

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 15-1506

SMALL JUSTICE LLC; RICHARD A. GOREN; and CHRISTIAN DUPONT
d/b/a ARABIANIGHTS-BOSTON MASSACHUSETTS,

Plaintiffs-Appellants,

v.

XCENTRIC VENTURES LLC,

Defendant-Appellee.

**On Appeal from the United States District Court
for the District of Massachusetts
No. 1:13-cv-11701-djc, Denise J. Casper, District Judge**

**BRIEF OF PUBLIC CITIZEN, INC., AND ELECTRONIC FRONTIER
FOUNDATION AS AMICI CURIAE URGING AFFIRMANCE**

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June 7, 2016

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, amici Public Citizen and Electronic Frontier Foundation disclose that they are non-profit corporations that do not own stock in any companies and in which no company owns stock.

TABLE OF CONTENTS

Corporate Disclosure Statement.....	i
Table of Authorities.....	iii
Introduction and Summary of Argument.....	1
Interest of Amici.	2
Argument.....	4
I. GOREN'S THEORY WOULD VITIATE THE IMPORTANT PROTECTION THAT SECTION 230 PROVIDES FOR THE SYSTEM OF ONLINE FREE SPEECH.	4
A. Section 230 Immunizes Defendants Like Xcentric from Being Sued to Compel Removal of Content Posted by Its Users.	4
B. Section 230 Plays an Important Role in Protecting Online Content Against a Heckler's Veto.....	6
C. Goren's Legal Theory Provides a Roadmap for Unscrupulous Litigants to Circumvent Section 230.....	10
II. GOREN'S DEFAMATION CLAIM CANNOT PARADE IN COPYRIGHT'S RAIMENT.....	11
A. Congress Prohibited Involuntary Transfer of Copyright Precisely Because It Could Be Used to Censor Speech.	12
B. Invocation of Copyright to Censor Speech Is a Forbidden Misuse of Copyright.	16

III. THE TERMS OF SERVICE PROVISION ASSIGNING EXCLUSIVE COPYRIGHT TO XCENTRIC IS UNENFORCEABLE. 21

A. Terms of Service are Contracts of Adhesion.. . . . 23

B. The Doctrine of "Reasonable Expectations" Renders the Copyright Assignment Ineffective.. . . . 25

C. The Terms of Service Copyright Assignment is Both Procedurally And Substantively Unconscionable.. . . . 28

D. Enforcing the Transfer of Copyright in Xcentric's Terms Would Be Contrary to Public Policy Protecting Freedom of Speech.. . . . 32

Conclusion. 36

Certificate of Compliance. 38

Certificate of Service.. . . . 39

TABLE OF AUTHORITIES

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1800 Ocotillo, L.L.C. v. WLB Grp., Inc.,
 196 P.3d 222 (Ariz. 2008). 32

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 466 F. Supp. 2d 628 (D. Md. 2006). 14

Alcatel USA v. DGI Technologies,
 166 F.3d 772 (5th Cir. 1999). 20

Assessment Technologies of WI v. WIREdata, Inc.,
 350 F.3d 640 (7th Cir. 2004). 20

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 869 P.2d 505 (Ariz. 1994). 25

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 678 F.3d 102 (1st Cir. 2012). 20

Barrett v. Rosenthal,
 40 Cal. 4th 33, 146 P.3d 510 (2006). 7

Ben Ezra, Weinstein & Co. v. America Online,
 206 F.3d 980 (10th Cir. 2000). 5

Berry v. Berry,
 277 P.3d 968 (Haw. 2012). 13

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 1995 WL 803576 (D.N.H. Aug. 30, 1995). 20

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 114 S.W.3d 101 (Tex. App.-Austin 2003). 34

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510 U.S. 569 (1994). 16, 17, 18

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16 F. Supp. 3d 689 (W.D. Va. 2014). 17

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291 U.S. 431 (1934). 5

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519 F.3d 666 (7th Cir. 2008). 7

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471 U.S. 539 (1985)..... 14

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702 P.2d 1341 (Ariz. App. 1985)..... 26

Jane Doe No. 1 v. Backpage.com,
817 F.3d 12 (1st Cir. 2016). 4, 6

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755 F.3d 398 (6th Cir. 2014)..... 4

Katz v. Google,
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134 N.E.2 (Mass. 1956)..... 15

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 2010 WL 5399219 (N.D. Cal. Dec. 23 2010)..... 13

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 15 F.3d 559 (6th Cir. 1994)..... 17

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 402 U.S. 415 (1971)..... 15

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 456 F.3d 220 (1st Cir. 2006)..... 12

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 189 P. 625 (Ariz. 1920)..... 32

Salinger v. Colting,
 607 F.3d 68 (2d Cir. 2010)..... 16, 18

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 811 F.2d 90 (2d Cir. 1987)..... 14

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129 F.3d 327 (4th Cir. 1997). 7

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United States Constitution

First Amendment. 15, 17, 18, 34

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INTRODUCTION AND SUMMARY OF ARGUMENT

After Christopher Dupont excoriated Boston lawyer Richard Goren on Ripoff Report's website, Goren sought to evade the immunity against suit over criticisms that section 230 of the Communications Decency Act affords to hosts of such review sites. First he sued Dupont for defamation; promising not to seek damages, Goren secured a default judgment and used that judgment to seize Dupont's copyright in his own criticism; then Goren charged Xcentric Ventures, Ripoff Report's host, with infringing his newly acquired copyright. The trial court rejected that strategem on two independent grounds: first, that Xcentric had itself secured the copyright in the critical material so that Dupont had no copyright interest to convey; second, that section 201(e) of the Copyright Act barred the involuntary transfer of Dupont's copyright.

