more than a sufficient basis to form the required good faith belief that [Internetmovies.com] contained infringing content The fact that a further investigation may have revealed that movies could not actually be downloaded does not alter this conclusion." *Id.*

112. See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 442 (2003). See generally Kristina Groennings, Note, Costs and Benefits of the Recording Industry's Litigation Against Individuals, 20 BERKELEY TECH. L.J. 571 (2005)

113. See Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 944 (2004).

and in the eyes of consumers. Instead of denying (or attempting to explain away) its blunders,¹¹⁴ the industry should own up to them.

The industry's reliance on the anti-SLAPP motion to strike is misguided: gaining absolute immunity for its cease-and-desist letters will do little to advance its war on piracy. Instead, its attempts to legitimate its tactics—calling the letters “petitions” and brandishing the First Amendment as a shield—will only weaken the message the industry is so desperately trying to get across: namely, that artists' rights are worth respecting and that the anti-piracy campaign is a battle entertainment companies are entitled to fight. Putting suspected infringers on notice that they may face penalties for piracy is one thing; making unsubstantiated allegations and demanding immediate settlement is another. Instead of trying to shield themselves from liability for erroneous demand letters, entertainment companies should simply 'fess up to their mistakes and offer to make the innocent consumer whole. If, as they insist, mistakes really are the exception and not the rule, then the cost to the industry will be negligible.

If entertainment companies want to cast wide nets, they should be willing to pay a price for over-fishing. In return for greater latitude in enforcement (which the industry arguably deserves), entertainment companies could agree to provide compensation (including costs and attorneys fees) for injuries caused by erroneous demand letters. Raising the costs of mistakes and creating greater incentives to reduce their occurrence would ensure greater protection for fair use and First Amendment interests.¹¹⁵

Another solution would be to encourage entertainment companies to practice self-regulation. Since the type of language used in demand letters often determines whether a recipient will feel compelled to sue, companies could decrease the risk of retaliatory litigation merely by using “softer” language.¹¹⁶ This type of self-regulation could go a long way in preserving

114. See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES, Sept. 25, 2003, at C1.

115. See Katyal, *supra* note 19, at 379 (proposing that “by raising standards of proof for copyright infringement as well as the cost of mistaken detections, courts and legislators can aim to strike a much-needed balance between property, speech, and privacy”).

116. In rephrasing their correspondence, entertainment companies should also take into account the possibility that even if the recipients have committed piracy, they may be young or uneducated about copyright law. See Cecilia Ogbu, Note, *I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fansites, Internet Culture, and Copyright Owners*, 12 S. CAL. INTERDISC. L.J. 279, 316 (2003).

the industry's public image, which is vital to the success of its campaign.¹¹⁷

V. CONCLUSION

To allow entertainment companies to use anti-SLAPP laws to further their private business interests, where the only thing at stake is their ability to send unsubstantiated demand letters, seems a perversion of purpose of the laws. Laws designed to protect the "little guy"—specifically, to safeguard his right to stand up to the big guy whose resources far outnumber his—are being used by the big guy to ensure the opposite result. Courts may allow entertainment companies to avail of anti-SLAPP immunity, but from the public's perspective, the industry's tactics are another example of corporate domination. Consumers are already wary of media conglomerates. Imagine the public backlash when another unassuming grandmother or scrupulous professor ends up on a target list. It will not matter to the public that the industry has gotten it right 99% of the time; it is that one percent—the ones they got wrong—that will convict the industry in the court of public opinion. Because public support is so critical to the war on piracy, an unapologetic attack is bound to backfire. Thus, instead of defending its right to get it wrong sometimes, the entertainment industry should simply own up to its mistakes and work harder to get it right.

117. Perhaps the tide is already beginning to change. After discussions with the Electronic Frontier Foundation (EFF) and the Center for Internet and Society (CIS) Cyberlaw Clinic, DirecTV has agreed to modify its nationwide campaign against signal piracy in order to reduce threats and lawsuits against innocent users of smart card technology. Specifically, the company has promised to no longer sue or threaten to sue people merely for possessing smart card devices. See Press Release, Electronic Frontier Foundation, DirecTV to Narrow Anti-Piracy Campaign: Satellite TV Giant Will No Longer Prosecute Users for Mere Possession (June 14, 2004), available at http://www.eff.org/news/archives/2004_06.php#001615.

