

COPYRIGHT TROLLS AND PRESUMPTIVELY FAIR USES

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The “troll” label, long a staple of the patent system, had little connotation and even less application in the copyright context until 2010. That is when the so-called copyright troll emerged to acquire unenforced copyrights being infringed in the digital marketplace. Trolls threaten to chill speech and discourage innovation by exploiting copyright incentives without contributing to the market for creative works. Yet, despite the copyright troll’s conspicuous arrival, little scholarship has discussed how trolls undermine copyright policy goals or potential measures for mitigating the harms they impose.

This Article is the first to hone in on the fair use doctrine as copyright law’s internal limitation on the enforcement-only business model. Fair use’s judicial development predates the original United States copyright law and was codified in the 1976 Copyright Act, which neither expanded nor limited the scope of this equitable defense to infringement. The doctrine remains flexible and robust—and well-tailored to raising a presumptive bar to troll-related litigation. After defining the “copyright troll” and documenting its quick rise, this Article argues that, in troll-related litigation, burden shifting is warranted under traditional fair use analysis for three reasons: (1) there is no market harm because the troll has no market other than litigation; (2) the secondary use is for a different purpose and thus transformative; and (3) courts may excuse infringements because enforcement would not support the objectives of copyright law.

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INTRODUCTION

Developments in technology have dramatically changed the scope of works covered by the United States copyright system. With the demise of the Gutenberg Press and the rise of the Internet publishing platform, today countless more people produce copyrighted expression than ever before. This exponential growth in authorship has been great for expanding contributions to the progress of culture.¹ But it also has

1. Of course, much has been said about how the expansion of authorship and the automatic vesting of copyright protection have slowed the growth of the public domain. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008), available at <http://thepublicdomain.org/thepublicdomain1>.

exposed the creative works of many more people—from amateur authors to traditional content-industry titans—to much more infringement.² For many copyright owners, monitoring for and enforcing against infringements is cost prohibitive.³ This reality, coupled with the ever-expanding universe of copyrighted works, has littered the Internet with “vast swaths of de facto free use”⁴—tolerated or at least overlooked infringements like mash-ups, fan fiction, and remixes that are difficult for copyright owners to identify and thus go unenforced, even though they may not qualify as fair uses.⁵ That, in turn, created a vacuum in the copyright system: an unexploited market for copyright-enforcement firms, the so-called copyright trolls. Their emergence threatens to impose heavy costs on society, particularly by chilling speech and discouraging innovation.

Long familiar to the patent system,⁶ the troll label had little connotation and even less application in the copyright context until 2010.⁷ New firms emerged then to exploit enforcement rights by using the threat of statutory damages to extract quick settlements from secondary users, regardless of whether the use was legally protected.⁸ The most notable entrant into this new market was Righthaven.⁹ This

pdf; David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139 (2009); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

2. See *infra* text accompanying notes 139–41.

3. Recall the musical artists and record labels that went heavily uncompensated for public performances of their songs before the creation of the American Society of Composers, Authors and Publishers (ASCAP). See *infra* text accompanying notes 107–10. For recent discussion on scaling copyright enforcement for the digital age, see Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (2011); see also John M. Owen, *Graduated Response Systems and the Market for Copyrighted Works*, 27 BERKELEY TECH L.J. 559 (2012).

4. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 733 (2011).

5. *Id.*

6. Patent trolls, around for more than a century, have been an expensive tax on the patent system since at least the 1990s and pose significant threats to innovation. See *infra* Part II.

7. See *infra* Part I.

8. Unlike in the patent field, where Colleen Chien helped rebrand trolls as patent assertion entities (PAEs), see *From Arms Race to Marketplace: The New Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297 (2010), there is no alternative name for copyright trolls—and I do not endeavor to be a lexicographer.

9. See *infra* Part I.B.

enforcement firm partnered with newspapers—perhaps the most desperate mass producers of copyrighted content¹⁰—to enforce copyrights against users who copied news articles and photos, in whole or in part, elsewhere online. Righthaven’s strategy was to purchase only copyrights that already had been infringed and to file no-warning lawsuits, often against unsophisticated individuals and nonprofits. It then would offer to settle for between \$1,000 and \$5,000. Considering the time, costs, and uncertainty of litigation, even defendants with strong defenses were wise to settle.¹¹

Despite the conspicuous arrival of the copyright troll, little scholarship has addressed measures for mitigating the harms trolls pose. This Article is the first to hone in on the fair use doctrine as a powerful limitation on trolls. Fair use is an affirmative defense to an action that would otherwise constitute infringement. The doctrine’s history predates the United States original copyright law and was codified in Section 107 of the 1976 Copyright Act,¹² which neither expanded nor limited the scope of this equitable rule of reason. Judges generally evaluate fair use by weighing the four factors identified in the statute: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality used; and (4) the effect of the use on potential markets for the copyrighted work.¹³ However, Section 107 left to federal judges the power to continue developing the doctrine in response to changed circumstances. Though fair use generally is evaluated by balancing the four statutorily enumerated factors, courts are not limited to these factors and may consider how troll-related litigation undermines copyright

10. The newspaper industry was ill-prepared for the disruptive effects of the Internet, and newspaper owners have responded by drastically reducing staff and desperately seeking new revenue streams. *See infra* text accompanying notes 57–63.

11. *See* James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 81 (2012); *see also* Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 17 (2006) (discussing motivations to settle for similar amounts in infringement actions brought by the music recording industry to deter peer-to-peer file-sharing). Of course, it often is difficult to know when a defendant with a meritorious fair use defense has settled, and thus there likely were many more cases.

12. Copyright Act of 1976 § 107, 90 Stat. at 2546 (codified as amended at 17 U.S.C. § 107 (2006)).

13. *See id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–78 (1994).

policy goals.¹⁴

This Article proceeds in four Parts. Part I defines the “copyright troll” label and surveys its limited history and recent emergence. As a stark example, Part I analyzes Righthaven’s creation and business practices. Part II weighs the costs and benefits of trolls, looking to the patent system as a bellwether for copyright law, with an emphasis on the threats copyright trolls pose to individuals and industry. Part III then identifies copyright’s fair use doctrine as the tool by which judges may excise trolls from the copyright system. Based on a textual reading of Section 107 and a historical understanding of fair use’s development, this Part argues that courts should impose a presumptive bar on troll-related litigation. Such burden shifting is warranted under traditional fair use analysis for three reasons: (1) the troll has no market to be harmed; (2) the secondary use is for a different purpose and thus transformative; and (3) courts may excuse copyright infringements in troll-related matters because enforcement would not support the objectives of copyright law.¹⁵ Additionally, trolls have shown a propensity for acting in bad faith, and when that occurs it weighs in favor of fair use. Finally, Part IV considers challenges to a fair use presumption, evaluates the efficacy of alternative measures, and argues that fair use is the best available means for protecting the copyright system from trolls.

I. TROLLS AT THE GATE

After appearing as a frequent topic on technology and intellectual property blogs for the past three years,¹⁶ so-called

14. See *infra* Part III.B.3.

15. Even more than the copyright infringers whom trolls enforce against, trolls disturb the copyright system by exploiting incentives without contributing to the creative works market—they do not produce, distribute, consume, or use the copyrighted work—and do so in a manner that discourages other creators.

16. See, e.g., Timothy B. Lee, *Furious Judge Decries “Blizzard” of Copyright Troll Lawsuits*, ARS TECHNICA (May 2, 2012, 4:00 PM), <http://arstechnica.com/tech-policy/2012/05/furious-judge-decries-blizzard-of-copyright-troll-lawsuits/>; Mike Masnick, *Photographer Who Took Family Portrait of Girl Shot in Tucson Suing Media for Using the Photo*, TECHDIRT (Feb. 18, 2011, 12:07 PM), <http://www.techdirt.com/articles/20110218/10170213164/photographer-who-took-family-portrait-girl-shot-tucson-suing-media-using-photo.shtml>; Eric Goldman, *Blogger Wins Fair Use Defense . . . On a Motion to Dismiss!*—Righthaven v. Realty One, TECH. & MKTG. L. BLOG (Oct. 21, 2010, 10:00 AM), <http://blog>.

copyright trolls recently have received increasing attention in judicial opinions,¹⁷ academic literature,¹⁸ and legislative policy papers.¹⁹ The field, though, lacks a working definition of the copyright troll.²⁰ The challenge is that “troll” means different things to different people²¹ and, significantly, the label refers

ericgoldman.org/archives/2010/10/righthaven_defe.htm (noting that for most of Righthaven’s defendants “it’s almost always cheaper to settle than fight,” enabling the troll to “effectively run[] a settlement mill”).

17. See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691–92 (7th Cir. 2012) (stating that the costly and expansive discovery the plaintiff claimed to need to oppose a fair use defense gave the plaintiff “the appearance of a ‘copyright troll’”); *Malibu Media, LLC v. John Does 1, 6, 13, 14*, No. 12-2078, 2013 WL 3038025, at *1 (E.D. Pa. June 18, 2013) (stating that the plaintiff was not a copyright troll because it actually produced the adult films and did not merely acquire the copyright therein to enforce against infringers); *Third Degree Films v. Does 1–47*, 286 F.R.D. 188, 189–90 (D. Mass. 2012) (stating that “this Court has grown increasingly troubled by ‘copyright trolling’” because it uses litigation not to make the copyright owner whole but to provide a new revenue stream).

18. See, e.g., Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 759 (2013) (discussing whether suggested reforms would appropriately address copyright trolls); Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 728–29 (2013) (identifying how trolls disrupt copyright’s under-enforcement equilibrium); DeBriyn, *supra* note 11 (proposing that statutory damages be removed from the Copyright Act to deter trolls).

19. For example, in an August 2012 report addressing United States intellectual property policy to the Office of Management and Budget, two Internet and communications trade organizations warned that “[c]opyright trolls pose a threat to the U.S. economy by posing a threat to innovative companies.” NETCOALITION AND COMPUTER & COMMUNICATIONS INDUS. ASS’N, RESPONSE OF NETCOALITION AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION TO THE INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR’S REQUEST FOR COMMENTS ON THE JOINT STRATEGIC PLAN 13 (2012), available at <http://www.policybandwidth.com/briefs>; see also Clark D. Asay, *A Case for the Public Domain*, 74 OHIO ST. L.J. (forthcoming 2013) (manuscript at 39) (on file with author).

20. At the time of this writing, the Westlaw database of journals and law reviews included twenty-six articles and student comments that used the phrases “copyright troll” or “copyright trolls” in textual sentences—all since 2007. None of the sources present a common definition of the copyright troll. See, e.g., Samuelson, *supra* note 18, at 759 (defining trolls as “rightsholders who threaten or bring infringement lawsuits in order to induce users to pay to settle weak claims”); DeBriyn, *supra* note 11, at 86 (defining the troll as “a plaintiff who seeks damages for infringement upon a copyright it owns, not to be made whole, but rather as a primary or supplemental revenue stream”); Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 51 (2012) (defining the troll as “a person or entity that acquires a (usually narrow) license from an original copyright holder for the sole purpose of suing and obtaining settlements from alleged infringers” in mass lawsuits against thousands of defendants). This Article articulates a definition similar to that independently developed by Shyamkrishna Balganes, *supra* note 18, at 732.