Section 230's immunity is the essential precondition for the system of online free speech that enables members of the public to express views effectively without fear of unjustified censorship by targets of criticism who often have superior access to legal resources that can be used to improperly suppress protected speech. If Goren's end run around section 230 were permitted to succeed, it could create a roadmap whereby any

plaintiff, regardless of the merits of his claims, could skew public discussion by suppressing critical speech.

The court below correctly found Goren's attempt to compel Xcentric to remove the review to be at odds with copyright law; it also properly upheld Xcentric's irrevocable licence to publish the review. The court erred, however, by enforcing the contract term by which Xcentric purported to secure ownership of the copyright to Dupont's criticism (and hence an exclusive right to publish that criticism); that term was unenforceable.

INTEREST OF AMICI ¹

Public Citizen is a public-interest organization with members and supporters nationwide, over 21,000 in the First Circuit. Since its founding in 1971, Public Citizen has encouraged consumers to participate in civic affairs and speak out about matters of public interest. Public Citizen believes that the broad discretion afforded interactive website operators best preserves consumers' right to criticize; in many cases it has either

¹No part of this was authored by counsel for any party. No party, no counsel for any party, and indeed no person other than amici, contributed money to fund preparing or submitting this brief.

appeared as amicus curiae or its attorneys have represented operators of consumer-oriented websites in litigation seeking to circumvent their section 230 immunity.

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect legal rights in the digital world. Founded in 1990, EFF is based in San Francisco, California. EFF has tens of thousands of dues-paying members throughout the United States and internationally, and maintains one of the most linked-to websites in the world (<http://www.eff.org>).

Amici share a strong interest in preserving the right to free expression and often file amicus briefs supporting the legal safe harbors that protect free speech online. Both sides consent to this filing.

ARGUMENT

I. GOREN'S THEORY WOULD VITIATE THE IMPORTANT PROTECTION THAT SECTION 230 PROVIDES FOR THE SYSTEM OF ONLINE FREE SPEECH.

A. Section 230 Immunizes Defendants Like Xcentric from Being Sued to Compel Removal of Content Posted by Its Users.

Section 230(c)(1) states:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section 230(e)(3) provides:

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

These provisions immunize web hosts from tort claims based on materials placed on their sites by third persons. *Universal Communications Sys. v. Lycos*, 478 F.3d 413 (1st Cir. 2007). Acceptance of this approach has become “near-universal.” *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 18-19 (1st Cir. 2016); *Jones v. Dirty World Entm't Recordings*, 755 F.3d 398, 406 (6th Cir. 2014) (citing cases).

Section 230 precludes injunctive relief as well as damages. The

operator of an interactive computer service (“ICS”) is no less being treated as the “publisher . . . of . . . information provided by another,” section 230(c)(1), when the action seeks injunctive relief instead of damages. Moreover, section 230(e)(3) forbids a “cause of action” from being “brought” against the operator of an interactive computer service, thus making the operator immune from suit as well as immune from liability.

Moreover, the statute bars “liability” from being “imposed” under any law that is inconsistent with section 230. An injunction is a form of relief against a defendant that has been determined to have been liable for a legal wrong; it cannot issue against “persons who act independently and whose rights have not been adjudged according to law.” *Chase Nat’l Bank v. Norwalk*, 291 U.S. 431, 437 (1934). Because Xcentric was not found liable for Dupont’s review—nor could it have been, given Xcentric’s immunity—Xcentric could not be subjected to an injunction. *Giordano v. Romeo*, 76 So. 3d 1100, 1102 (Fla. App. 2011). Indeed, cases dismissed pursuant to section 230 often involve claims for both injunctive relief and damages. *E.g.*, *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000); *Green v. America Online*, 318 F.3d 465, 708 (3d

Cir. 2003).

B. Section 230 Plays an Important Role in Protecting Online Content Against a Heckler's Veto.

This Court has recognized the key function that section 230 plays in enabling operators of ICS functions to provide services that enable members of the general public to have their say:

Websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content “would have an obvious chilling effect” in light of the difficulty of screening posts for potential issues.

Jane Doe No. 1 v. Backpage.com, 817 F.3d at 18-19.

See also Carafano v. Metrosplash.com., 339 F.3d 1119, 1123-1124 (9th Cir. 2003). Although Xcentric's business model enables it to charge businesses for some special programs, most ICS operators receive very small sums for hosting services, or offset the costs of hosting by selling advertising on the site for pennies per page-view or per click. Not only can they not police content in advance, but even when particular comments are challenged, it is unrealistic to expect operators to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove them or leave them posted. The cost of making intelligent assessments of the risks

of litigation, not to speak of the cost of participating in the litigation, far outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers Committee v. Craigslist*, 519 F.3d 666, 668-669 (7th Cir. 2008).

