THE RISE OF COPYRIGHT TROLLS IN A DIGITAL INFORMATION ECONOMY: NEW LITIGATION BUSINESS STRATEGIES AND THEIR IMPACT ON INNOVATION

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I. INTRODUCTION

When Brian Hill posted a digital photograph of a Transportation Security Administration agent conducting routine pat-downs on his personal blog, he likely never imagined becoming the newest victim in a mass reverse class action lawsuit. One month later, Righthaven, LLC ("Righthaven"), the owner of the sole right to sue for infringement of the photograph, filed a complaint in the United States District Court for the District of Colorado, accusing Hill of "willful" infringement of the work, the photograph. Threatening upwards of $150,000 in damages under federal copyright law, Righthaven offered Hill the option of settling for $6,000.

Referred to as "copyright trolls," businesses such as Righthaven threaten to

\[\text{Id.} \]

\[\text{Righthaven's litigation strategy encourages and extorts settlements from defendants intimidated by the potential expenses of litigation.} \]

unravel the close-knit system of copyright enforcement by effectively exploiting a loophole in copyright law.\(^4\) Copyright trolls employ a business model that allows them to extort settlements in cases of clear fair use,\(^5\) most often when they lack an exclusive right to sue for infringement as required by §106 of the Copyright Act of 1976.\(^6\) Hill is not the first victim of this emerging litigation strategy, either. As of July 13, 2011, Righthaven had sued 276 defendants regarding information published by the Las Vegas Review Journal and The Denver Post,\(^7\) grossing approximately $352,500 in settlement claims against “willful infringers” based on 141 settled cases.\(^8\) Any entity—from the large media organization to the individual citizen—is at risk of being cornered into accepting a $2,500 settlement in order to avoid the legal costs of pursuing litigation.\(^9\)

Left undeterred, copyright trolls threaten to disturb the delicate balance between fair use in the public domain and the protected rights of copyright


\(^6\) A copyright owner has the right:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based on the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public;
4. in the case of literary, musical, dramatic, and choreographic works...to perform the copyrighted work publicly;
5. in the case of...pictorial, graphic, or sculptural works...to display the copyrighted work publicly;
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2006). See 17 U.S.C. § 501(b) (2002) (“only the legal or beneficial owner of a copyright...is entitled to sue for infringement”). See also Silvers v. Sony Pictures Entm’t Inc., 402 F.3d 881, 884 (9th Cir. 2005) (holding that an assignee with an accrued copyright infringement claim may not institute an action for infringement if he does not have a legal or beneficial interest in the copyright at issue). An important distinction to note is that the “sole right to sue for infringement” does not amount to the “exclusive right to sue for infringement” that full copyright owners enjoy under §106. Buying the sole right to sue does not entitle the holder to all the rights under §106.


\(^8\) *Id.* See also Charles S. Sims & Michelle E. Arnold, *Copyright Trolling: Is the Righthaven Business Model a Wrong Haven for Copyright Enforcement?*, COPYRIGHT & TRADEMARK L. BLOG (Sept. 7, 2011), http://commcn.org/K2egRT.

\(^9\) Although the *Las Vegas Review Journal* and Denver Post have been primary targets, Righthaven’s copyright infringement claims are not limited to newspaper content. *E.g.*, Complaint and Demand for Jury Trial at 3, Righthaven, L.L.C. v. Allec, No. 2:11-cv-00532 (D. Nev. Apr. 8, 2011).
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owners. The convergence of copyright law with the proliferation of digital technology has renewed concerns over the double-edged sword of copyright protection. While over-enforcement of copyright laws can diminish the incentive for creating innovative technology, under-enforcement can discourage spontaneous artistic creativity. The promotion of competition is fundamentally at odds with the grant of exclusive rights to copyright owners, but enforcing intellectual property rights is essential to encourage owners to improve their product and to avoid a "tragedy of the commons."

Though courts ultimately have rejected Righthaven's litigation tactics, the loophole in copyright law it exploited remains exposed and un-remedied. This Article explores the failure of the current state of legislation to strike a balance between protecting the rights of copyright-holders and expanding the public domain, thereby fostering the emergence of copyright trolls. Part II details the development of copyright law from the early 19th century through the rapid advancement of the technological age, with particular emphasis on legislative amendments to the Copyright Act of 1909. Next, the Article discusses the emergence of copyright trolls in the wake of the digital age and the judicial and legislative effort to restrain their activities. Part IV evaluates the shortcomings

10 Nichelle Nichols Levy, Beware the Copyright Trolls, ROBINSON BRADSHAW & HINSON, P.A. (May 16, 2011), http://commcns.org/Jldc3X (evaluating the recent effort to curtail copyright infringement and the emergence of "copyright trolls").
11 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) ("The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off"); Jacqueline D. Lipton, Solving The Digital Piracy Puzzle: Disaggregating Fair Use from The DMCA's Anti-Device Provisions, 19 HARV. J.L. & TECH. 111, 112 (2005) (discussing the trade-off of innovation and creativity in the context of cryptography and file-sharing).
12 Id.
14 A "tragedy of the commons" occurs where the incentives are arranged so that an actor only bears a small portion of the costs of an action, while simultaneously enjoying the full benefits of that action. Garrett Hardin, The Tragedy of the Commons, in 162 SCIENCE 1243, 1243 (1968).
of current legislation, proposing revisions to the Digital Millennium Copyright Act of 1998 ("DMCA") and the Copyright Act of 1976, with particular emphasis on the positive implications of amending the 1976 Act. The Article then concludes with an analysis of public policy reasons for the proposed amendments, keeping in mind the underlying goals of promoting progress and innovation.