21. In the patent context, for example, numerous troll definitions have been

more to behavior than group membership—“troll is as troll does.”²² But such an abstract description offers about as much guidance as Justice Stewart’s test for obscenity.²³ In the copyright context, the primary concern is the perceived extortion of settlements by an individual who is not contributing to the market for creative works. Thus, for the purpose of clarity, and by using the patent troll as a point of reference, this Article defines a copyright troll as a copyright owner who: (1) acquires a copyright—either through purchase or act of authorship—for the primary purpose of pursuing past, present, or future infringement actions; (2) compensates authors or creates works with an eye to the litigation value of a work, not the commercial value; (3) lacks a good faith licensing program; and (4) uses the prospect of statutory damages and litigation expenses to extract quick settlements of often weak claims. The combination of these characteristics is essential to distinguishing a copyright troll, who exploits the copyright system in contravention of copyright objectives, from a genuine copyright owner, who enforces his rights for intended purposes.²⁴

advanced. See Mark A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 619 (2008) [hereinafter Lemley, *Universities*]; Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 459 (2012); cf. Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1526 (2007) [hereinafter Lemley, *Proof of Copying*] (defining trolls as “entities that do not manufacture products or transfer technology, but instead assert patents against successful companies that independently develop and manufacture technology without knowledge of those patents”); Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583, 1583 (2009) (defining a troll as a member of the secondary market for patent rights “that does not contribute to the social goal the patent system was meant to serve: technological innovation”); Joe Brennan et al., *Patent Trolls in the U.S., Japan, Taiwan and Europe*, UNIV. OF WASH. SCH. OF LAW, CTR. FOR ADVANCED STUDY & RES. ON INTELL. PROP. NEWSL. (Spring/Summer 2006), available at <http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=2006&article=newsv13i2BrennanEtAl> (identifying four broad categories of patent trolls: (1) companies that purchase weak patents to enforce against a third party; (2) companies that originally manufactured their own products but presently derive their primary revenue through licensing; (3) agents of patent owners; and (4) law firms that “help clients to exploit their intellectual property” on contingency).

22. Lemley, *Universities*, *supra* note 21, at 612.

23. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (saying of obscenity: “I know it when I see it, and the motion picture involved in this case is not that.”).

24. Significantly, this definition does not include those lawyers who represent copyright owners in mass-joinder litigation but lack a personal ownership interest

Under this Article's definition, the Recording Industry Association of America (RIAA)²⁵ was not a copyright troll when it aggressively (and infamously) sued about 35,000 people for illegally sharing music²⁶ on peer-to-peer sites like Napster.²⁷ That is because the RIAA represented the recording industry distributors, who were actively engaged in licensing their copyrighted works and whose revenue did not primarily derive from litigation.²⁸ Similarly, copyright-collecting societies like the American Society of Composers, Authors and Publishers (ASCAP) are not trolls because they have good faith licensing programs.²⁹ On the other hand, the status of Bridgeport Music, which some commentators have characterized as a copyright troll,³⁰ turns on whether Bridgeport's efforts to license its sound recordings before suing samplers were in good faith or

in the copyright. *But cf. Who Are Copyright Trolls?*, FIGHT COPYRIGHT TROLLS, <http://fightcopyrighttrolls.com/about/> (including such lawyers in its definition of copyright trolls) (last visited Sept. 15, 2013).

25. *Who We Are—RIAA*, RIAA, <http://www.riaa.com/aboutus.php> (last visited Sept. 15, 2013).

26. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, <http://online.wsj.com/article/SB122966038836021137.html>; see also *Piracy Online—Why We Do What We Do*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-why-we-do-what-we-do (last visited Sept. 15, 2013); Hugh Prestwood, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), <http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E-206CE8A1>.

27. The file-sharing site was used primarily for illegally downloading protected music. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 100–01 (2002–2003) (“Tens of millions of Internet users actively downloaded music over Napster’s peer-to-peer network during its relatively short lifespan, resulting in the unauthorized distribution of potentially billions of copies of sound recordings.”); see also Matthew Green, Note, *Napster Opens Pandora’s Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799 (2002).

28. The RIAA also ran a public-education initiative and, at least at first, offered an amnesty program. Matt Hines, *RIAA Drops Amnesty Program*, CNET NEWS (Apr. 20, 2004, 8:59 AM), http://news.cnet.com/2100-1027_3-5195301.html.

29. Some scholars offer a less favorable view of the RIAA and collecting societies. See, e.g., Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMP. L. & ECON. 541 (2005).

30. See, e.g., Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html (labeling Bridgeport a “sample troll” for the way it enforced its copyrights against music samplers and arguing that Bridgeport’s litigation activities were ruining hip-hop music); Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. Rev. 943 (2008).

just a pretext for litigation. Critics of Bridgeport's business model have suggested the latter.³¹

Clearly, Righthaven, which was formed for the sole purpose of enforcing copyrights purchased after an infringement had been identified and lacked a good-faith licensing program, warrants the troll label.³² So too would individuals who created copyrighted works for the purpose of inducing infringement and then suing to profit from litigation,³³ and entities like Prenda Law,³⁴ which may have done the same with pornographic films seeded onto BitTorrent and then used the additional element of shame to extract settlements.³⁵ The copyright troll's existence relies on several provisions of copyright law that are vulnerable to exploitation. First, copyright infringers are strictly liable: "the innocent intent of the defendant constitutes no defense to liability."³⁶

31. See, e.g., Wu, *supra* note 30 ("Bridgeport and companies like it hold portfolios of old rights (sometimes accumulated in dubious fashion) and use lawsuits to extort money from successful music artists for routine sampling, no matter how minimal or unnoticeable.").

32. Righthaven's business model, and the rationale for labeling it a copyright troll, are discussed at length *infra* Part I.B.

33. See, e.g., Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).

34. And its numerous associated shell companies. See Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *1-2 (C.D. Cal. May 6, 2013).

35. See *id.*; Andrea Peterson & Timothy B. Lee, *Firm Accused of Uploading Porn, Shaking Down People Who Download It*, WASH. POST (Aug. 16, 2013, 9:42 AM), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/16/firm-accused-of-uploading-porn-shaking-down-people-who-download-it/>; Cyrus Farivar, *Prenda Seeded Its Own Porn Files Via BitTorrent, New Affidavit Argues*, ARS TECHNICA (June 3, 2013, 9:15 PM), <http://arstechnica.com/tech-policy/2013/06/prenda-seeded-its-own-porn-files-via-bittorrent-new-affidavit-shows/> (citing Declaration of Delvan Neville, First Time Videos, LLC v. Oppold, 6:12-CV-01493-CEH-KRS (M.D. Fla. May 25, 2013)); Ken White, *Prenda Law's Attorneys Take the Fifth Rather Than Answer Judge Wright's Questions*, POPEHAT (Apr. 2, 2013), <http://www.popehat.com/2013/04/02/prenda-laws-attorneys-take-the-fifth-rather-than-answer-judge-wrights-questions/>; Timothy B. Lee, *Panicked Porn Troll Prenda Law Now Dismissing Pending Lawsuits*, ARS TECHNICA (Mar. 15, 2013, 8:30 PM), <http://arstechnica.com/tech-policy/2013/03/panicked-porn-troll-prenda-law-now-dismissing-pending-lawsuits/>; Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BLOOMBERG BUSINESSWEEK (May 30, 2013), <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls>.

36. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08[B][1] (Matthew Bender rev. ed. 2013); see also Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 489 (1984) (Blackmun, J., dissenting) (stating that the Copyright Act "establishes no general exemption for those who believe their infringing activities are legal"); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976) (holding that

Second, commercially valueless copyrights³⁷ are ubiquitous; they are much more cheaply available than bad patents³⁸ because copyright law no longer requires formalities, such as notice, registration, or deposit,³⁹ and copyright protection is granted even when the author has no interest in commercially exploiting or licensing the work.⁴⁰ Third, owners of commercially valueless copyrights can be overcompensated ex post infringement due to statutory damages that inflate settlements or jury awards.⁴¹ These copyright provisions embolden trolls to sit on the sidelines and wait until after an infringement to assert a copyright and seek statutory damages ranging from \$750 to \$30,000 per non-willful infringement.⁴²

infringement may occur subconsciously—i.e., even when the copier thinks that he independently created the new work).

37. By this, I mean those copyrights in works that have little or no commercial value, and therefore offer the copyright holder little hope of licensing.

38. See *infra* text accompanying note 122.

39. And for good reason. See generally Brad A. Greenberg, Comment, *More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028 (2012) (arguing that an opt-in copyright regime characterized by formalities does not scale in the digital age and would reduce incentives for authors).

40. So long as a work evinces a modicum of creativity, copyright protection vests automatically upon fixation, regardless of authorial intent. See 17 U.S.C. §102(a) (2006); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362–63 (1991).

41. Though not troll-related, a lawsuit brought by several record labels against Jammie Thomas-Rasset for copyright infringement for music file-sharing demonstrates the massive judgments at which juries can arrive when calculating infringements based on statutory damages. See *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1001–03 (D. Minn. 2011), *vacated by* *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012). In 2007, a jury found that Thomas-Rasset had infringed twenty-four songs and awarded damages of \$9,250 per song, for a total of \$222,000. In Thomas-Rasset's re-trial based on faulty jury instructions, the jury again found against Thomas-Rasset—this time awarding damages of \$80,000 per song, for a total of \$1.92 million. (As shocking as that number is, the Copyright Act permits even larger damages per infringement.) The court reduced the damages to \$54,000. When the record labels refused to accept the reduced judgment, a third trial was ordered solely on the issue of damages. Once again, a jury found against Thomas Rasset, awarding \$1.5 million. The court again reduced that amount to \$54,000 because “an award of \$1.5 million for stealing and distributing 24 songs for personal use is appalling.” *Id.* at 1001.

42. 17 U.S.C. § 504 (2006). Because damages can be so difficult to prove in the copyright context, statutory damages serve an important purpose in preserving incentives. See *infra* text accompanying notes 330–31. However, their availability is tempting fruit for trolls and may become the incentive itself.