The costs are no less if only injunctions are sought. If ICS operators could be subjected to the expense of litigation—wholly apart from the risks facing damages awards—the result would likely be that as soon as any comment were challenged, the operator would remove it rather than take the risk of being dragged into the litigation. *See Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510, 524-525 (2006). Thus, without the protection of section 230, online speech would be subject to the heckler’s veto: speech would likely be removed just because somebody objected to it, regardless of the merits of the objection.

And only critical speech is targeted for such removal. Nobody threatens to sue over overstated online praise or undeserved online compliments. Section 230 thus protects the marketplace of ideas from consistent removal of one side of the debate, and protects consumers from

falsely one-sided portrayals of businesses and others that may, indeed, merit criticism. As a result, the powerful immunity provided to ICS operators has become a vital aspect of our system of free speech online—so central that when Congress banned libel tourism, preventing the enforcement of foreign defamation judgments in the United States that would run afoul of our constitutional protections, it included protection for ICS operators. 28 U.S.C. § 4102(c).

Moreover, if an injunction were to forbid an ICS operator from allowing a given statement to remain on its website, the operator would risk further exposure given the possibility of being cited for contempt if, for example, somebody else deliberately posted that statement, or a very similar statement, on another page of its website. Such a contempt proceeding could lead to additional legal expense to defend the contempt proceedings and even to the imposition of monetary contempt sanctions, including attorney fees. Once faced with the prospect of contempt proceedings, ICS operators would have to assess their exposure especially carefully when future statements that might violate the injunction are posted to their sites. In this way, injunctive proceedings could produce

the same problems of the heckler's veto as pre-litigation demands. Section 230 was intended to protect ICS operators from that consequence.

Instead of subjecting ICS operators to suit over the removal of objectionable material, section 230 tells plaintiffs: sue the speaker, not the host. In that way, the litigation is filed against the party who is best situated to evaluate the circumstances about which she was speaking, and who has the greatest interest in defending her right to make the statements. If the speaker is found liable, then the court can assess damages against the wrongdoer. Additionally, if the jurisdiction allows injunctions against defamatory speech, the court can order the speaker to use her best efforts to remove the statement found to have been false and defamatory. But if the ICS operator does not provide a means for users to remove or edit their own content once posted — and many reputable sites do not — then section 230 leaves it to the discretion of the ICS operator whether to accommodate a request by the user to remove content, even if that request is motivated by a court order. For example, such discretion allows a host to consider whether defendant consented to a judgment, or failed to oppose its entry, because she couldn't afford to

defend herself and hoped that the plaintiff would not pursue further litigation at that point.²

C. Goren's Legal Theory Provides a Roadmap for Unscrupulous Litigants to Circumvent Section 230.

Goren's litigation strategy did not depend on having meritorious claims against Dupont. Considering both how vitriolic Dupont's statements about Goren were, and that Dupont was Goren's litigation adversary, amici recognize the likelihood that Dupont's laundry-list of nasty accusations may well have included false and malicious statements. At the same time, however, the record below provides some reason to worry about the means by which Goren seized Dupont's copyright. Dupont was served by email and through an address where he formerly lived, App. 161-166; he never appeared, *id.* 370, and may have lacked the financial means to defend himself in litigation. Dupont lacked any

²"Reputation management" firms have been known to employ unscrupulous techniques to secure court orders for their clients. See Cushing, *The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants* Techdirt (March 31, 2016), <https://www.techdirt.com/articles/20160322/10260033981/latest-reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml>. Section 230's discretion allows ICS hosts to respond appropriately.

financial incentive to defend himself because Goren made it clear that he sought no damages, but was content to obtain equitable relief to dislodge Xcentric from its stance of never removing critical content. App. 216, 370-371, 374-375. The default judgments consistently recited that the damages claims had been dismissed. App. 27, 176.

Goren's technique could be deployed by anybody who wants to remove from the Internet criticism by ordinary people who can't afford to defend themselves—seek only an injunction, promise the speaker no personal adverse consequences, take a default judgment, acquire the copyright, then make a demand on the ICS operator. That technique would succeed regardless of whether the online criticism consisted of true statements of fact or constitutionally protected opinions.