II. THE DEVELOPMENT OF COPYRIGHT LAW IN A DIGITAL AGE

The rapid emergence of digital technology has shaped the scope of copyright protection.\(^\text{16}\) To illustrate the development of the loophole in copyright enforcement, it is first necessary to evaluate Congress' effort to reconcile enforcement with this rapid evolution. Many factors mediate the relationship between technological change and legal response; developments in technology modify social, economic, and cultural relations, and require alterations in federal copyright law.\(^\text{17}\)

A. English Antecedents of American Copyright Law

The history of copyright law begins with the advent of the printing press in 15th century England.\(^\text{18}\) English booksellers and printers were organized as members of a guild, and enacted the Stationers' Company to protect owner's rights against encroachment.\(^\text{19}\) In response to widespread criticism of the failure of licensing laws to protect author's rights, the English Parliament enacted the Statute of Anne, which granted authors limited duration rights to control the publication of works.\(^\text{20}\) The Statute of Anne was the first to

\(^{16}\) Viva R. Moffat, Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection, 19 BERKELEY TECH. L.J. 1473, 1493 (2004) ("As a general proposition, however, copyright protection has only expanded over time and that trend is likely to continue or even accelerate.").


\(^{19}\) Id. at 26. See generally CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT (1999) (analyzing the issues and legal context leading up to the enactment of the Copyright Act of 1842).

\(^{20}\) The Statute of Anne granted rights for two 14-year terms with the primary goal of encouraging learning. Cohen, supra note 18, at 27 (providing an overview of the history of copyright law from England through the Copyright Act of 1976). See generally LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 20-29 (1968) (analyzing the historical
establish a public domain encompassing works that were not protected by copyright. The ideas of an explicit public domain and limited terms of rights holders had a significant impact on the development of modern copyright law.

B. The Origins of Copyright Law in the United States

The Constitution grants the U.S. Congress authority to endorse the promotion of arts and sciences by providing authors and inventors with limited rights and protections over their works. The constitutional objective of enhancing innovation underlies legislative efforts to expand the protection of owner’s rights. The first of these efforts was the Copyright Act of 1790 ("1790 Act"), which mirrored the structure of the formalities and limitations codified in the Statute of Anne. The 1790 Act provided protection to any author of a "map, chart, or book" for a limited period of fourteen years. Renewal of the term was granted as long as the author re-entered the title and published the record.

In 1834, the Supreme Court abolished the federal common-law copyright.

underpinnings of copyright law).

21 See Cohen, supra note 18, at 27 (providing an overview of the history of copyright law from England through the Copyright Act of 1976). See also Lyman Ray Patterson, The Statute of Anne: Copyright Misconstrued, 3 HARV. J. LEGIS. 223, 226 (1966) (discussing the impact of the Statue of Anne on the enactment of the Copyright Act of 1790).

22 Id.

23 Congress has the authority to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

24 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (indicating that the primary objective of copyright law is to encourage creative labor while endorsing creativity through public access to protected works).


26 Id.

27 Id.

28 Wheaton v. Peters, 33 U.S. 591, 601 (1834) (holding that the common-law of Pennsylvania was separate from English common-law copyright; the "right to copy" was solely in the domain of Congress). See Ray Patterson, Copyright and "the Exclusive Right" of Authors, 1 J. INTELL. PROP. L. 1, 28 (1993) (discussing how Wheaton established the limited-grant principle and its corollary, the separation principle). Following the Act of 1790, prints, musical works, dramatic performances, and photographs were added, along with the extended protection of a twenty-eight-year term. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171 (codified as amended at 17 U.S.C. §§ 101-1332 (1976)) (prints and engravings); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (codified as amended at 17 U.S.C. §§ 101-1332 (1976)) (musical compositions); Act of Aug. 18, 2856, ch. 170, 11 Stat. 138, 139 (codified as amended at 17 U.S.C. §§ 101-1332 (1976)) (dramatic compositions); Act of Mar. 3,
Seventy-five years later, the Copyright Act of 1909 ("1909 Act") made significant advancements to preexisting copyright law.\(^{29}\) In particular, the 1909 Act provided copyright protection from the date of publication of the work with notice of copyright and extended the renewal period to fifty-six years.\(^{30}\) Copyright protection was also granted to unpublished works displayed in exhibitions or performances.\(^{31}\) Finally, the Act stipulated that a certificate of registration was sufficient to prove any facts recorded.\(^{32}\) The rapid development of television, radio, and sound recording technologies in the mid-20th century emphasized the need for modernizing the 1909 Act.\(^{33}\)

The Copyright Act of 1976 ("1976 Act") marked a key turning point in the formation of modern intellectual property law.\(^{34}\) In a drastic departure from the theoretical underpinnings of pre-existing copyright statutes,\(^{35}\) the 1976 Act provided federal copyright protection to "original works of authorship fixed in any tangible medium of expression."\(^{36}\) Under the 1976 Act, a single period of protection is calculated by the author's life plus seventy years after his death.\(^{37}\)

To prevail in a copyright infringement suit, a plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."\(^{38}\) To prove the second element, the plaintiff must show: "(a) that the defendant actually copied the work as a


\(^{33}\) See Gorman, supra note 25, at 7.