A. *Limited History in Copyright*

Despite the recent emergence of the copyright-litigation business model, the first copyright troll appeared more than a century ago.⁴³ In the 1870s, Englishman Thomas Wall “conceived the idea of exploiting the fixed penalty of £2 for unauthorised performances” of dramatic works and music works under British copyright law.⁴⁴ But Wall did not create, nor did he employ the creation of, original works to obtain the copyrights therein.⁴⁵ His copyright enforcement relied on purchasing other owners’ unenforced “public performance rights.”⁴⁶ Unlike a modern collecting society—for instance, ASCAP—that acts as an agent for content owners and actively negotiates with potential licensees in advance of the use of the content,⁴⁷ “Wall operated after the event and exacted the full penalty, not as a deterrent, but as a ripe fruit to be plucked.”⁴⁸ Identifying potential licensees pre-infringement would have required time-consuming investigations and negotiations and likely resulted in less revenue than enforcing an infringement action for statutory damages. Wall’s business model was most efficient when he waited until one of his rights had been infringed and then demanded from the infringer the two-pound statutory maximum. As the English copyright scholar Gavin McFarlane noted: “his activities came close to a form of extortion within the framework of the law as it then stood, and eventually legislation had to be passed to curb him. . . .”⁴⁹

Between Wall’s era and 2010, the United States marketplace for copyrighted works was not without the occasional troll,⁵⁰ but copyright enforcement rights generally

43. There may have been an earlier predecessor, but none has been identified.

44. GAVIN MCFARLANE, *COPYRIGHT: THE DEVELOPMENT AND EXERCISE OF THE PERFORMING RIGHT* 79 (1980).

45. See Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 *COLUM. J.L. & ARTS* 1, 11 (2008).

46. See *id.* In some circumstances, Wall also operated as an enforcement agent for other copyright owners. MCFARLANE, *supra* note 44, at 80.

47. Taking them outside the realm of a copyright troll, as defined by this Article.

48. MCFARLANE, *supra* note 44, at 79.

49. *Id.* In response to Wall’s activities, Parliament passed two amendments to the British copyright act, which removed automatic statutory damages and left the determination of damages to the discretion of the judge. *Id.* at 86–88. No longer able to demand two pounds per public performance, Wall lost the massive leverage he had against infringers and his business model crumbled. *Id.* at 88.

50. Including, based on the perception that it lacked a good faith licensing

were not emphasized as a primary revenue stream and there was no recognizable enforcement-only business model. As John Tehranian wrote in 2007, one had to “imagine a dystopian future” to be confronted by content owners who derived profits not from the exploitation and licensing of their copyrighted works but only from the enforcement of their copyrights.⁵¹ Those who built a copyright catalog for the purpose of commencing infringement actions to extract large settlements were anomalies. But then content catalog firms suddenly appeared.⁵² They were not in the business of publishing or distributing or even licensing copyrighted works.⁵³ Instead, these firms primarily purchased unenforced copyrights and sought to recover from the infringer—claiming settlements and legal judgments as the sole source of revenue. The copyright troll had arrived,⁵⁴ and Righthaven, followed quickly by the “porn trolls,”⁵⁵ became the face of the movement.

program, Bridgeport Music.

51. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 550 (“One can readily imagine a future dystopian world where the record labels, long since irrelevant to the development and distribution of new music, become nothing more than copyright trolls, drawing their revenue entirely from collections (or litigation) of this kind.”); see also Jack Russo & Lucy Goodnough, *Inventors and Their Innovations: Intellectual Property and the Evolution of Its Regulation*, 947 PLI/PAT 1213, 1246 (2008) (“[T]here has not yet been any regular identification of any ‘copyright trolls’ or ‘trade secret trolls’ or ‘trademark trolls’ though it would seem those are logical next versions.”).

52. Righthaven, discussed immediately below, was seen as heralding in a new era. See, e.g., Joe Mullin, *Is This the Birth of the Copyright Troll?*, CORPORATE COUNSEL (Aug. 16, 2010).

53. Their business models and the copyrights they owned varied. See *Copyright Trolls*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/copyright-trolls> (last visited Sept. 15, 2013) (using a broader definition of the copyright troll than that used in this Article); Julie Samuels, *Courts Call Out Copyright Trolls’ Coercive Business Model, Threaten Sanctions*, ELEC. FRONTIER FOUND. (Oct. 5, 2011), <https://www.eff.org/deeplinks/2011/10/courts-call-out-copyright-trolls-coercive-business>; Lee, *supra* note 16. This Article focuses on Righthaven because its activities attracted significant attention and prompted several fair use rulings.

54. And was roundly condemned by many journalists, online speakers, and legal scholars who took note. See *infra* text accompanying notes 73–76.

55. Prenda Law most notably fits within this Article’s definition of a copyright troll. See *supra* text accompanying notes 34–35. However, many pornographic studios that initiated mass John Doe infringement lawsuits against downloaders, though also referred to generally as copyright trolls, would not fit this Article’s narrow definition. Accord *supra* note 24 with John Biggs, *Bait Car: How Hollywood Has Found a New Way to Make Money*, TECHCRUNCH (Mar. 25, 2013), <http://techcrunch.com/2013/03/25/how-copyright-trolls-run-bait-car-operations-to-grab-pirates/>.

B. *Righthaven Breaks Through*

Righthaven formed in March 2010 and immediately turned its attention to buying unenforced copyrights from incredibly desperate content owners: newspapers.⁵⁶ Much has been written about the decline of the newspaper industry.⁵⁷ In short, the Internet has smashed the traditional newspaper business model into a billion bits.⁵⁸ Though more Americans today consume news than ever before, far fewer get that information from a traditional daily newspaper—and even fewer actually pay for it.⁵⁹ Many readers now get their news from online-only news sites, niche blogs, and aggregators that produce little or no original content.⁶⁰ Amid a decade of plummeting profits and massive staff reductions,⁶¹ newspaper executives desperately sought solutions to stave off print’s extinction.⁶² Some newspapers and news organizations looked to stronger copyright enforcement.⁶³ Righthaven capitalized on this by

56. Steve Green, *Righthaven: The Controversy over Copyrights*, VEGAS INC (July 25, 2011, 3:00 AM) [hereinafter Green, *Controversy over Copyrights*], <http://www.vegasinc.com/news/2011/jul/25/copyright-conundrum/>.

57. See, e.g., FTC STAFF DISCUSSION DRAFT, POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (2010); Brad A. Greenberg, *A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189 (2012) [hereinafter Greenberg, *Public Press*]; Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It*, 59 UCLA L. REV. 414 (2011) [hereinafter Greenberg, *News Deal*]; David M. Schizer, *Subsidizing the Press*, 3 J. LEGAL ANALYSIS 1, 12 (2011); Clay Calvert, *Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661 (2009); Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Oct. 19, 2009), http://www.cjr.org/reconstruction/the_reconstruction_of_american.php.

58. Greenberg, *News Deal*, *supra* note 57, at 420–23.

59. *Id.* at 420–21.

60. *Id.* at 435. For a discussion of the long-term threat to informational access posed by aggregators, see Brad A. Greenberg, *Tollbooths and Newsstands on the Information Superhighway*, 20 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2013).

61. Greenberg, *Public Press*, *supra* note 57, at 192–94.

62. Even the Federal Trade Commission held hearings on ways that the government could “support the reinvention of journalism.” See FTC STAFF DISCUSSION DRAFT, *supra* note 57.

63. The Associated Press, for instance, created a new system for “bundling its text stories in an ‘informational wrapper’ that . . . include[d] a built-in beacon to monitor where stories go on the Internet.” Michael Liedtke, *AP to Build Online Tracking System to Deter Unlicensed Use in Hopes of Generating New Revenue*, ASSOCIATED PRESS, July 23, 2009, available at <http://www.startribune>.

partnering first with the *Las Vegas Review-Journal*, whose parent company Stephens Media provided significant backing to Righthaven, to purchase rights to articles and photos that Righthaven had already determined were being infringed online.⁶⁴ Righthaven later partnered with other newspapers, of which the *Denver Post* was the most notable.⁶⁵

Righthaven's business practice was to sue infringers, without warning, for statutory damages.⁶⁶ Defendants generally were not competitors of the newspapers whose copyrights Righthaven purchased and likely did not have a sophisticated understanding of the scope of federal copyright law. Among the defendants were an unemployed cat blogger,⁶⁷ a United States Senate candidate whom the *Review-Journal* had in fact endorsed,⁶⁸ and a news source who republished on his own website the *Review-Journal* article quoting him and the research he had provided free to the newspaper.⁶⁹

com/templates/Print_This_Story?sid=51522147. When unlicensed uses were identified, the news organization planned to charge the user a licensing fee or demand the material's removal. See Richard Perez-Pena, *A.P. Cracks Down on Unpaid Use of Articles on Web*, N.Y. TIMES, July 23, 2009, http://www.nytimes.com/2009/07/24/business/media/24content.html?_r=0.

64. David Kravets, *Copyright Troll Righthaven Goes on Life Support*, WIRED (Sept. 7, 2011, 12:59 PM), <http://www.wired.com/threatlevel/2011/09/righthaven-on-life-support/> (reporting that Stephens Media invested \$500,000 in Righthaven).

65. See *Newspaper Blacklist*, RIGHHAVEN VICTIMS, <http://www.righthavenvictims.com/p/participating-newspapers.html> (last visited Sept. 15, 2013); Steve Green, *Denver Post Owner Not Renewing Righthaven Contract After PR Debacles*, VEGAS INC (Sept. 8, 2011), <http://www.vegasin.com/news/2011/sep/08/denver-post-owner-not-renewing-righthaven-contract/>.

66. See, e.g., Defendant Jan Klerks' Motion to Set Aside Default, *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, Docket No. 10 at 3, 2010 WL 3414508 (D. Nev. Aug. 17, 2010) ("Righthaven is a 'copyright troll'—an entity formed for the sole purpose of acquiring copyrights of allegedly infringed articles published in the *Las Vegas Review-Journal* and then suing, without prior notice, any web site operator whose site contains any portion of the article, regardless of whether the web site operator itself published the material.").

67. Allegra Wong, who wrote a blog from the perspective of a cat, was sued for posting on her noncommercial blog a *Review-Journal* article about birds killed in a fire. See Steve Green, *8 More Websites Sued Over R-J Copyrights; 34 Total*, LAS VEGAS SUN, June 5, 2010, <http://www.lasvegassun.com/news/2010/jun/05/8-more-websites-sued-over-r-j-copyrights-34-total/>; Eric E. Johnson, *Purr-loined Story Gets Cat Blog Sued*, BLOG L. BLOG (June 8, 2010, 9:18 AM), <http://bloglawblog.com/blog/?p=408>.

68. Josh Gerstein, *Angle Latest Target in 2010 Lawsuitpalooza*, POLITICO (Sept. 6, 2010, 12:43 AM), http://www.politico.com/blogs/joshgerstein/0910/Angle_latest_target_in_2010_election_lawsuitpalooza.html.

69. See Wendy Davis, *Publisher Sued for Reposting Article Based on His Own Research*, DAILY ONLINE EXAMINER (June 28, 2010, 5:15 PM), <http://www.mediapost.com/publications/article/131043/>.