II. GOREN'S DEFAMATION CLAIM CANNOT PARADE IN COPYRIGHT'S RAIMENT.

Although Goren purported to sue Xentric for copyright infringement, his complaint is redolent with whiffs of libel—he sought damages for injury to his reputation, and he obtained the copyright at issue not for the purpose of selling copies or otherwise profiting from the expression, but solely to get it removed from the Internet. Achieving this objective was

not a proper use of copyright law; Goren's copyright claims were properly dismissed, not only because the transfer to Goren was invalid, but also because equity could not be invoked to remove the content and because his claims represent a misuse of copyright law.³

A. Congress Prohibited Involuntary Transfer of Copyright Precisely Because It Could Be Used to Censor Speech.

In refusing to give force to the state-court driven transfer of Dupont's copyright to Goren, the district court invoked section 201(e) of the Copyright Code:

[N]o action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, . . . shall be given effect under this title

Congress drafted this provision out of a concern for free speech. Specifically, "[t]his limitation was introduced in response to fears that the then-recent adherence of the former Soviet Union to the Universal Copyright Convention (U.C.C.) might permit the use of copyright (expropriated and thus 'owned' by the government) as a means of

³ The Court "may affirm . . . on any ground supported by the record." *Puerto Rico Auth. v. Umpierre-Solares*, 456 F.3d 220, 224 (1st Cir. 2006).

suppressing the dissident writings of its citizens as published in other U.C.C. nations, such as the United States.” 2 Patry on Copyright § 5:116 (2015); Newcity, *The Universal Copyright Convention as an Instrument of Repression: The Soviet Experiment*, 24 Copyright L. Symp. 1, 16-20 (1974).

The commonly accepted scenario . . . would run as follows: an American publisher would acquire a manuscript copy of one of the unpublished works of a Russian dissident writer and would begin preparation to publish it. Prior to publication, the Soviet government would . . . compulsorily purchase the author’s copyright in the work. Then, again prior to publication, the Soviet government agency that purchased the copyright (or its assignee) would enter into an American court to enjoin the publication in the United States of the work.

Id. 19-20.

Congress passed section 201(e) “to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by an involuntary transfer.” H.R. Rep. No. 94-1476, at 124 (1976), 1976 U.S.C.C.A.N 5739. Although inclusion of the subsection was driven by concerns about foreign censorship, courts have not hesitated to apply it in the domestic context. *See Berry v. Berry*, 277 P.3d 968, 988 (Haw. 2012) (barring disposal of copyright through divorce); *McMunigal v. Bloch*, 2010 WL 5399219 at *6 (N.D. Cal. Dec. 23,

2010) (barring request to partition a joint work under copyright law absent consent of the joint author); *Advance Magazine Publishers v. Leach*, 466 F. Supp. 2d 628, 636 (D. Md. 2006) (barring claim of adverse possession over copyrighted works).

The prohibition on involuntary transfers is also a critical piece of the balance between copyright and free expression. The presumption that copyright owners intend to disseminate their work is a key to how courts attempt to reconcile copyright with the First Amendment. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright “spur[s] the creation and publication of new expression”); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (copyright supports speech “by establishing a marketable right to use one’s expression”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) (“The Copyright Clause and the First Amendment . . . were drafted to work together to prevent censorship.”); *see also* Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180, 1181 (1970) (“A legal system protective of the creator and those who claim through him will both assure a

property right in artistic expression, and will abjure the silencing of that expression through censorship.”). Even when authors choose not to publish a work, their ability to stop others from doing so is usually defended on the ground that the author may decide to do so at a later date, or will sell the right to publish the material after death. *See, e.g., Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987).

Using copyright to censor speech upsets that balance. Goren invokes the power of copyright to erase this speech wherever it is located. And if Goren is held to be the owner of Dupont’s words, then even Dupont himself will be severely restricted in his ability to say what he wants to about Goren, even with the objectionable parts removed. Thus, Xcentric’s exclusive license forbids Dupont from expressing himself on other forums. If Goren’s claim is allowed in this case, copyright transfers could be sought as an alternative remedy in any speech tort case where courts, for good reason, have traditionally declined to provide injunctive relief.⁴ Congress

⁴ Preliminary injunctions against defamation are barred under the doctrine of prior restraint, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), and many states hold that equity will not enjoin a libel either as a matter of state common law or under state constitutional free speech provisions; several states, including Massachusetts, severely limit the issuance of libel injunctions as a matter of state law. *Krebiozen*

sought to prevent such censorship with section 201(e); because Goren's theory of ownership rests on transfer, it is void ab initio, and his copyright claims fail. *See Society of Holy Transfiguration Monastery v. Gregory*, 689 F.3d 29, 40-44 (1st Cir. 2012).

B. Invocation of Copyright to Censor Speech Is a Forbidden Misuse of Copyright.

Beyond the prohibition on involuntary transfers, courts have used their equitable powers to block application of copyright law when it is used to censor speech. This has long been done in the realm of fair use, where criticism of another's work or its author has long been defended. *E.g., Campbell v. Acuff-Rose Music*, 510 U.S. 569, 592 (1994). Courts also consider speech implications when deciding whether to grant injunctions in copyright cases, following *eBay v. Mercexchange, L.L.C.*, 547 U.S. 388 (2006). *See Salinger v. Colting*, 607 F.3d 68, 82-83 (2d Cir. 2010).