\(^{34}\) Rather than categorizing works by their form or medium of expression, the Act of 1976 expanded the scope of the categories protected by law (e.g. "literary works" as opposed to "books"). See e.g., 17 U.S.C. § 102(a) (2011) (extending copyright protection to "works of authorship" classified by categories based on subject matter). See also Cohen, supra note 18, at 26 (providing the history of copyright law from England through the Copyright Act of 1976).

\(^{35}\) 17 U.S.C. § 102(a) (2011). Section 102(a)(1) extends protection to "literary works; musical works; dramatic works; pantomimes and choreographed works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works." Id. See also Gorman, supra note 25, at 8.


factual matter, either through direct evidence or through indirect means . . . and (b) that the defendant’s ‘copying of the copyrighted material was so extensive that it rendered the infringing and copyrighted works ‘substantially similar.”

Only the legal owner of the exclusive right under a copyright is entitled to assert a copyright infringement claim. However, courts are increasingly recognizing that the exclusive right to sue for copyright infringement is insufficient to support a copyright infringement action, as it fails to confer standing.

Alleged copyright infringers defend themselves against infringement suits by means of the fair use doctrine. To determine whether use of a work constitutes fair use, courts must consider a number of factors, including the purpose and character of the use; the nature of the copyrighted work; the amount and sustainability of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. The ultimate purpose of the fair use doctrine is to discourage inflexible application of copyright law where it would impede creativity and innovation. The degree to which the use of a work is “transformative” informs the fair use analysis under the first factor, which effectively colors the court’s analysis of the third and fourth factors. The “transformative use” of a work is a use that adds something novel to an original work, which in turn modifies the work with a renewed expression. The significance of preserving the public domain is evident in the codification

39 Id.
42 See e.g., Harper & Row v. Nation Enters., 471 U.S. 539, 560 (1985) (holding that The Nation’s copying of 300 words from the Ford manuscript does not fall under the scope of fair use).
45 Id. at 579 (holding that 2 Live Crew’s parody, “Pretty Woman,” constituted fair use of the original song under the four factor analysis). See generally Neil Weinstock Netanel, Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715 (2011) (examining the impact of digital technology on the development of the fair use doctrine and the rise in importance of the transformative use doctrine).
46 Campbell, 510 U.S. at 578-79.
of the fair use restriction on exclusive rights. The fair use doctrine further promotes non-exclusive use for educational, nonprofit, media broadcasting, and collection purposes.

C. The Digital Millennium Copyright Act of 1998

The rapid expansion of digital piracy and the fluidity of its worldwide dissemination have led copyright holders to demand increased safeguards for protection of their works. In response to the fears of Internet Service Providers ("ISPs") that digital piracy would lead to a diminished Internet public domain, Congress added six new sections to the 1976 Act in the form of the DMCA. The Act's anti-circumvention provisions are of particular significance to the minimization of ISP liability for third-party infringement. Specifically, the trafficking or use of any service, product, or device for the purpose of circumventing technological measures that restrict access to copyrighted works is prohibited. In addition, the DMCA proscribes the marketing of anti-circumvention products that pinpoint the use of the work. The Act also provides exceptions to the anti-circumvention provisions for non-profit libraries, archives, educational materials, along with law-enforcement and reverse engineering.

The safe harbor provisions of the DMCA are designed to grant refuge to ISPs when their subscribers engage in copyright infringement. Under these

48 Id. See also Gorman, supra note 25, at 8.
52 17 U.S.C. § 1201(a)(1)-(2). As used in Section 1201, the circumvention of a technological measure means: "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." Id. § 1201(a)(3)(A).
53 Id. § 1201(a)(2).
54 Id. § 1201(d)-(f). The "reverse engineering" exception allows a person who has obtained lawful use of a computer program to circumvent a technological measure so long as it is for the purpose of identifying the portions of the program that are required for interoperability. Id. § 1201(f).
55 Id. § 512(c). See also The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary, 105th Cong. 25 (1997) (statement of George Vradenburg III, Senior Vice President & Gen. Counsel, Am.
provision, ISPs are not liable for monetary, injunctive, or equitable relief for
the copyright infringement of a subscriber who is using protected material on
the ISP’s website. To enjoy this immunity, the ISP must prove that it lacks
actual knowledge of the infringement; does not receive financial benefits from
the infringement; and expeditiously removes infringing material once notified. The
DMCA also requires ISPs to register an agent to receive notification of
any claimed infringement from copyrights holders.