Righthaven typically offered to settle for between \$1,000 and \$5,000.⁷⁰ Most defendants—faced with the massive costs of defending an infringement action and the prospect of statutory damages of up to \$30,000 for a single infringing use⁷¹—could not afford to decline the settlement. Between March 2010 and July 2011, Righthaven filed 276 lawsuits and reportedly recovered \$352,500 in 141 settlements.⁷²

These tactics were widely criticized,⁷³ “with Righthaven and its newspaper partners often portrayed as digital ambulance chasers using lawsuit settlement shakedowns and the court system to make a quick buck.”⁷⁴ What made Righthaven’s practices so unseemly? To start, the lawsuits caught many by surprise because, as Shyam Balganesch explains, they disrupted an implicit “enforcement equilibrium that is integral to the functioning of copyright as an institution.”⁷⁵ Without warning, previously actionable but tolerated claims were being acted upon. Though Righthaven was not obligated to warn potential defendants about the

70. Green, *supra* note 56.

71. Or \$150,000 per use if the infringement was found to be willful. 17 U.S.C. § 504(c)(2) (2006).

72. *Welcome to Righthaven Lawsuits*, RIGHTHAVEN LAWSUITS, <http://righthavenlawsuits.com/> (last visited Sept. 15, 2013).

73. *See, e.g.*, James Rainey, *On the Media: Las Vegas Review-Journal Bares Its Claws*, L.A. TIMES, June 9, 2010, <http://articles.latimes.com/2010/jun/09/entertainment/la-et-onthemedial-20100609> (stating that the lawsuit against the cat blogger was similar to “blast[ing] a small tabby with a howitzer”); Eric E. Johnson, *Righthaven “Really Outdid Itself” Suing Blogger over Article That Contains His Material*, BLOG L. BLOG (July 7, 2010, 10:55 PM), <http://bloglawblog.com/blog/?p=630> (referring to “copyright thugster Righthaven”); Green, *Controversy over Copyrights*, *supra* note 56 (noting the negative national media attention that Righthaven had received). Steve Green, who began covering Righthaven as a reporter at the *Las Vegas Sun*, repeatedly drew attention to Righthaven’s tactics. Coincidentally, due to a joint operating agreement between the *Sun* and the *Review-Journal*, the *Sun* is delivered daily as a tabloid inserted inside the broadsheet *Review-Journal*—meaning that the *Review-Journal* was in the awkward situation of delivering a competing newspaper that frequently included scathing criticisms of the *Review-Journal*’s involvement with Righthaven. *See Las Vegas Sun Now a Morning Paper*, KNPR (Oct. 6, 2005), <http://www.knpr.org/archive/detailNEW.cfm?FeatureID=2505> (discussing the joint operating agreement).

74. Green, *Controversy over Copyrights*, *supra* note 56. Righthaven’s CEO publicly bristled at the criticisms: “We own the copyright. To call it a ‘shakedown’ is to ignore 200 years of copyright law.” Steve Green, *Legal Attack Dog Sicked on Websites Accused of Violating R-J Copyrights*, LAS VEGAS SUN, Aug. 4, 2010, <http://www.lasvegassun.com/news/2010/aug/04/unlikely-targets-emerging-war-media-content/>.

75. Balganesch, *supra* note 18, at 729.

infringing nature of their expression before filing suit, the refusal to do so suggested that Righthaven had no interest in licensing the work or securing its removal without penalty. The firm's only interest appeared to be springing the trap and demanding settlement. Additionally, many defendants were noncommercial bloggers or nonprofit organizations—people who “(often mistakenly) assume fair use permits them to freely republish any articles they think would be interesting to their audiences”⁷⁶—and some quoted only a small portion of the copyrighted article.⁷⁷ Two other practices demonstrated that Righthaven was attempting to exploit copyright law's provision of statutory damages. First, the firm only acquired copyrights for works for which it had already identified an online infringement, and it never sent takedown notices,⁷⁸ instead targeting only web operators who failed to pay the \$105 fee to register a takedown agent with the Copyright Office.⁷⁹ Second, and more troubling, Righthaven exclusively targeted individuals and nonprofits that were not direct, nor arguably even indirect, competitors of the newspapers with which Righthaven contracted.⁸⁰

Righthaven saw itself much differently. Newspapers had been struggling mightily and needed a financial savior. Though copyright infringement was not the primary source of the newspaper industry's problems, enforcing copyrights, which are frequently infringed, could provide a much-needed new revenue stream. And, by acting as the middleman, Righthaven could streamline the process, enabling newspapers to offset lost

76. Goldman, *supra* note 16.

77. For example, the first five sentences of a fifty-sentence article. See *Righthaven v. Democratic Underground*, No. 2:10-cv-01356 (D. Nev. Mar. 9, 2012).

78. Copyright owners commonly send notices to suspected infringers requesting that the implicated work be removed. Though not legally required, except as provided by 17 U.S.C. § 512(c), sending such a notice is an effort to achieve the copyright owner's desired relief of removing the infringing work or licensing it without the need for litigation.

79. 17 U.S.C. § 512(c); see also Benjamin E. Hoopes, *Avoiding the Pitfalls That Lead to Righthaven's Four-Figure 'Gotcha!'*, 54-JUL ADVOC. 19; David Kravets, *The \$105 Fix That Could Protect You from Copyright-Troll Lawsuits*, WIRED (Oct. 27, 2010), <http://www.wired.com/threatlevel/2010/10/dmca-righthaven-loophole/>.

80. As the courts later found, these infringers shared the expression from the copyrighted newspaper articles with individuals who otherwise would not have been exposed to the information; these were not people who absent the infringement would have visited the *Review-Journal* or *Denver Post* websites for the news.

revenue without needing to take time or resources away from reporting the news.

Righthaven's business model began to unravel once some defendants, backed by digital rights organizations like the Electronic Frontier Foundation, fought back.⁸¹ Courts demonstrated strong opposition to Righthaven, and opinions chipping away at its business model began to mount.⁸² But many of those decisions, in particular those pertaining to Righthaven's lack of standing to sue infringers, were anomalous to Righthaven's failure to obtain anything more than the naked—and ineffective—right to sue infringers.⁸³ These rulings did not close the door on trolls. In fact, they provided would-be copyright trolls with guidelines for better trolling.⁸⁴

81. Several defendants had academics and organizations like the Electronic Frontier Foundation serving as pro bono counsel. *See, e.g.*, *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 970 (D. Nev. 2011); *Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265, 1266 (D. Colo. 2011); *Righthaven LLC v. JAMA*, No. 2:10-cv-1322, Brief of Amicus Curiae Jason Schultz, Docket No. 21 (D. Nev. Dec. 17, 2010).

82. In some cases, Righthaven lost more than just its infringement claims; defendants counterclaimed against Righthaven and won large awards for attorney's fees under the fee-shifting provision of the Copyright Act. *See* 17 U.S.C. § 505 (2006). To date, Righthaven reportedly has been ordered to pay \$323,138 in attorneys' fees. *Legal Fees and Sanctions Against Righthaven*, RIGHHAVEN VICTIMS, <http://www.righthavenvictims.com/p/legal-fees-and-sanctions-against.html> (last visited Sept. 15, 2013). Unable to do so, Righthaven said it would need to file for bankruptcy protection. Steve Green, *Righthaven Says It Might Have to File for Bankruptcy*, VEGAS INC. (Sept. 9, 2011), <http://www.vegasinc.com/news/2011/sep/09/righthaven-says-it-might-have-file-bankruptcy/>. Its web domain name was auctioned off and its assets—about 278 copyrights and its trademark—were transferred to a court-appointed receiver and also will be auctioned to pay down the \$186,680 Righthaven owes creditors. Steve Green, *Judge Strips Righthaven of Its Rights to 278 Copyrights and Its Trademark*, VEGAS INC. (Mar. 5, 2012), <http://www.vegasinc.com/news/2012/mar/05/judge-strips-righthaven-rights-278-copyrights-and-/>; Steve Green, *R-J Copyright to be Auctioned Following Righthaven's Collapse*, VEGAS INC. (Mar. 14, 2012), <http://www.vegasinc.com/news/2012/mar/14/r-j-copyright-be-auctioned-following-righthavens-cl/>. Righthaven.com sold for \$3300. *See* Chris Crum, *Righthaven Domain Sold in Auction*, WEBPRONEWS (Jan. 7, 2012), <http://www.webpronews.com/righthaven-domain-sold-in-auction-2012-01>.

83. Most of the rulings against Righthaven were based on the court finding that the defendant's use was fair or that Righthaven lacked standing. *See, e.g.*, *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 976 (D. Nev. 2011); *infra* note 160.

84. *See* Patrick Anderson, *A 'Bike Lesson' From Dickinson Wright Partner (and Righthaven CEO) Steve Gibson On IP Monetization*, GAMETIME IP (Mar. 28, 2012), <http://gametimeip.com/2012/03/28/a-bike-lesson-from-dickinson-wright-partner-and-righthaven-ceo-steve-gibson-on-ip-monetization/>

II. BENEFITS, COSTS, AND COPYRIGHT CONSIDERATIONS

This introduction begs a basic question: what makes trolls bad for the copyright system? It cannot merely be that trolls build catalogs of copyrighted works that they did not create and seek to enforce the rights therein. As discussed in this Part, collecting societies have played an important role in the copyright system for a century without creating copyrighted works. They create economies of scale that ensure commercial compensation for authors, and they enable authors to focus on creating rather than seeking licensees. In short, they are market-makers. The trouble is that certain characteristics make trolls a net drain on the copyright system. At an abstract level, trolls disrupt the enforcement equilibrium by “convert[ing] copyright law’s previously *actionable but tolerated* claims into *actionable and enforced* ones.”⁸⁵ Their motivation for doing so is unrelated to any market for the copyrighted work and, worse, undermines copyright policy goals by enforcing speech restrictions without the societal benefit of providing incentives for the creation of new expression and dissemination of information.⁸⁶

The first Part below briefly reviews the potential benefits of copyright trolls. It focuses specifically on the rent-seeking aspect of trolls and how that can be valuable to authors. The second Part then looks to the patent system as a bellwether for

(“[T]he guidance Gibson and Righthaven themselves provide is reminiscent of The Bike Lesson, and ought to make a handy ‘how to’ guide of everything NOT to do when starting your own IP monetization outfit.”). Indeed, Righthaven’s CEO indirectly suggested as much when discussing in an interview the first Righthaven actions to be dismissed for lack of standing: “What the judges are saying is, ‘Listen folks, Righthaven is filing a ton of lawsuits.’ They understand that we are potentially genuine with respect to upholding copyrights. They don’t want to see Righthaven competitors come on with not solid documentation and they are giving us guidance as to what the documentation should be.” *Dead in the Water?*, LAS VEGAS SUN, June 22, 2011, <http://www.lasvegassun.com/videos/2011/jun/22/5268/>. At the same time, Gibson continued to maintain that Righthaven would succeed in its lawsuits and, significantly, that the adverse fair use rulings were in error. See Joe Mullin, *Righthaven CEO Steve Gibson Brushes Aside Fair Use Setbacks*, PAIDCONTENT (Aug. 16, 2011), <http://paidcontent.org/article/419-righthaven-ceo-steve-gibson-brushes-aside-fair-use-setbacks/>.

85. Balganes, *supra* note 18, at 730.

86. Consequentialism is the dominant theory of copyright policy. See *infra* Part IV.A.3. In short, this theory posits that the chief purpose of copyright incentives is to motivate authors to create original expressive works and, thereby, serve the public good; any financial reward is ancillary. See, e.g., *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 432 (1984) (citations omitted).

copyright law, showing that trolls pose a drain on social welfare. The final Part compares the patent and copyright systems, highlighting the different statutory provisions that make copyright law less attractive for trolls. It concludes that, though copyright trolls may be less harmful than their patent counterparts, they are nonetheless an unwelcome addition to the copyright system because they threaten to chill speech and discourage technological innovation.