Courts have frowned on pretextual transfers of copyright for the purpose of suppressing speech. For example, the Eleventh Circuit used the

Research Found. v. Beacon Press, 134 N.E.2 1, 7 (Mass. 1956). It remains an open question whether the First Amendment bars permanent injunctions even against the repetition of defamatory statements fully adjudicated as false.

fair use doctrine to prevent a businessman from using copyright law to suppress the use of an unflattering photograph on a website critical of him, after he separately obtained the copyright interest in the photograph from the original photographer. *Katz v. Google*, 802 F.3d 1178, 1184 (11th Cir. 2015) (per curiam). In discussing the potential market effect of this use, the court noted that because the plaintiff obtained this photograph solely to prevent its publication, the normal analysis of market effects in fair use should not apply “[d]ue to [plaintiff’s] attempt to utilize copyright as an instrument of censorship.” *Id.*; see also *Garcia v. Google*, 86 F.3d 733, 736 (9th Cir. 2015) (en banc) (“[A] weak copyright claim cannot justify censorship in the guise of authorship.”). Numerous courts have used the fair use doctrine to guard against copyright claims based primarily on criticism of the copyright owner or her works. See, e.g., *Campbell*, 510 U.S. at 592-93; *Ty, Inc. v. Publ’n Int’l Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002); *NRA v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994); *Caner v. Autry*, 16 F. Supp. 3d 689, 712 (W.D. Va. 2014).

Two Second Circuit cases have considered the First Amendment harms from blocking speech about a copyright owner, even absent a

successful fair use defense. *Salinger v. Colting*, 607 F.3d 68, 81, 82-83 (2d Cir. 2010), requires courts to weigh First Amendment interests in considering whether to enjoin alleged infringement. Preventing censorship of speech—even potentially infringing speech—is in many ways a reflection of the same concerns that permeate defamation law: when damages are adequate to compensate the plaintiff’s commercial interest, injunctions should not issue to restrain another’s speech. *Campbell*, 510 U.S. at 578 n.10 (copyright’s goals of stimulating the creation and dissemination of works “are not always best served by automatically granting injunctive relief”); *Suntrust Bank*, 268 F.3d at 1277 (denying an injunction, noting both a possible fair use claim and that “to the extent [plaintiff] suffers injury . . . , such harm can adequately be remedied through an award of monetary damages”). And in *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), the Second Circuit found that a copyright holder was misusing his copyright to suppress otherwise protected speech. Rosemont Enterprises was a corporation acting on behalf of Howard Hughes, who did not want any biographies written about him. Rosemont bought the copyrights in a few news articles that

had been published about Hughes and used those copyrights to sue Random House over its forthcoming Hughes biography. The court found in favor of Random House, explaining that the “spirit of the First Amendment applies to the copyright laws. . . . [C]ourts should not tolerate any attempted interference with the public’s right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.” *Id.* at 311. In short, as this Court said previously in the context of a dubious application of trademark law, “the constitutional issue raised here cannot be dispensed with by simply asserting that [plaintiff’s] property right need not yield to the exercise of first amendment rights.” *L.L. Bean, Inc. v. Drake Publishers*, 811 F.3d 26, 29 (1st Cir. 1987).

Following *Rosemont*, every circuit that has decided the issue has recognized an affirmative defense of copyright misuse, which applies when “copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.” *Lasercomb America Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990), *i.e.*, claims brought by

copyright holders who seek to use their rights to achieve ends not furthered by the copyright laws.⁵ This Court has avoided deciding whether copyright misuse is a defense,⁶ but two district courts in the circuit have recognized that affirmative defense.⁷ Although the doctrine of copyright misuse is most frequently employed to bar copyright claims that are used to further anti-competitive behavior, circuits have recognized its possible application beyond antitrust concerns, *id.* at 978; *Assessment Technologies*, 350 F.3d at 647, including a “copyright holder’s attempt to restrict expression that is critical of it.” *Video Pipeline*, 342 F.3d at 205.

⁵ *Video Pipeline v. Buena Vista Home Entertainment*, 342 F.3d 191, 203-06 (3rd Cir. 2003); *Alcatel USA v. DGI Technologies*, 166 F.3d 772, 792-95 (5th Cir. 1999); *Assessment Technologies of WI v. WIREdata, Inc.*, 350 F.3d 640, 646-647 (7th Cir. 2003); *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516, 521 (9th Cir. 1997).

⁶ *Holy Transfiguration Monastery*, 689 F.3d at 65; *Garcia-Goyko v. Law Environmental Consultants*, 428 F.3d 14, 21 (1st Cir. 2005). *See also Banco Popular de Puerto Rico v. Asociación de Compositores*, 678 F.3d 102, 111 (1st Cir. 2012) (apparently assuming that copyright misuse is an affirmative defense).

⁷ *BMI v. Hampton Beach Casino Ballroom*, 1995 WL 803576, at *5 (D.N.H. Aug. 30, 1995); *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609, 616 (D.R.I. 1976).

Thus, even if Goren acquired the copyright, its use to censor speech sweeps far beyond the legitimate realm of copyright law.