D. Copyright Misuse: An Affirmative Defense to Copyright Infringement
Claims

Though primarily used in computer software litigation, the copyright misuse
defense has become a growing trend in peer-to-peer file sharing litigation. Under this defense, a defendant denies liability because a copyright owner has
unlawfully attempted to expand the scope of the copyright protection of a
work. In applying the copyright misuse defense, courts employ two varying
approaches. Under the first approach, the court must first find that the
plaintiff was involved in antitrust violations before it may consider the doctrine
of copyright misuse. The second approach, utilized primarily by the Ninth
Circuit, allows a defendant to invoke the defense when a plaintiff extends the
“copyright monopoly” in order to ensure competitive control over areas

56 17 U.S.C. § 512(c).

57 Id. § 512(c)(1)(A)(i)-(iii). See also William Leef, Copyright Trolls and the Importance of § 512(c) Protections, THE ENT., ARTS & SPORTS L. BLOG (Sept. 13, 2011), http://commens.org/Kts06y (highlighting the significance of obtaining § 512(c) protections in avoiding suit by copyright trolls).

58 17 U.S.C. § 512(c)(2); 37 C.F.R. § 201.3(c), 201.38 (2010).


60 See Davis, supra note 59, at 347, 349.

61 Napster, 191 F. Supp. 2d at 1102-03. See also Cohen, supra note 18, at 648.

62 See, e.g., Saturday Evening Post v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199-1200 (7th Cir. 1987) (citing USM Corp. v. SPS Techs., Inc. 694 F.2d 505, 512 (7th Cir. 1982)). See also Napster, 191 F. Supp. 2d at 1103, n.10 (noting that courts find antitrust violations result from either per se misuse or, after performing a rule of reason test, determining that activity as a whole restricts competition).
outside of the monopoly. The test under this approach focuses on whether the plaintiff violated the public policy incorporated in the copyright grant. However, due to impracticalities in its application, this approach is used only in cases where the content of the licensing provision is dispositive.

Recently, the misuse defense has been extended from the patent law realm to the copyright context, and has been expanded from its traditional use in anticompetitive cases. Namely, the Third Circuit discussed copyright misuse in the context of a copyright owner's attempt to prevent the creative use of a public good through restrictive licensing agreements. Though the court ultimately held that copyright misuse was inapplicable, it recognized the importance of ensuring that licensing agreements do not conflict with the positive public policy of promoting progress and innovation.

The Fourth Circuit also employed the copyright misuse defense outside of the antitrust violation context. Similar to other "public policy" cases endorsed under the second approach, the court held that copyright misuse might apply when plaintiffs create overly restrictive copyright licensing agreements. However, the phrase "unduly restrictive licensing" has yet to be explicitly defined. As a result of this unarticulated concept, the "public policy" cases are only useful in identifying clear cases of misuse, such as where a copyright licensing agreement is explicitly overextending.

While the copyright misuse defense has been primarily used in the antitrust context by competing entities, it may be invoked when a plaintiff brings an unmerited copyright infringement suit. At least one district court has recognized that unfounded copyright infringement claims, in which the

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63 See, e.g., Practice Mgmt. Info. Corp. v. Am. Med. Assoc., 121 F.3d 516, 520 (9th Cir. 1997) (citing Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977-79 (4th Cir. 1990)). See also Napster, 191 F. Supp. 2d at 1103 (noting misuse "forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office . . . .").
64 Napster, 191 F. Supp. 2d at 1103.
65 Id. at 1105.
66 Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 203-06 (3d Cir. 2003) (extending the patent misuse doctrine to copyright, but holding that the defense does not apply when licensing agreements do not restrict public creativity).
67 Id.
68 Id. at 206.
69 Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990).
70 Id.
71 In re Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1105 (N.D. Cal. 2002) (citing Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977 (4th Cir. 1990)).
72 Napster, 191 F. Supp. 2d at 1105.
73 See, e.g., Qad. Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1266 (N.D. Ill. 1991) ("When a copyright holder attempts to use legal proceedings to protect an improper extension of a copyright, the court may refuse to enforce the copyright."). See also Davis, supra note 59, at 347, 357-58.
plaintiff lacks actual ownership of the copyright, can lead to dismissal and court-ordered sanctions. 74 Though the court did not expressly recognize copyright misuse as a defense in the context of unmerited copyright infringement suits, it is possible that defendants may use this additional affirmative defense to expose plaintiffs who lack actual copyright ownership. 75

III. THE RISE OF THE COPYRIGHT TROLL: THE EVOLUTION OF THE LUCRATIVE BUSINESS STRATEGY

The struggle to balance the economic incentives for authors and inventors with the goal of enhancing the public domain has inadvertently created an avenue for copyright trolls to exploit the system. 76 While copyright trolls have enjoyed the most success in the context of peer-to-peer file sharing, 77 they have expanded their business strategy into the realm of online news media and private firm judicial proceedings. 78

A. The Litigation Approach of Copyright Trolls in a Modern Information Economy

As part of its litigation strategy, Righthaven first contacted parties who had ownership rights in certain works to inform them that their content had been reproduced on online sites without permission. 79 Under the 1976 Act, these

76 Nichelle Nicholes Levy, Beware the Copyright Trolls, ROBINSON BRADSHAW & HINSON, P.A. (May 16, 2011), http://commcns.org/Jjdc3X (providing evaluation of the recent effort to curtail copyright infringement and the emergence of “copyright trolls”). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting that the primary objective of copyright law is to encourage creative labor while endorsing creativity through public access to protected works).
77 Peer-to-peer file sharing involves the transmission of MP3 files to and between Internet users. Most notably employed by Napster, the process allows users to: 1) create MP3 files on individual computer hard drives for use by other Napster users; 2) search for MP3 files on other users’ computer hard drives; 3) transfer identical copies of MP3 files from one computer to another through the internet. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).
78 See Levy, supra note 76.
parties maintained the exclusive right "to institute an action for any infringement of that particular right." Righthaven would then enter into Strategic Alliance Agreements ("SAAs") with these parties, acquiring their sole right to sue for copyright infringement. Subsequently, under the guise of copyright enforcement, Righthaven would hire small teams of lawyers to file suits against alleged infringers for the sole purpose of attaining financial benefits through fast settlements.