A. *Benefits*

As the term is used by legal scholars, trolls are not wholly bad—and not all of their characteristics are exclusive to trolls. For example, in the patent context, in which all trolls are non-practicing entities (NPEs) but not all NPEs are patent trolls or, more politely, patent assertion entities (PAEs), some NPEs have active technology transfer programs that seek corporate partners to develop and manufacture the patented technology.⁸⁷ Historically, NPEs have facilitated technology markets and increased profits for small inventors.⁸⁸ And even though the subset of NPEs commonly known as trolls lack technology-transfer programs, they also help develop markets for intellectual property.⁸⁹

Trolls demonstrate similar benefits in the copyright context. To the extent that trolls are enforcement middlemen, they can add value to the copyright system. Particularly when operating in the spaces in which collecting agencies do not work well, enforcement middlemen provide vertical integration.⁹⁰ Trolls create scaled economies that enable copyright owners to effectively outsource costly and time-

87. Universities fit this model because they do not develop their inventions into commercially viable products but rather license patents to corporate partners. Doing so enables universities to focus on what they are great at—research.

88. James Bessen et al., *The Private and Social Costs of Patent Trolls*, REGULATION (Winter 2011–2012), <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/5/v34n4-1.pdf>.

89. Patent trolls, for instance, “provide liquidity, market clearing, and increased efficiency to the patent markets—the same benefits securities dealers supply capital markets.” James F. McDonough III, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 190 (2006).

90. See generally Shyamkrishna Balganes, *Copyright Infringement Markets*, 113 COLUM. L. REV. (forthcoming 2013).

consuming infringement identification and enforcement. They also help copyright owners focus on their primary business—creating, reproducing, distributing, and licensing future uses of their works of authorship—while still providing those owners with advance compensation based on the settlements and judgments that the troll anticipates obtaining. And, finally, trolls increase compensation to authors. They do this both generally by purchasing works that have been infringed and, in some cases, specifically by purchasing commercially valueless works whose authors would otherwise see no financial reward for creating. In turn, if an author knows that he may later be able to sell his copyrighted work to a troll, he arguably could have greater *ex ante* incentives to create than if he personally will have to enforce against infringers.

The Righthaven story shows how much benefit some content owners see in having an enforcement middleman. Knowing well the power of public opinion, MediaNews Group, one of the country's largest newspaper chains,⁹¹ and several other newspapers, partnered with Righthaven in the face of heavy criticism.⁹² However, as MediaNews Group discovered, the costs can outweigh the benefits. Shortly before appointing in September 2011 a CEO who had been critical of the Righthaven model,⁹³ MediaNews Group declined to renew its enforcement-outsourcing contract.⁹⁴

B. Costs

Though trolls bear some fruit, they also impose costs on the copyright system. By scaling enforcement economies, copyright trolls serve a function similar to that of champertous

91. At the time of the partnership, MediaNews Group owned more than fifty daily newspapers, including the *Denver Post*, *Detroit News*, *San Jose Mercury News*, and *Los Angeles Daily News*. See Greenberg, *News Deal*, *supra* note 57, at 464 n.253.

92. See sources cited *supra* note 73.

93. See Green, *supra* note 65; see also Mathew Ingram, *Is John Paton the Savior Newspapers Have Been Looking For?*, BUSINESSWEEK, Sept. 7, 2011, <http://www.businessweek.com/technology/is-john-paton-the-savior-newspapers-have-been-looking-for-09072011.html>.

94. See Green, *supra* note 65; Greg Griffin, *MediaNews Won't Renew Contract with Copyright Enforcer Righthaven*, DENV. POST, Sept. 7, 2011, http://www.denverpost.com/breakingnews/ci_18846816. According to a MediaNews Group spokeswoman, "It's something we felt was important to try because we are committed to protecting copyright, but it hasn't worked the way we expected." *Id.*

arrangements, in which a stranger carries on litigation at the stranger's own expense and in consideration for receiving a share of litigation profits.⁹⁵ The common law prohibited champerty out of concern that such "trafficking in lawsuits"⁹⁶ enables an officious intermeddler to "gorge upon the fruits of litigation,"⁹⁷ which, in turn, motivates vexatious litigation by parties whose only interest is financial. Though lawyers no longer are barred from sharing in litigation proceeds,⁹⁸ common law still prohibits champerty by non-lawyers⁹⁹ and "the core of the doctrine—the public policy against profiteering and speculating in litigation—still survives in most states."¹⁰⁰ Despite convenience and efficiency, concerns remain that champertous arrangements encourage parties to be litigious

95. See *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 603 (5th Cir.1982); RICHARD A. LORD, 7 WILLISTON ON CONTRACTS § 15:5 (4th ed. 2010); JOHN A. GLENN, 14 C.J.S. CHAMPERTY AND MAINTENANCE § 1 (2006). Though many states have abrogated the common law by statute, it still exists in some. See, e.g., *McKellips v. Mackintosh*, 475 N.W.2d 926 (S.D. 1991). "Although the common law action of champerty, *eo nomine*, is rare in modern times, such conduct now finds remedy in abuse of process, wrongful initiation of litigation and malicious prosecution actions." *McMullin v. Borgers*, 806 S.W.2d 724, 734–35 (Mo. Ct. App. E.D. 1991).

96. LORD, *supra* note 95, at 15:5.

97. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003).

98. Contingent fees today are an important tool for providing access to American courts. See Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989); Virginia G. Mauer, et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 293 (1999) ("Although this fee arrangement has flaws, it has many benefits that accrue primarily to clients. In particular, the arrangement more closely aligns the financial interest of the client and the attorney than do the fixed and the hourly fee systems; nevertheless, the alignment is flawed in important respects. The arrangement allows the client to shift substantial risk of loss and costs to the attorney, and it permits financing that increases access to the justice system."). Of course, academic literature is filled with critiques of contingency fee arrangements. See, e.g., Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2002); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Murray K. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

99. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI.-KENT L. REV. 625, 631 (1995).

100. Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1529 (1996). The laws, however, are rarely enforced. See Janet E. Findlater, *The Proposed Revisions of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667 (1981).

where judicial remedy is unnecessary or even unwarranted. This too is a primary criticism of patent and copyright trolls.

Moreover, trolls are inefficient intermediaries. First, trolls compensate authors for the litigation value of a work, not the commercial value. In this sense, trolls undermine society's delegation to an author of the exclusive right to control access to her work and price access based on the work's social value.¹⁰¹ Litigation value is not directly tied to a work's commercial value, particularly when a copyright enforcer is empowered to bring weak claims that will be settled below litigation costs. And this windfall comes at the cost of potentially chilling speech and deterring innovation from others.¹⁰² Second, authors and copyright owners do not need trolls to ensure that they receive adequate compensation. Recall the circumstances encountered in the early twentieth century by songwriters who wanted compensation for the live public performances of their music in bars, clubs, concert halls, and taverns.¹⁰³ Monitoring for and enforcing against such infringements was not feasible for individual songwriters. Policing was impractical because infringements occurred across vast and geographically dispersed venues,¹⁰⁴ and the amount of damages recoverable for the infringement of a single song was relatively small.¹⁰⁵ Also, there was legal uncertainty regarding whether the venues were vicariously liable for infringing live performances or whether the songwriter would have to enforce his or her copyright against a potentially judgment-proof artist.¹⁰⁶ Songwriters responded to these concerns by forming ASCAP in 1914 to license music to "theaters, dance halls, hotels, taverns, and later radio stations" and to enforce against infringers.¹⁰⁷ The organization had at least three primary

101. For an exhaustive discussion of when and why commercial value is a poor proxy for social value in copyright law, see generally Steven J. Horowitz, Copyright's Agency (Oct. 30, 2013) (unpublished manuscript) (on file with author).

102. See *infra* Part II.C.

103. Andrew N. Kleit, *ASCAP Versus BMI (Versus CBS): Modeling Competition Between and Bundling by Performance Rights Organizations*, 38 ECON. INQUIRY 579, 580 (2000).

104. Robert Israel Goodman, Comment, *Music Copyright Associations and the Antitrust Laws*, 25 IND. L.J. 168, 168 (1950).

105. The 1909 Copyright Act set the statutory damages for the infringement of a single song at \$10. Copyright Act of 1909 § 25(b), 35 Stat. 1075 (1909).

106. See *infra* text accompanying note 110.

107. *Id.* See also ASCAP HISTORY, <http://www.ascap.com/about/history.aspx> (last visited Sept. 15, 2013).

objectives: “(i) permit users rapid access to a large body of copyrighted material; (ii) avoid the cost and delay of individual negotiations over specific copyrighted works; and (iii) ensure the copyright owners reasonable payment for exploitation of their works.”¹⁰⁸ Early on, “ASCAP brought scores of infringement suits as it beat down concentrated opposition.”¹⁰⁹ But, unlike copyright trolls, litigation and deriving profits therefrom were not ASCAP’s goal. Litigation was but a means to the end of spurring music venues to license the copyrighted music. It worked. Within a decade, ASCAP had achieved its goal of providing licenses to all the music venues (and later radio stations) that otherwise would have infringed songwriters’ public performance rights.¹¹⁰

Additionally, the experience of the patent system suggests that the costs of copyright trolls will outweigh any market-making benefits,¹¹¹ as demonstrated by the Obama Administration’s recent attention to limiting the harms of patent trolls.¹¹² Though parallels are not perfect, trolls have been prominent in the patent system since at least the early-1990s¹¹³ and are what Mark Lemley calls “the most significant

108. Frederick C. Boucher, *Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform*, 44 WASH. & LEE L. REV. 1157, 1158 (1987).

109. Goodman, *supra* note 104, at 169.

110. *Id.* ASCAP also succeeded in convincing the courts that the music halls and restaurants were vicariously liable for performers’ infringements and were able to require venues that used a single ASCAP song to purchase a blanket license for the entire ASCAP catalog. See Boucher, *supra* note 108; see also Joan M. McGivern, *A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment*, 34 COLUM. J.L. & ARTS 631 (2011). Courts later held that ASCAP’s blanket music licenses were not a restraint of trade in violation of the Sherman Act. See *Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980).

111. Merges, *supra* note 21, at 1588. The costs associated with copyright trolls have yet to be empirically measured. However, as discussed below, the dangers they pose to expression and innovation are substantial.

112. See, e.g., EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (2013), available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf; Jeff John Roberts, *Feds May Spear Patent Trolls With Antitrust Law: FTC Chair Wants Help for “Victims”*, GIGAOM (June 20, 2013), <http://gigaom.com/2013/06/20/feds-may-spear-patent-trolls-with-antitrust-law-ftc-chair-wants-help-for-victims/>.