III. THE TERMS OF SERVICE PROVISION ASSIGNING EXCLUSIVE COPYRIGHT TO XCENTRIC IS UNENFORCEABLE.

Xcentric argued below that Goren could not use his default judgment to execute on Dupont's copyright because, in posting his criticisms of Goren on Ripoff Report, Dupont had agreed to a linked set of Terms of Service that conveyed the copyright to Xcentric; on that theory, Dupont had no copyright to be seized. The trial judge initially embraced this argument as one of two alternate grounds for granting summary judgment dismissing Goren's copyright infringement claims. Goren Appellate Addendum 5-11. Two months later, however, she issued a docket entry saying that she was "inclined" to add a footnote to her summary judgment opinion holding that, even if Goren's objections to her summary judgment ruling were correct, summary judgment was still appropriate because language next to the "I agree" box that Goren clicked to post his report gave Xcentric a perpetual nonexclusive license to publish Dupont's review. *Id.* 36-37. The judge made that addition in a later order, *id.* 48, while at

the same time confirming that Xcentric's acquisition of the copyright through the browsewrap procedure was one of her reasons for granting summary judgment. *Id.* 39.

On appeal, Goren argues that the trial court erred in approving either the exclusive license or the nonexclusive license, contending that Massachusetts law precludes both holdings. Xcentric now declines to defend the exclusive license holding that it secured below, although it defends the nonexclusive license whose recognition Judge Casper added to her ruling by a footnote identified in a later opinion. Amici agree with Goren that Xcentric's exclusive license argument should have been rejected, but the reasons for rejecting the trial court's acceptance of the exclusive license matter for future cases, and amici's reasoning departs sharply from Goren's.⁸

⁸Xcentric attempts to insulate this basis for its victory below from appellate review, arguing that "the district court found that the writing requirement of 17 U.S.C. § 204 makes a browsewrap agreement insufficient to effect a transfer of copyright. Add. 36-37, 38-40. That amendment, from which no party appealed, moots any issue of the transfer to Xcentric." Appellee Brief 15. However, Judge Casper did not rescind the branch of her summary judgment ruling based on the exclusive license; rather, she addressed what the rule would be "[e]ven if . . . § 204 . . . applies," Add. 36, and "[a]ssuming a written and signed conveyance was required here." Add. 37. Moreover, the fact that nobody

Terms of service provisions that strip authors of copyright ownership and give it to the platform have serious consequences for authors' speech: it gives the platform the power to bar authors from repeating their speech elsewhere, such as on other platforms, and even to prevent them from making substantially similar postings that would infringe the copyright in the original post. However, browsewrap or clickwrap agreements, such as the Xcentric Terms of Service, are non-negotiated contracts of adhesion. When those contracts include surprising terms that strip users of fundamental speech rights, enforcing those terms as if they were freely-negotiated would lead to unconscionable results. And Arizona law, which applies under the Terms of Service choice-of-law provision, App. 59, provides three independent bases to reign in such abusive policy practices: the "reasonable expectations" doctrine, unconscionability, and the non-enforcement of contract terms that are contrary to public policy.

A. Terms of Service are Contracts of Adhesion.

appealed from the footnote order is irrelevant because Goren appealed from the final order to which the footnote was later added. Having won below on this ground, in part, Xcentric should not be allowed to continue to impose these conditions on consumers in the hope that future litigants won't raise the arguments advanced by amici.

Under Arizona law, “[a]n adhesion contract is typically a standardized contract form offered to consumers of goods and services on essentially a ‘take it or leave it’ basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form of contract [T]he distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms.” *Cooper v. QC Fin. Servs.*, 503 F. Supp. 2d 1266, 1276 (D. Ariz. 2007).

Website terms of use are typically contracts of adhesion, offered on a take-it-or-leave-it basis by service providers with far greater bargaining power and legal sophistication than their users. Typical Internet users would have to spend approximately 250 hours each year to read every privacy policy for services they use. McDonald & Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. Law & Policy 540, 560 (2008). That is over six work weeks and is more than the entire amount of time a typical user spends surfing the web. *Id.* It would be impossible for a user to read or even skim all of the Terms of Service they encounter. One company

offered a \$1000 prize for the first person to read the terms associated with its software; it took five months and over 3000 users before anyone found that line in the terms and collected the prize. TC Pit Stop, *It Pays to Read License Agreements (7 Years Later)*, <http://techtalk.pcpitstop.com/2012/06/12/it-pays-to-read-license-agreements-7-years-later/>. In other words, companies impose terms unilaterally on “unwitting customers,” knowing that users typically are not aware of their contents.

B. The Doctrine of “Reasonable Expectations” Renders the Copyright Assignment Ineffective.

Because Arizona law “recognizes [that] most adhesive contracts are formed between businesses and consumers when both parties are more interested in efficiency than in negotiating and reaching mutual agreement over multiple contractual terms,” the doctrine of “reasonable expectations” ensures that unusual terms are “intended and agreed to, not merely imposed upon an unwitting customer.” *Philadelphia Indem. Ins. Co. v. Barerra*, 21 P.3d 395, 402 (Ariz. 2001) (quoting *Averett v. Farmers Ins. Co.*, 869 P.2d 505, 508 (Ariz. 1994)) (emphasis in original).

The *Barerra* court could easily have been describing online Terms of Service when it explained, in the offline context of car rental: “the

ordinary customer does not have the ability to check his rights by carefully reading the fine print of the rental contract, together with the separate descriptions of the insurance coverage, before purchasing it. Nor, we believe, does the car rental company expect its ordinary customer to spend fifteen or twenty minutes at the rental desk reading all of the small print and asking for an explanation of the terms involved.” 21 P.3d at 402. Consequently, “a provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him.” *Huff v. Bekins Moving & Storage Co.*, 702 P.2d 1341, 1343 (Ariz. App. 1985).