Opponents of this litigation strategy rebut the contention that Righthaven engaged in pure copyright enforcement by pointing to the large number of lawsuits and Righthaven’s refusal to give defendants the option of engaging in takedown procedures. Specifically, Righthaven does not send mandatory takedown documents to alleged infringers. Instead, it sends a letter that threatens prosecution under federal copyright law for upwards of $150,000 if the alleged infringer does not settle.

Though the entrepreneurial approach of copyright trolls has only recently gained attention in the copyright world, the world’s first copyright troll can be traced back to early 19th century England. While Parliament’s reaction was to

http://commcns.org/K2ecgT.

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83 See Sims & Arnold, supra note 79 (discussing how recent district court dismissals of Righthaven infringement claims is indicative of a growing willingness among defendants to fight back).
86 In the wake of a flourishing culture of performing arts and musical performances, Harry Wall discovered the business opportunities created by the Dramatic Copyright Act’s extension to music in 1842. CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY
pass a bill in 1888 that limited statutory damages for infringement and expanded judicial discretion. United States district courts are cornered into employing different approaches in order to diminish the financial incentives of today’s copyright trolls.

B. Pushback by Courts Against Righthaven Litigation Tactics

In response to the high volume of reverse class action copyright infringement litigation instigated by copyright trolls, U.S. district courts have begun to recognize that a majority of the defendants are protected under fair use. Further, inherent in recent court opinions is the implicit recognition that the exclusive right to sue for copyright infringement of a work does not amount to the exclusive ownership rights required by the 1976 Act. Although recent court decisions reflect a growing awareness of the ultimate financial motive behind copyright troll lawsuits, legislative reform at the pre-trial level is essential to prevent the extortion of settlements from private individuals and organizations.

1. Righthaven v. Reality One Group, Inc.

On June 25, 2010, Righthaven filed a complaint in the United States District Court for the District of Nevada against Realty One Group, alleging infringement of the literary work, “Program may level housing sale odds.”

The work was a thirty-sentence article that had been published by the Las Vegas Review Journal on April 30, 2010. Later that day, Michael Nelson, a

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87 Victorian England 256 (1999) (analyzing the issues and legal context leading up to the enactment of the Copyright Act of 1842). Wall established the “Authors’, Composers’, and Artists’ Copyright Protection Office,” which he used to collect statutory damages from wildly popular musical performances that sampled songs then protected under the 1842 Act. Isabella Alexander, 'Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words': The Birth of the Performing Right in Britain, in Privilege and Property: Essays on the History of Copyright 321, 339 (Ronan Deazley et al. eds., 2010) (investigating the history of copyright law with particular emphasis on the development of rights protecting visual and performing works).

88 Isabella Alexander, 'Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words': The Birth of the Performing Right in Britain, in Privilege and Property: Essays on the History of Copyright 321, 344 (Ronan Deazley et al. eds., 2010).

89 See generally Sims & Arnold, supra note 79.


licensed realtor in Nevada, reproduced the first eight sentences of the article on his blog.\textsuperscript{92} Righthaven, having gained ownership of the exclusive right to sue for infringement by virtue of a May 25, 2010 SAA with Stephens Media L.L.C.,\textsuperscript{93} argued that Nelson’s use of the work failed to meet the statutory requirements for fair use.\textsuperscript{94} In particular, Righthaven claimed the work lacked transformative value under the first factor, the “purpose and character of the use.”\textsuperscript{95} Moreover, Righthaven argued that Nelson materially diminished the market value of the work because the lack of transformative value enhanced the potential for market harm.\textsuperscript{96}

In response, Nelson defended his work as coming under the purview of fair use.\textsuperscript{97} First, he argued that the work was “transformative” because he had published it in the context of other material describing the state of the housing market and had indicated the respective source material involved.\textsuperscript{98} He also claimed that the highly factual and commercial nature of the work weighed towards a finding of fair use under the second factor, the “nature of the copyrighted work.”\textsuperscript{99} Finally, Nelson emphasized the established notion that under the fair use doctrine, published works enjoy less protection than unpublished works.\textsuperscript{100}