113. The troll label was coined by an Intel assistant general counsel, Peter Detkin, who spent much of his time fighting patent infringement claims from companies that did not make competing devices. Detkin characterized these “patent trolls” as “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.” Brenda Sandburg, *Trolling for Dollars*, THE RECORDER, July 30,

problem facing the patent system today.”¹¹⁴ Patent troll-related litigation has been steadily increasing;¹¹⁵ it accounted for 40 percent of all patent cases filed in 2011—up from 22 percent in 2007.¹¹⁶ As Robert Merges notes, “in many industries, the profusion of patent troll litigation threatens the very legitimacy of the entire patent enterprise.”¹¹⁷ Troll-related losses have been exacted upon both patent holders, who have had to defend their rights against trolls seeking to enforce controversial patents, and the patent system’s incentive structure itself. The primary costs associated with trolls can be attributed to lost wealth, lost innovation, and lost social welfare. Significantly, troll-related litigation resulted in lost wealth of \$500 billion between 1990 and 2010, mainly from technology companies by reducing the funding available for research and development.¹¹⁸ Innovation also is inhibited by the threat of such litigation, which has discouraged companies from investing heavily in areas prone to patent trolls.¹¹⁹ Generally, “the losses correspond to static losses of social welfare.”¹²⁰

Patent trolls have prospered due to a handful of factors, including: the allure of overvalued jury awards and permanent injunctions, which enable patent trolls to be dramatically overcompensated for the value of their patents;¹²¹ the

2001. In essence, rather than manufacture a product based on its patented technology, a troll bases its revenue model primarily on ex post licensing greased by the threat of litigation and the potentially devastating consequences of a legal judgment. Such patents, generally acquired from others, are the troll’s primary asset; attorneys are their primary employees.

114. Lemley, *Proof of Copying*, *supra* note 21, at 1526.

115. *NPE Litigations over Time*, PATENTFREEDOM, <https://www.patentfreedom.com/about-npes/litigations/> (last visited Sept. 15, 2013) (charting the number of patent lawsuits involving NPEs between 2001 and 2011 and finding on average a 33 percent annual increase since 2004).

116. Sara Jeruss et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. & TECH. REV. 357, 361 (2012). That marks a significant increase from the early 2000s. *Cf.* Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1600–06 (2009).

117. Merges, *supra* note 21, at 1587–88.

118. Bessen et al., *supra* note 88, at 31.

119. As noted, this harm to social welfare is particularly severe in the tech industry, including clean technology. *See infra* note 125; MATTHEW RIMMER, INTELLECTUAL PROPERTY AND CLIMATE CHANGE: INVENTING CLEAN TECHNOLOGIES 214–15 (2011); Eric L. Lane, *Keeping the LEDs On and the Electric Motors Running: Clean Tech in Court After eBay*, 2010 DUKE L. & TECH. REV. 13 (2010).

120. Bessen et al., *supra* note 89.

121. *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*,

availability of bad patents, caused by problems with the patent approval process;¹²² the lack of a requirement that a patented product be in use or manufactured;¹²³ and the ability for patent trolls to hide in the shadows and sue when someone infringes or at least raises a reasonable question of infringement. Additionally, and significantly, patent law offers no independent invention defense, enabling patent trolls to hold-up independent inventors.¹²⁴ The nature of developing commercially viable products amplifies hold-up harms in some industries, like information technology, in which innovators must identify and clear thousands—sometimes hundreds of thousands—of patents to manufacture a single product.¹²⁵

85 TEX. L. REV. 1991, 1993 (2007) (“Injunction threats often involve a strong element of *holdup* in the common circumstance in which the defendant has already invested heavily to design, manufacture, market, and sell the product with the allegedly infringing feature. . . . [T]he threat of an injunction can enable a patent holder to negotiate royalties far in excess of the patent holder’s true economic contribution.”). See also Nicholas P. Chan, *Balancing Judicial Misvaluation and Patent Hold-Up: Some Principles for Considering Injunctive Relief After eBay*, 59 UCLA L. REV. 746, 749 (2012) (“By threatening to enjoin the defendant’s business, the patent holder in effect holds the defendant’s product-specific investments hostage and can coerce settlement amounts that grossly exceed the value of the patent’s technological contribution. The problem becomes even more acute when multiple patents cover the defendant’s product, as is increasingly common. In those cases, a defendant’s product-specific investments can include not only manufacturing facilities and the like, but also the amounts already paid and the contracts already signed to obtain permissions from other patent holders.”).

122. Namely, that it is too easy to get a patent, that there is too low a threshold for nonobviousness, and that the patent office has too few examiners reviewing too many applications.

123. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 423–25 (1908). But see Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437 (2013) (arguing that the Supreme Court mischaracterized patent rights and proffering that patent remedies should be contingent upon an effort to disseminate the patented invention).

124. Unlike copyright law. See *infra* note 134.

125. For instance, there are about 250,000 patents covering smartphone technology. Colleen V. Chien & Mark A. Lemley, *Patents and the Public Interest*, N.Y. TIMES, Dec. 13, 2011, <http://www.nytimes.com/2011/12/13/opinion/patents-smartphones-and-the-public-interest.html>; see also Lemley, *Universities*, *supra* note 21, at 613 (“[A] product developer such as Intel . . . must aggregate thousands of different inventions into its semiconductor chip [and thus] is vulnerable to hold-up by any one of the thousands of inventors.”); Merges, *supra* note 21, at 1591 (“There are literally millions of patents in force at any time. In a complex field such as commercial software or semiconductors, there are potentially tens of thousands of relevant patents that might be interpreted so as to cover one or more components of a complex product. Because of uncertainty in the process of patent claim construction, it is essentially impossible to screen all

Patent troll activity is so pervasive—and lucrative—that the man who coined the term is now reportedly a patent troll executive.¹²⁶ His firm’s licensing practices remind one venture capitalist of “a mafia-style shakedown, where someone comes in the front door of your building and says, ‘It would be a shame if this place burnt down. I know the neighborhood really well and I can make sure that doesn’t happen.’”¹²⁷ Companies targeted by patent trolls often find it cheaper to settle and pay for a license than to fight the troll’s infringement claim,¹²⁸ facilitating hold-up.¹²⁹ And that plays right into the trolls’

the patents that one might infringe. As a consequence, it is much harder to protect against the ex post risk in the patent context.”); Brennan et al., *supra* note 21 (noting that trolls are more prevalent in the tech industry in the United States than in Europe, Japan, or Taiwan). Infringing any one of these patents can lead the patentee to demand a sizable royalty share. See, e.g., Robert Cyran, *A Patent Fever over Smartphones*, N.Y. TIMES, July 31, 2011, http://www.nytimes.com/2011/08/01/business/a-patent-fever-over-smartphones.html?_r=1 (“Microsoft is asking Samsung to pay as much as \$15 for each device using Google’s Android software because of accusations of infringement. With so many millions of phones being manufactured monthly, the cash can add up.”).

126. *Has the Enemy of Patent Trolls Become One?*, CIO INSIGHT (Dec. 5, 2005), <http://www.cioinsight.com/c/a/Trends/Has-the-Enemy-of-Patent-Trolls-Become-One/> (“Today [Detkin] is a managing director of Intellectual Ventures LLC, a Bellevue, Wash., firm some observers fear is itself a troll—on steroids. IV is a patent holding company with a war chest estimated at up to \$400 million; for five years it has been acquiring thousands of patents.”); Gene Quinn, *Intellectual Ventures Becomes Patent Troll Public Enemy #1*, IPWATCHDOG (Dec. 9, 2010, 1:39 PM), <http://www.ipwatchdog.com/2010/12/09/intellectual-ventures-becomes-patent-troll-public-enemy-1/id=13711/>. But see Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1 (2012), <http://stlr.stanford.edu/pdf/feldman-giants-among-us.pdf> (arguing that “mass aggregators,” in which tech titans, renowned universities, and the World Bank as investors and of which Intellectual Ventures is the “oldest and largest,” are not the same as trolls but that they still pose a threat to innovation by, among other things, creating a tax on production, raising rivals’ costs, and providing opportunities for anti-competitive behavior). Primarily by purchasing patents and patent applications, Detkin’s firm has invested \$5 billion in obtaining an estimated 29,000 to 58,000 patents and patent applications worldwide. *When Patents Attack!*, NPR (July 22, 2011, 8:04 PM), <http://www.npr.org/blogs/money/2011/07/26/138576167/when-patents-attack>; Ewing & Feldman, *supra*, at 35.

127. *When Patents Attack!*, *supra* note 126.

128. This is also true of those defending against copyright trolls like Righthaven and will be discussed *infra* Part II. A key difference is that with patent infringement claims, the “cheaper” option of settlement might still cost several million dollars. See *When Patents Attack!*, *supra* note 126 (citing an attorney in Marshall, Texas, who said that even for a defendant who can win at trial against a patent troll, “sometimes it makes more sense to settle and pay a license fee than to spend \$2 million to \$5 million on a court case”).

129. For instance, Research in Motion (RIM), the maker of the BlackBerry, was sued by NTP, which claimed a patent on the technology for wireless email. RIM’s

business model: “Litigation is not the desired outcome for the trolls. Instead, they would prefer that the users of the technology make a business judgment that it is more economically efficient to share a portion of the profits with the patent owner.”¹³⁰ Often holding weak patents, patent trolls prefer to settle and license a patent rather than get to a jury, where they could lose and wind up with nothing (or, worse, have the patent invalidated). At the same time, patent defendants often prefer to avoid the time, cost, and uncertainty of defending against a weak patent; they want to settle the matter and get their implicated product to market. These dynamics guarantee patent trolls a comfortable home in the patent system.

C. Copyright Considerations

Though Congress’s authority to enact copyright and patent laws derives from the same Constitutional clause,¹³¹ the justifications for and expectations of both statutory schemes differ. Copyright anticipates and accepts that people will refuse to license their works and sue those who try to use them

efforts to invalidate the patent by showing prior art at the time NTP filed its application failed and RIM was ordered to pay \$53 million in damages. More significantly, the judge issued an injunction, which was stayed pending a lengthy appeals process, that prohibited RIM from future use of the technology absent a license. The injunction threatened to shut down service for more than three million BlackBerry users, including federal government workers. RIM staved off the business disaster by settling with NTP for \$612.5 million. *See* NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005); *see also* *Settlement Reached in BlackBerry Patent Case*, ASSOCIATED PRESS, Mar. 3, 2006, available at <http://www.nbcnews.com/id/11659304/wid/11915829#.URO9UB3nVbJ>. This occurred before the Supreme Court held in *eBay Inc. v. MercExchange, L.L.C.* that the traditional analysis for a preliminary injunction applied in patent (and by extension copyright) actions, doing away with the near-automatic granting of injunctions. 547 U.S. 388 (2006).

130. JEFFREY H. MATSUURA, *JEFFERSON VS. THE PATENT TROLLS: A POPULIST VISION OF INTELLECTUAL PROPERTY RIGHTS* 101 (2008). *See also* *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring) (“For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.”).