Online Terms of service are emblematic of the problems that the “reasonable expectations” doctrine seeks to remedy. As discussed above, it is physically impossible for anyone to read all of the terms that purport to bind them as a user of technology and the Internet. When companies choose to present a wall of small print to their users (or put that text behind a link), they know it will go unread.

The copyright assignment in Xcentric’s Terms of Service upsets the reasonable expectations of those who speak through online platforms. It

is almost unheard of for an online platform to claim ownership over the copyright in user content, as Xcentric has done. For example, major platforms such as Facebook, Twitter, and YouTube all take non-exclusive licenses to user content. <https://www.facebook.com/terms.php> at 2.1; <https://twitter.com/tos?lang=en> at §5; <https://www.youtube.com/static?template=terms> at 6(C). When discovered, rare attempts to take exclusive copyright ownership have prompted user outcry. After Craigslist tried to obtain ownership of users' apartment rental postings, it took less than a week before public pressure forced Craigslist to reverse course and remove that provision from its terms. Welch, *Craigslist Takes Extreme Stance on Copyright Policy, Declares Exclusive Ownership of Ads*, <http://www.theverge.com/2012/8/1/3213314/craigslist-copyright-exclusive-licensee-classifieds>; Opsahl, *Good News: Craigslist drops exclusive license to your posts*, <https://www.eff.org/deeplinks/2012/08/good-news-craigslist-drops-exclusive-license-your-posts>.

Indeed, Xcentric's Terms of Service used a legal term of art, "exclusive license," rather than candidly acknowledging the effects of the provision. Under a quirk of copyright law, a so-called "license" can

actually effectuate a transfer of ownership of the underlying copyright. Laypersons reading the language would be unlikely to realize the threat to their own speech activities. Moreover, Xcentric concealed the impact of its Terms of Service copyright grab in that it presented a snippet of text to those posting online reviews. Accompanied by a checkbox, it read, in relevant part: “I am giving Rip-off Report irrevocable rights to post [the content] on the website.” App. 520. This language creates an irrevocable, but non-exclusive, license and would not impede the user’s freedom of speech in any way. The Terms of Service, however, do not create the non-exclusive license that this phrasing suggests; they purport to take complete ownership of the copyright itself. This element of misdirection, combined with the inherently surprising nature of the provision, makes the assignment term unenforceable.

C. The Terms of Service Copyright Assignment Is Both Procedurally and Substantively Unconscionable.

In Arizona, the doctrines of “reasonable expectations and unconscionability are two distinct grounds for invalidating or limiting the enforcement of a contract . . . even if the contract provisions are consistent with the reasonable expectations of the party they are unenforceable if

they are oppressive or unconscionable.” *Maxwell v. Fid. Fin. Servs.*, 907 P.2d 51, 57 (Ariz. 1995). A contract may be procedurally or substantively unconscionable. *Id.* at 58-59. “[A] claim of unconscionability can be established with a showing of substantive unconscionability alone.” *Id.* at 59.

Procedural unconscionability “is concerned with ‘unfair surprise,’ fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should.” *Id.* at 57-58. Courts consider “the real and voluntary meeting of the minds of the contracting party: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.” *Id.*

Terms of service are a contract of adhesion in the truest sense. Xcentric did not realistically expect users to read and understand the terms it drafted and certainly provided no opportunity for negotiation. Its brief attempt to ‘explain’ the terms via the checkbox text would have

communicated to the typical user that Xcentric would take a non-exclusive license, not that the user would waive important speech rights and forfeit ownership of their copyright. There clearly was no “real and voluntary meeting of the minds.”

Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed at the time the contract was made. *QC Fin. Servs.*, 503 F. Supp. 2d at 1279. “Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.” *Maxwell*, 907 P.2d at 58.

Xcentric’s terms curtail users’ speech. Users may not repeat the speech using other online platforms, for example, because they have given up the right to authorize others to publish it. And the prohibitions are backed up by the hammer of copyright’s statutory damages, which can exceed the damages available for a mere tort, and by the ability to sidestep the safe harbor of section 230 in favor of the less speech-protective regime of the Digital Millennium Copyright Act’s

Section 512 notice of takedown procedure.

The assignment is also unrelated to Xcentric's legitimate needs. Although Xcentric does need an irrevocable license in order to fulfill its promise to maintain the visibility of online reviews, demanding assignment of the copyright is oppressive and anti-competitive. When Xcentric becomes the only authorized publisher of a user's complaint, the exclusivity harms not only the user, but also the public and other platforms that publish users' speech.

In return for giving up substantial speech rights, a user bound by Xcentric's terms would gain the opportunity to have Xcentric host their speech. Here, two factors are in tension within the unconscionability analysis: on the one hand, the fact that there are alternative venues to publish online reviews would suggest that it is extraordinarily one-sided for Xcentric to demand exclusive copyright ownership for the privilege of publishing on their platform. On the other hand, it suggests that an informed user could simply reject Xcentric's oppressive Terms of Service and speak elsewhere. The key to resolving this paradox is the fact that users simply are not aware of the oppressive term and the need to look to

alternatives. The availability of alternatives may be relevant in cases where procedural unconscionability arises from undue influence, but not where the adhering party is simply unaware or misled as to the substance of the contract.