The district court granted Nelson’s motion to dismiss.\textsuperscript{101} In applying the fair use factors, the court held that the educational purpose of the work and its diminutive effect on the market for the original article weighed strongly in favor of fair use.\textsuperscript{102} Furthermore, the court found the publication of only eight sentences of a thirty-sentence media report, and the fact that Nelson did not financially benefit from the publication of the work, supported a determination of fair use under the third and fourth factors.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{92} Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 3, Righthaven L.L.C. v. Realty One Group, Inc., No. 2:10-cv-1036-LRH-PAL (D. Nev. Aug. 16, 2010).
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id. at 3-4.
\item \textsuperscript{95} Id. at 4-8.
\item \textsuperscript{96} Id. at 11-12.
\item \textsuperscript{97} Defendant’s Motion to Dismiss at 5, Righthaven L.L.C. v. Realty One Group, Inc., No. 2:10-cv-1036-LRH-PAL (D. Nev. July 29, 2010).
\item \textsuperscript{98} Id. at 5-6.
\item \textsuperscript{99} Id. at 6.
\item \textsuperscript{100} Id. at 6-7. See also Harper & Row v. Nation Enters., 471 U.S. 539, 564 (1985) (holding that The Nation’s copying of 300 words from the Ford manuscript does not fall under the scope of fair use).
\item \textsuperscript{102} Id. at 2.
\item \textsuperscript{103} Id.
\end{itemize}
2. *Righhaven LLC v. Democratic Underground*

While the fair use doctrine represents one way that district courts have dismissed copyright troll lawsuits, courts have likewise dismissed Righhaven’s infringement claims for lack of standing.\(^{104}\) This more recent trend reflects courts’ recognition that the exclusive right to sue for infringement over a work does not amount to exclusive ownership rights required by the 1976 Act.\(^{105}\) The right to institute an infringement suit is insufficient, on its own, to meet the statutory requirements for standing.\(^{106}\)

On August 10, 2010, Righhaven filed a complaint in the United States District Court for the District of Nevada against Democratic Underground, alleging copyright infringement over the posting of a portion of an article from the *Las Vegas Review Journal*.\(^{107}\) A Democratic Underground subscriber named “Pampango” published a five-sentence portion of the fifty-sentence article entitled “U.S. Senate Race: Tea Party Power Fuels Angle.”\(^{108}\) A link to the full version of the article on the newspaper’s website was included.\(^{109}\) As in the *Realty One* case, Righhaven did not obtain an assignment of the copyright from Stephens Media until after the user published the article excerpt.\(^{110}\)

The court dismissed the case for lack of standing, holding that Righhaven was not the “legal or beneficial owner of an exclusive right under copyright law.”\(^{111}\) The court’s ultimate determination was based on its analysis of the SAA between Stephens Media and Righhaven.\(^{112}\) Under the SAA, Righhaven had the sole right to institute and benefit from copyright infringement suits


\(^{106}\) *Id.* at 976.


pertaining to the work at issue, but no right to future assignments.\footnote{113}{Section 7.2 of the SAA expressly states: “Righthaven shall have no right to license to Exploit or participate in the receipt of royalties from the Exploitation of Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.” Id. at 4.} Had Righthaven attained additional rights under the SAA, such as the exclusive right to reproduce the work in copies or the right to create derivative works based on the protected works, the court may not have dismissed its claims.\footnote{114}{The owner of a copyright has the exclusive rights to do the following: “to reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based on the copyrighted works...” 17 U.S.C. §106(1) (2006).} Given that the acquisition of the sole right to sue for infringement is not an exclusive right, and only the “legal or beneficial owner of an exclusive right” can sue for copyright infringement, the transfer by Stephens Media of the right to sue was insufficient to confer standing.\footnote{115}{Julie Samuels, \textit{Judge Shuts Down Another Mass Copyright Case, Characterizes Lawsuits as “Massive Collection Scheme,”} ELECTRONIC FRONTIER FOUND. (Sept. 8, 2011), http://commcns.org/J70XQN. \textit{See generally On the Cheap, L.L.C. v. Does 1-5011, No. 3:10-cv-04472 (D. Cal. Sept. 6, 2011) (order serving Doe defendants 1-16 and 18-5011) (holding that all 5,000 defendants are dismissed without prejudice for lack of personal jurisdiction except for Doe 17, whose IP address identifies him as residing in the Northern District of California).} 4

3. \textit{Nu Image, Inc. v. Does}

In response, the United States District Court for the District of Columbia held that failure to identify defendants by more than their respective IP addresses does not satisfy the requirements for venue and personal jurisdiction. The court noted that in the interest of preserving judicial resources, the process of obtaining the personal information of the defendants would be extensive and would unjustly delay litigation. Opponents of copyright troll litigation strategies assert this decision is notable for its dismissal on the grounds of lack of personal jurisdiction. Further, as the United States District Court for the District of Columbia has been viewed as a sympathetic court for copyright trolls, it reflects a general trend of unwillingness to support mass copyright litigation schemes.

C. Copyright Trolling in the Realm of Private Firm Patent Examination

The exploitative litigation strategy employed by copyright trolls has been observed recently in the context of private law firms in the patent community. Major patent law firms have come under fire from groups such as the American Institute of Physics ("AIP") and John Wiley & Sons, Inc. ("Wiley"), which publish scientific, technological, and medical journals and license the copyright of each of their articles selected for publication.

AIP and Wiley allege that these firms have distributed unauthorized copies of their copyrighted articles—also known as non-patent literature ("NPL")—to the U.S. Patent and Trademark Office ("USPTO") in the preparation of patent applications. While the USPTO currently obtains the majority of its NPL through proper licensing, permitting the use of copies in the process of preparing patent applications, it contends that its use of unlicensed NPL is protected by fair use.