131. U.S. CONST. art. I, § 8, cl. 8.

without permission.¹³² By comparison, patent law grants monopolies for a limited period on the premise that doing so will provide society with the innovation and the knowledge needed for others to replicate and advance the innovation.¹³³ Until the term runs and others may practice the patented claims, a patent owner harms society if it neither licenses its patents nor develops from them commercially viable products. The societal harm is much more tenuous if, for example, J.K. Rowling refuses to license derivative uses of the *Harry Potter* universe. Thus, the harms caused by patent and copyright trolls vary at a fundamental policy level.

Another significant difference comes from the provisions of the two legal regimes. First, unlike in patent law, copyright offers independent creation as an absolute defense to infringement claims.¹³⁴ This reduces the likelihood that individuals will accidentally infringe another's copyrighted work—something that happens frequently in the patent context because often multiple inventors simultaneously are developing similar technology and massive amounts of patented technology are implicated by a single product.¹³⁵ Second, and for related reasons, the threat of ex ante hold-up is not as chronic in copyright law because expression may be interchangeable where technology is not.¹³⁶ Additionally, “[i]n

132. For example, copyright law does not require J.K. Rowling to license the use of *Harry Potter* characters to another author nor Picasso's heirs to license reproduction rights.

133. The creation of private wealth is an ancillary benefit of the patent system. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917); see also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003).

134. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”); *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1227 n.7 (3d Cir. 1986) (“[I]ndependent creation is a complete defense to a claim of copyright infringement.”); see also Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683 (2003) (arguing that copyright's creativity requirement serves an evidentiary purpose when a defendant claims that his work, similar to the plaintiffs, was independently created).

135. See Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709 (2012); Chien & Lemley, *supra* note 125.

136. In other words, a historian writing about the legacy of a global event need not copy verbatim a news article that appeared at the time in order to relay relevant details. There are many combinations of expression that will convey the same message; the historian can choose different words and order them differently. On the other hand, there may be only one form of technology that will

several industries (e.g., music and television) that could have been entangled with copyright holdup, legislative and private initiatives have for the most part transformed them from property-rule regimes into liability-rule regimes[.]”¹³⁷ Both of these distinctions—the availability of an independent creation defense and the more interchangeable nature of expression over technology—make copyright law a field less fertile for trolls than patent law. The distinctions also force copyright trolls to focus primarily on small-time infringers, whereas patent trolls target both technology industry goliaths and start-ups. And that means the profits for copyright trolls are likely to be smaller and based more on volume than big legal judgments or settlements.

There are, however, scenarios in which trolls find ripe fruit in the copyright system. To start, independent creation offers no defense to the portions of an original work of authorship that incorporate another copyrighted work.¹³⁸ Second, the expression incorporated into some innovative projects, including music sampling and online searchable databases like Google Book Search, is not interchangeable, making hold-up a costly concern. This Article now proceeds by discussing these exceptions and considering how copyright trolls threaten to chill speech and discourage innovation.

1. Chilling Speech

By dramatically reducing the costs of reproduction and distribution, the digital age has opened authorship to countless more individuals than ever before—but it also has exposed those authors, new and old, to much more infringement.¹³⁹

delivery text messages, and that method is patented.

137. Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 218 (2012) (discussing the availability of copyright injunctions after *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

138. Of course, the standard defense in such a scenario would be that the use of the underlying copyrighted material constitutes a fair use, but that is not always a meritorious defense. Fair use is discussed at length *infra* Part III.

139. See Greenberg, *supra* note 39, at 1035–36; Tehranian, *supra* note 51, at 543. Scholars have primarily focused on the role of peer-to-peer networks in the explosion of online copyright infringement. See, e.g., Andrew J. Lee, *MGM Studios, Inc. v. Grokster, Ltd & In Re Aimster Litigation: A Study of Secondary Copyright Liability in the Peer-to-Peer Context*, 20 BERKELEY TECH. L.J. 485 (2005); Menell, *supra* note 27. But, more generally, much of the growth in infringement has been fueled by the digitization of copyrighted works. “Once

Numerically comparing infringement today to an earlier time has proven elusive because the overwhelming majority of infringement goes undocumented.¹⁴⁰ But many individuals infringe potentially dozens of copyrighted works each day, often unknowingly, and John Tehranian has argued that they hypothetically could be liable for *billions* of dollars a year in potential damages.¹⁴¹ Tehranian's calculations of "worst-case scenario" damages do not account for affirmative defenses like fair use and implied license or the likelihood that certain regularly infringed works, like emails, will be unregistered and therefore ineligible for statutory damages.¹⁴² But Tehranian's

digitized, a work's publication, reproduction, and distribution costs approach zero; unlike the work's ancestors, the copies are nonrivalrous and nonexcludable[]", meaning they can be illicitly shared an infinite number of times. Greenberg, *supra* note 39, at 1035.

140. I know of no empirical studies that have attempted to do so, though MarkMonitor reports more than one billion infringement incidences worldwide on peer-to-peer file sharing services alone in 2012. *Pirated Digital Content (Q1-Q4 2012)*, MARKMONITOR, https://www.markmonitor.com/images/infographics/MarkMonitor_Piraced_Digital_Content.png (last visited Sept. 15, 2013). Additionally, anecdotal studies have attempted to monetize the problem. For example, a U.S. International Trade Commission study found that U.S. firms estimated losses of \$23.7 billion in 2009 due to China-based copyright infringement. U.S. INT'L TRADE COMM'N, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY, no. 332-519, USITC Publication 4226, at 3-27 (May 2011), *available at* <http://www.usitc.gov/publications/332/pub4226.pdf>; *see also* THE COMM'N ON THE THEFT OF INTELLECTUAL PROPERTY, THE IP COMMISSION REPORT 51-53 (May 2013).

141. Tehranian, *supra* note 51, at 547-48; *see also* JOHN TEHRANIAN, INFRINGEMENT NATION: 2.0 AND YOU (2011). In discussing how copyright law is in conflict with social norms by focusing on the everyday-infringements that most people commit without even knowing it, Tehranian tells the story of "a hypothetical law professor named John," assuming a "worst-case scenario of full enforcement of rights by copyright holders and an uncharitable, though perfectly plausible, reading of existing case law and the fair use doctrine." Tehranian, *supra* note 51, at 543. In a normal day, the hypothetical "Professor John" copies the emails sent to him when he replies; distributes to his constitutional law class copies of three Internet news articles discussing a recent Supreme Court decision; doodles a sketch inspired by Frank Gehry's designs; reads a poem to his law and literature class; emails his family five photographs taken by a friend; bares a Captain Caveman tattoo on his right shoulder at the university pool; sings "Happy Birthday" at a public restaurant to a friend and captures that rendition on his cell phone, which also happens to capture art work on the wall behind his friend; and purchases a hipster 'zine that contains fifty notes and drawings found "lying in city streets, public transportation, and other random places." *Id.* at 543-47.

142. Peter S. Menell, *Infringement Conflation*, 64 STAN. L. REV. 1551, 1556-57 (2012) (book review) ("Tehranian seriously misleads the reader as to the scope of copyright liability. . . . None of Professor John's activities are ones where

broader point about the massive scale of infringement that individuals commit daily in the digital age is indisputable.

This means that a lot of people are exposing themselves to liability and that there is an immeasurable number of unenforced copyrights that trolls could buy up after identifying the infringement, much of which is of nominal or no commercial value. Typically, the infringement is committed by those likely to think that copyright protection is much narrower in scope than it actually is and that a use is permissible if accompanied by any single factor cutting in favor of fair use.¹⁴³ Absent copyright trolls, these infringing uses go unenforced because they often are what Tim Wu has called “tolerated uses”—infringements that cause nominal harm and are not worth the effort of enforcement.¹⁴⁴ And the balance of the copyright system is better without copyright trolls because these actionable but tolerated uses function as “a calibration of the amount of incentive—in terms of the expected value from copyright—needed to stimulate creativity.”¹⁴⁵ Trolls disturb this equilibrium and, according to Balganes, expand copyright protections beyond the incentives that authors have tacitly said they need by transforming these previously tolerated uses into legal claims.¹⁴⁶

The disruption of copyright’s enforcement equilibrium could impose substantial costs on creative expression, and in particular threatens to chill speech. Imagine a content firm that combs massive personal publishing sites like Blogger and Tumblr or aggregators like Google Blogs and Google Images, scouring for works that have been taken from other authors

enforcement would be even remotely likely. And even if the owner were to prevail, it is unlikely that the recovery would cover litigation costs, not to mention the wasted time and social/consumer backlash.”)

143. The Internet’s information-wants-to-be-free culture tends to skew perspectives on fair use far beyond the doctrine’s legal boundaries. *See, e.g., Fair Use Doctrine—Top 10 Misconceptions*, LEGALFLIP.COM, <http://www.legalflip.com/Article.aspx?id=27&pageid=136> (last visited Sept. 15, 2013); *see also* Goldman, *supra* note 76; Doug Lichtman, *Google Book Search in the Gridlock Economy*, 53 ARIZ. L. REV. 131, 137 (2011) (“A common misconception is that the fair use doctrine excuses any infringing use that is sufficiently valuable to society.”). For a glimpse of how these misconceptions are reinforced, *see Navigating Copyright and Fair Use Online*, BLUE FOUNTAIN MEDIA (June 24, 2013), <http://www.bluefountainmedia.com/blog/navigating-copyright-and-fair-use-online/> (in which a marketing manager gives very bad legal advice).

144. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619–20 (2008).

145. Balganes, *supra* note 18, at 757.

146. *Id.*

(either as a direct reproduction or a derivative work). Targeting infringed works owned by amateur authors or freelance artists, the troll, who has lower transaction costs and strategic advantages as a repeat player in copyright litigation,¹⁴⁷ then approaches the author whose commercially valueless work has been infringed and offers to buy the copyright from an uncompensated author who was not motivated by commercial exploitation and is thrilled to get anything for his work.¹⁴⁸ Or perhaps the troll focuses on buying rights to infringed newspaper articles. The troll then sues the infringer and offers a quick, get-rid-of-me settlement of about \$5,000. Even if the infringer has a strong fair use defense—e.g., his blog post criticizing the local newspaper quoted a small portion of an article that he thought contained inaccurate information—he will be inclined to accept the settlement. Defending in court is too expensive, time consuming, and uncertain. Now imagine that happens several times to the same author. He is likely to stop contributing his expression at all because the cost is simply not worth the benefit.

The harm here is not just potential cultural losses. Outside the troll context courts have recognized that frivolous copyright infringement lawsuits “have a chilling effect on creativity insofar as they discourage the fair use of existing works in the creation of new ones.”¹⁴⁹ Trolls threaten to broaden the perimeter of copyright’s speech restrictions over facts and ideas, not just expression,¹⁵⁰ which, in turn, will amplify the

147. See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1345–48 (2012) (discussing how intellectual property’s “asymmetrical litigation costs can lead to the erosion of entitlements” and “stunt the development of fair-use, misuse, and other copyright defenses”). Parchomovsky and Stein focus on the strength of the content industries’ centralized organizations, like ASCAP and RIAA; for reasons discussed in this Part, trolls raise the same litigation concerns but without the benefit of bona fide licensing programs and, typically, with more dubious claims.