In sum, the provision assigning users' copyrights to Xcentric is both procedurally and substantively unconscionable and may not be enforced.

D. Enforcing the Transfer of Copyright in Xcentric's Terms Would Be Contrary to Public Policy Protecting Freedom of Speech.

Contracts that contravene public policy are void. *S.H. Kress & Co. v. Evans*, 189 P. 625, 627 (Ariz. 1920); *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 299 (Ariz. App. 1997). In determining whether a provision is void as against public policy, "courts balance the interest in enforcing the provision against the public policy interest that opposes enforcement." *1800 Ocotillo, L.L.C. v. WLB Group*, 196 P.3d 222, 224 (Ariz. 2008) (citing Restatement (Second) of Contracts § 178 (1981)). Weighing the "public policy interest generally focuses on the extent to which enforcement of the term would be injurious to the public welfare." *Id.*

Here, two aspects of public policy would be undermined by enforcing

the transfer of copyright: (1) the freedom of speech and (2) the longstanding policy against involuntary transfer of intellectual property ownership. The assignment of copyright ownership enables Xcentric to prevent authors from republishing via its competitors or authoring further posts that are substantially similar to the original. This power to censor would be at odds with the public's interest in free expression and the dissemination of information. Indeed, the FTC recently obtained a preliminary injunction against a company called Roca Labs for using "gag clauses" in its customer contracts in order to limit the publication of negative reviews. *FTC v. Roca Labs*, No. 8:15-cv-2231-T-35TBM (M.D. Fla. Oct. 15, 2015).

Courts recognize that contractual waivers of speech rights should not be enforced unless they are "intelligent and voluntary." For example, the Texas Court of Appeals has held that because "[f]ree speech rights are the heart of our democratic system and involve not only the right of the individual to speak freely, but also the citizenry's interest in public discourse," contractual waivers of speech rights are invalid absent "clear and convincing" evidence of a "knowing, voluntary, and intelligent"

waiver. *Brammer v. KB Home Lone Star*, 114 S.W.3d 101, 110 (Tex. App.-Austin 2003). Accord, *Perricone v. Perricone*, 972 A.2d 666, 682-83 (Conn. 2009) (judging waiver based on bargaining equality between parties, actual negotiation of terms, advice to waiving party from competent counsel, genuine benefit to waiving party from contract, and conspicuousness of speech waiver); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir.1993) (waiver of First Amendment rights was knowing, voluntary and intelligent when: [1] party was advised by competent counsel; [2] party proposed language to which it objected; [3] party voluntarily signed agreement; and [4] parties had relatively equal bargaining strength).

In the context of clickwrap or browsewrap agreements like the Xcentric Terms of Service, bargaining power is heavily skewed towards the platform, there is no opportunity to negotiate terms, users do not retain counsel (and could not realistically do so for all the services they encounter), and the restriction on speech is typically couched in legal terms of art. Users benefit in the sense that the service hosts their content, but it is far from customary for platforms to demand copyright ownership in exchange for this service. The factors overwhelmingly

indicate that the purported transfer should not be enforced.

Congress has also articulated a policy protecting authors from being stripped of ownership of their copyrights without adequate notice and formalities. Copyright ownership may only be assigned in writing, via a signed instrument of conveyance. 17 U.S.C. § 204. And as discussed in the previous section of this brief, the statutory history of section 201(e) reiterates a policy against involuntary transfers of copyright.

For these reasons, the browsewrap agreement providing for transfer of an exclusive license in Dupont's criticisms of Goren was unenforceable as contrary to public policy.⁹

⁹Amici agree with Xcentric, App. Br. 25-27, that Xcentric validly acquired an irrevocable, albeit nonexclusive, license to publish Dupont's criticisms. A non-exclusive license is implied when a user uploads copyrighted content and asks a platform to store and republish it. The license here is irrevocable because (1) Xcentric clearly explains that content posted to its platform will not be taken down except in narrow circumstances, even at the request of the user; (2) this practice is one reason users post to Xcentric's platform; and (3) Xcentric must have an irrevocable license to the user-generated content in order to live up to its never-remove promise to the user and accomplish the user's goal of publishing in a speech-protective forum. The irrevocable nature of the license advances the user's purpose, rather than hindering it. Most important, granting an irrevocable license does not restrict users' speech rights or implicate policies regarding the transfer of copyright ownership. Users remain free to republish and adapt their work and to grant permission for others to do the same.

CONCLUSION

The judgment of the district court dismissing Goren's claims against Xcentric should be affirmed.

Respectfully submitted,

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June 6, 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Century Schoolbook font using Word Perfect, which counted 6978 words in this brief excluding the cover, corporate disclosure, tables, signature block and certificates.

/s/ Paul Alan Levy

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2016, I am electronically filing this brief using the Court's ECF system, which will effect service on all counsel of record.

/s/ Paul Alan Levy