Given that courts have denied copyright infringement claims by copyright trolls such as Righthaven because of a lack of standing, the USPTO and firms argue that publishers should likewise be turned away because the use of NPL
in the patent application process is a legitimate fair use.127 In its analysis, the USPTO contends that the use of NPL simply facilitates the patent application process, which is a non-commercial, governmental purpose.128 Furthermore, the agency argues that the use is “transformative” because it is using the NPL for a renewed and different purpose—to demonstrate how particular features of the applicant’s claims are considered prior art.129 The USPTO also claims that the second fair use factor also weighs in its favor because factual, unpublished works such as NPL receive less protection than expressive, published works.130 Finally, the use of copyrighted NPL in the patent application process does not impair the marketability of such works because the USPTO expressly avoids the dissemination of the NPR through its database, preventing the free availability of NPR on the Internet.131

The small volume of recent lawsuits on behalf of publishers alleging copyright infringement in the patent application process may be insufficient to suggest an underlying motive of financial profit through settlement extortion. Nonetheless, the lawsuits parallel the strategy of copyright trolls such as Righthaven in that they involve the potential extortion of settlements in cases of clear fair use. Though experts anticipate an uphill battle for publishers seeking to recover damages for copyright infringement from major patent law firms, these lawsuits demonstrate that the loophole in copyright enforcement still remains exposed.

IV. CRACKING DOWN ON COPYRIGHT TROLLS: POTENTIAL AVENUES FOR REFORM ACTION

Legislative attempts to increase protection for rights holders have led to an untenable situation in copyright law—one that allows the rights to a work to be purchased and used for purposes contrary to public policy.132 The question arises whether such a situation, while contrary to the moral practice of copyright protection, merits judicial or legislative action.133 The exposure of this loophole in copyright enforcement, aside from exhausting judicial resources and costing media organizations thousands in legal fees for

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127 See Deutsch, supra note 125.
129 See Knight, supra note 123, at 3.
131 See Knight, supra note 123, at 5.
132 See supra Part III.
133 Id.
The Rise of Copyright Trolls

unmerited claims, also amounts to unequal bargaining power between the copyright troll and the alleged infringer.\textsuperscript{134} Although the litigation strategies employed by copyright trolls appear facially entrepreneurial, such coercive tactics beg legislative concern due to their negative impact on innovation and contradiction with the fundamental principles of copyright law.\textsuperscript{135}

Under the fair use doctrine, defendants in a copyright infringement action may invoke an affirmative defense to infringement of the work upon a showing of fair use under the four factors previously discussed.\textsuperscript{136} While recent court rulings reflect a growing recognition that the works at issue in copyright troll litigation are protected under fair use, reliance on judicial interpretation of the doctrine alone is insufficient to prevent this exploitative strategy at the pre-trial level.\textsuperscript{137} The primary objective of copyright trolls—to acquire financial benefits through settlement threats based on unfounded infringement claims—will remain intact.\textsuperscript{138}

In addition, the recent trend of dismissals primarily affects a narrow group of alleged infringers—the large media organization.\textsuperscript{139} This is due mostly to the fact that media corporations generally comprise the majority of copyright infringement lawsuits; whereas the average Internet user rarely declines settlement offers to pursue litigation.\textsuperscript{140} Therefore, at the pre-trial level, copyright trolls can still effectively extort settlements from the common citizen.\textsuperscript{141} As a result, the fine line between copyright enforcement and unmerited copyright trolling disappears at the pre-trial stage, allowing copyright trolls to continue to enjoy financial benefits from coerced settlements.\textsuperscript{142}

\textsuperscript{134} See Sims & Arnold, supra note 79; McSherry, supra note 117.
\textsuperscript{135} See supra Part I.
\textsuperscript{138} See Sims & Arnold, supra note 79.
\textsuperscript{140} David Kravets, Newspaper Chain’s New Business Plan: Copyright Suits, WIRED (July 22, 2010), http://commens.org/Lijvd7 (discussing a blogger who decided to settle with Righthaven rather than go through litigation).
\textsuperscript{141} See supra Part I. See also Sims & Arnold, supra note 79 (discussing Righthaven’s business model of “copyright trolling” and “extortion litigation”).
Judicial reform alone will be insufficient to undermine the exploitative strategy at the proper procedural step. In order to prevent the extortion of settlements prior to trial through diminishing incentives, action at the legislative level is necessary to pinpoint the issue at its weakest point. While the recent trend of dismissals due to standing and fair use considerations is encouraging, it pertains primarily to deep-pocket media organizations that have failed to acquire the protection of the safe harbor provisions of the DMCA. The average Internet user remains unprotected against coercive pre-litigation settlement threats.

The legislative solution to the for-profit copyright infringement suit involves amendments to the 1976 Act on two procedural levels. First, a requirement that a plaintiff in a copyright infringement case send a takedown letter to the alleged infringer in order to obtain standing to pursue a claim for infringement. While such a requirement relies on the assumption that the alleged infringer will remove the infringing content immediately, in balancing the costs of settlement or pursuing litigation with the minimal cost of removing the allegedly infringing material, the average reasonable person is likely to take the most cost-effective route and remove the material. Such an amendment also provides protection for the individual who is unknowingly infringing and lacks a full understanding of the nuances contained in federal copyright law.

Human beings are “rational maximizers” that act in response to monetary incentives. Therefore, the common citizen will comply with a mandatory takedown provision in order to minimize financial loss. In addition, if compliance with takedown provisions is a requirement for standing to file a copyright infringement suit, copyright trolls will be disincentivized from filing

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143 See Sims & Arnold, supra note 79 (concluding Righthaven can contract around recent judicial decisions, implying the judiciary alone may not be enough to stop trolling).
147 See supra Part III.A (discussing Righthaven’s refusal to use takedown notices).
150 See generally Posner, supra note 148, at 1.
In balancing the cost of buying licenses to sue for infringement with the low financial gain when alleged infringers comply with takedown provisions, copyright trolls likely will no longer profit from filing meritless lawsuits. By removing the underlying motive for pursuing unfounded copyright enforcement litigation—the monetary gain attained through unfair bargaining power—adding takedown requirements likely will stop copyright trolls from pursuing unsuspecting Internet users.

However, copyright trolls have a propensity for targeting deep-pocketed media corporations that are not registered under the DMCA’s safe harbor provision. While the designation of a DMCA agent can potentially avoid the threat of settlement or the potential cost of $150,000 in liabilities, securing such protection is not a priority for large media organizations. This allows copyright trolls to file infringement lawsuits against these organizations over material published by third-party Internet users. Therefore, making DMCA registration a mandatory requirement for Internet media corporations would remove the incentive for copyright trolls to target these deep-pocketed companies. Though codifying such a requirement for media organizations may burden the corporation’s process of obtaining publishing rights, the need to avoid the potential costs of copyright infringement litigation outweighs the slightly burdensome process and cost of DMCA registration.

Another solution is explicitly extending the affirmative defense of copyright misuse to mass copyright litigation schemes. As discussed, copyright misuse can provide a strong defense when the plaintiff lacks actual ownership of the copyrighted work at issue. Unlike the fair use doctrine, which involves a fact-based analysis of the market use of the infringing material, the copyright misuse defense pinpoints the analysis on the ownership status of the copyright.

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151 Id.
154 See 17 U.S.C. § 512(c) (1)(A)(i)-(iii) (2010). See also Leef, supra note 153 (highlighting the significance of obtaining § 512(c) protections in avoiding suit by copyright trolls).
155 See supra Part III; RIGHTHAVEN LAWSUITS, http://commcns.org/JFUHNi (last visited Apr. 15, 2012). See also Leef, supra note 153 (highlighting the significance of obtaining § 512(c) protections in avoiding suit by copyright trolls).
157 Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976 (4th Cir. 1990).
If courts focus their evaluation on the terms of licensing agreements between copyright trolls and true copyright owners, the lack of sufficient beneficial ownership status will become more apparent.

In the context of contract law, a contract is unconscionable, or void as against public policy, when the bargaining power is grossly disproportionate between the seller and the buyer. An analysis of unconscionability, for not only the licensing agreements between copyright trolls and copyright owners, but also the settlement letters sent to alleged infringers, likely would result in these documents being found void as contrary to public policy. By dismissing copyright infringement claims that are contrary to public policy, this approach will effectively eliminate the claims of copyright trolls.

V. CONCLUSION

Though Righthaven is now insolvent—the result of ethics investigations, court-ordered sanctions, and class action lawsuits—the loophole it exploited in federal copyright law remains. In the context of copyright infringement litigation, copyright trolls have effectively disturbed the delicate balance between the over-enforcement and under-enforcement of copyrights. As a result, the fine line between copyright enforcement and copyright trolling has disappeared at the pre-trial level, forcing the average Internet user to bear the costs.

Notwithstanding a growing recognition of the exploitative litigation model employed by Righthaven, the legislative struggle to strike the proper balance has failed to protect the rights of the average Internet user. Legislative reform of the 1976 Act to require that copyright trolls send mandatory takedown provisions to alleged infringers before they can file a copyright infringement claim will disincentivize any future copyright trolls from filing unmerited lawsuits. By not requiring an initial mandatory takedown letter, the average Internet user, who generally lacks knowledge of the nuances of federal copyright law, often will comply with settlement demands. Though the trend of court dismissals for lack of standing appears discouraging for copyright trolls, they may still be able to extort large settlements from unsuspecting Internet users who wish to avoid litigation.

Furthermore, to remove the incentive for copyright trolls to target large
media corporations that have failed to secure protections under the DMCA from liability, such provisions should be required for all online media organizations. Registration of a DMCA agent will provide a legislative bar to the liability of media organizations for the material published by third-party Internet users. Copyright trolls will be precluded from seeking to reap the benefits of third-party actions of large deep-pocketed online news organizations.

The current law fails to account adequately for entrepreneurs seeking to exploit the loophole in the copyright system. The repercussions of the litigation strategies employed by copyright trolls are contrary to the underlying purpose of copyright law envisioned by the Framers. In addition to judicial pushback against trolls like Righthaven, reform action must be initiated at the legislative level in order to stop future copyright trolls in their tracks.