148. A key aspect here is that the author was not motivated by copyright. This often is the case with such works, which are done gratis and for reasons other than monetary reward. If the author was not motivated by copyright protections, then the author did not expect to benefit from copyright law.

149. *SOFA Entm’t, Inc. v. Dodger Prod., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013) (quoting *SOFA Entm’t, Inc. v. Dodger Prod., Inc.*, No. CV 08–02616 DMG (PJWx), 2010 WL 6397558, at *3 (C.D. Cal. Nov. 29, 2010)).

150. Courts have held that copyright does not cover facts or ideas, only an author’s expression (i.e., her exact arrangement of those facts). See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991). This means, for instance, that though a newspaper article is copyrighted, the quotes therein are not copyrighted when removed from the rest of the article because quotes are facts.

chill.¹⁵¹ Concern over liability, even for protected activity, will extend beyond citizen journalists to traditional media outlets.¹⁵² As David Boies has noted, the potential costs of defending a defamation suit “discourage[] some in the media from undertaking stories (or undertaking approaches to stories) they know may engender litigation, regardless of whether they believe they can actually win that litigation.”¹⁵³

To be sure, the law tolerates some degree of speech-chilling. For example, the Supreme Court held in the landmark libel case of *New York Times v. Sullivan*¹⁵⁴ that liability could not flow from the publication of false material concerning a public figure, absent actual malice, but did not provide the “absolute, unconditional” immunity for the press that two concurring justices proffered.¹⁵⁵ And, of course, copyright itself is a limitation on speech.

However, the chill imposed by copyright trolls is not of the type that the Supreme Court has permitted. This can be seen without invoking First Amendment considerations and by looking solely at how the Court has explained copyright’s

However, the way a reporter paraphrases what someone said is the reporter’s expression, not a fact of what the speaker said, and therefore under copyright.

151. In his article *Risk Aversion and Rights Accretion in Intellectual Property Law*, James Gibson articulates a corollary expansion of copyright doctrine caused by “doctrinal feedback” from the creation of licensing markets. 116 YALE L.J. 882, 884 (2007) (“If a rights-holder can show that it routinely issues licenses for a given use, then copyright law views that use as properly falling within the rights-holder’s control. Thus, the practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use. Over time, public privilege recedes, and the reach of copyright expands; this moves the ubiquitous gray areas farther into what used to be virgin territory, which in turn creates more licensing markets, which in turn pushes the gray areas even farther afield, and so on. Lather, rinse, repeat.”). With trolls, the rights accretion is not a result of doctrinal feedback, but simply of risk aversion among copyright users who do not know the boundaries of an owner’s rights. For reasons discussed in Part IV.A.2, First Amendment protections cannot prevent this.

152. See Gary Williams, *California’s Constitutional Right to Privacy: Can It Protect Private Figures from the Unauthorized Publication of Confidential Medical Information?*, 18 LOY. L.A. ENT. L. REV. 1, 35 (1997) (arguing that the mere threat of litigation for invasion of privacy “might chill some press activity”); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 156–60 (2008) (discussing how defamation laws can shape speech online).

153. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1208 (1995).

154. 376 U.S. 254 (1964).

155. Compare *id.* at 279–80, with *id.* at 293 (Black, J., concurring).

Constitutional role. Specifically, “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”¹⁵⁶ But, as discussed throughout this Article, trolls tend to have the opposite effect.

The chill is particularly acute for online media. Blogs, forums, comment sections, and online-only newspapers all rely heavily upon the original reporting of traditional media outlets, particularly print newspapers.¹⁵⁷ Though some online speakers gather and report their own facts, most build on what others have already said, providing new commentary but little new information. In doing so, they frequently reproduce excerpts of relevant newspaper articles and images.¹⁵⁸ Many of these secondary uses do not make a fair use of the copyrighted work that they quote. But many others are (at least colorably) fair uses. Over time, the prospect of trolls combing the web for reproductions of newspaper articles—whether entire copies or excerpts—is likely to deter online speech.¹⁵⁹

Though Righthaven was unable to obtain an effective assignment of the newspaper copyrights,¹⁶⁰ it is foreseeable

156. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

157. See generally Greenberg, *News Deal*, supra note 57.

158. This is in part due to an incredible amount of confusion about the scope of copyright law and expectations of open-sharing online.

159. Anecdotally, the first thing that I did after learning of the Righthaven lawsuits was to search the archives and comments sections of my mainstream religion blog to make sure they were clean of any content previously owned by Righthaven’s most-notable partners, the *Review-Journal* and *Denver Post*. See THE GOD BLOG, <http://thegodblog.org> (last visited Sept. 15, 2013). And not without good cause. Among those Righthaven sued was Eriq Gardner, a journalist who wrote about Righthaven in an article for *Ars Technica*, in which he “included an image from Righthaven’s legal papers of a picture the company claimed to own.” Eriq Gardner, *The Righthaven Experiment: A Journalist Wonders If a Copyright Troll Was Right to Sue Him*, ABA JOURNAL LAW NEWS NOW (May 2012), http://www.abajournal.com/magazine/article/the_righthaven_experiment_a_journalist_wonders_if_a_copyright_troll_was_rig/. Righthaven called the lawsuit a “clerical mistake,” and it was dismissed with prejudice. *Id.*

160. Righthaven LLC v. Democratic Underground, LLC, 791 F. Supp. 2d 968, 972 (D. Nev. 2011); see also *Righthaven Case Ends in Victory for Fair Use* (Nov. 18, 2011), <https://www.eff.org/press/releases/righthaven-case-ends-victory-fair-use> (“[T]he copyright assignment was a sham, and . . . Righthaven was merely agreeing to undertake the newspaper’s case at its own expense in exchange for a cut of the recovery.”). The Court in *Democratic Underground* found that standing was lacking despite an amended agreement that Stephens Media and Righthaven entered into in a post hoc effort to perfect the grant. *Democratic Underground*,

that many newspapers would be willing to assign more than the naked right to sue infringers. Indeed, after courts told Righthaven that it lacked standing under Section 501 of the Copyright Act, the *Review-Journal* modified its licensing agreement in an attempt to also transfer the underlying exclusive right that had been infringed.¹⁶¹ Other newspapers likely would be willing to assign the full copyright to the troll with the agreement that the troll then license back to the newspaper the copyright for a period shorter than the full copyright term. The newspaper would be able to obtain revenue from the copyrighted work and retain control over its use, while the troll would own enough of an interest in the work to satisfy copyright's standing requirement. That the assignment and license might have been pretextual would not raise a jurisdictional bar to the troll's enforcement of the copyright. In other words, the potential for trolls to chill speech is real.

2. Discouraging Innovation

Trolls also threaten technological development, particularly innovations that incorporate other works, and derivative expressive works. Here, copyright trolls are compensated far beyond the implicated work's intrinsic value based on, among other things: (1) the availability of statutory damages that far exceed actual damages; (2) the copyright owner's exclusive right to create derivative works, which can leave a secondary author unable to legally exploit an infringing derivative work that was costly or time-consuming to create; and (3) the ease of obtaining an injunction, which prevents the

791 F. Supp. 2d at 973–75. Following this reasoning, numerous other Righthaven cases have since resolved in the same manner. *See, e.g.*, Righthaven LLC v. Computer Servs. One LLC, No. 2:11–CV–00721–LRH–PAL, 2012 WL 694468 (D. Nev. Mar. 1, 2012); Righthaven LLC v. Wehategringos.com, No. 2:10–CV–01457–LRH, 2012 WL 693934, at *2–*3 (D. Nev. Mar. 1, 2012); Righthaven LLC v. Eiser, No. 2:10–cv–3075–RMG–JDA, 2012 WL 527571, at *5 (D.S.C. Jan. 13, 2012) (finding the same lack of standing because Righthaven “owns no exclusive rights in the copyright” under the agreement with *Denver Post*-parent MediaNews Group); Righthaven LLC v. Wolf, 813 F. Supp. 2d 1265, 1269–73 (D. Colo. 2011) (same).

161. Courts, however, deemed the amended transfer ineffective because it occurred after the lawsuit was filed. *See, e.g.*, Righthaven LLC v. Hoehn, 716 F.3d 1166, 1171 (9th Cir. 2013) (stating that under most circumstances, including the enforcement of a copyright interest, “jurisdiction is based on facts that exist at the time of filing”); Righthaven LLC v. Democratic Underground, LLC, 791 F. Supp. 2d 968, 975 (D. Nev. 2011).

infringer from exploiting his derivative creation absent an agreement with the owner of the underlying copyright.¹⁶² Generally, these copyright provisions are beneficial in protecting author incentives.¹⁶³ However, there are circumstances in which these provisions actually effectuate a net harm on author incentives and social welfare.

Consider the Google Book Search project, a massive effort by the search engine giant to scan millions of books into a searchable database. The benefits would be many, as Judge Denny Chin, then on the United States District Court for the Southern District of New York, noted in 2011:

Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart buried in library stacks—will be preserved and given new life.¹⁶⁴

Google's scanning included orphan works, out-of-print titles, and literary classics in the public domain. But the company also made entire digital copies of millions of books still under copyright.¹⁶⁵ It did so with three important caveats: Google only made snippets, not entire books, available to users; it agreed to exclude certain books like thesauruses and short poems, though it did not make public the list of excluded works; and it provided a mechanism by which copyright owners could opt out of the book scanning.¹⁶⁶ For many of these books,

162. Even in this post-*eBay* world, “the vast majority of copyright owners prevailing on the merits were still granted an injunction regardless of whether and how the courts approached the *eBay* decision.” Liu, *supra* note 137, at 219.

163. Though preventing unlicensed exploitation of one's copyrighted work is not a direct incentive to create, it has the direct effect of protecting the author's own ability to commercially exploit the work.

164. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011).

165. *Id.*

166. Greenberg, *supra* note 39, at 1053; Douglas Lichtman, *Copyright as Innovation Policy: Google Book Search from a Law and Economics Perspective*, 9 INNOVATION POL'Y & ECON. 55, 58 (2009). *But see* Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 650–62 (2011) (arguing that Google's snippet view still exposes authors to an increased risk of

particularly the orphan works, Google argued that it would have been impossible to license the use.¹⁶⁷ But The Authors Guild said such caveats did not remove the infringing nature from Google's actions and sued.¹⁶⁸ Litigation is ongoing, and so are Google's book-digitizing efforts. As of March 2012, Google had scanned more than twenty million books.¹⁶⁹ If the court holds that Google infringed the copyrights in the books that Google scanned and displayed without receiving express permission, it is foreseeable that a troll could buy up entire catalogs of lesser-known titles and sue Google for the scanning of each book.

One could argue that Google Book Search might diminish copyright incentives for future authors, and troll-related litigation would deter not only Google but also future potential infringers.¹⁷⁰ But permitting such troll activity would be contrary to copyright objectives. Copyright law long has aimed to protect author rights without slowing technological innovation.¹⁷¹ In the Google Book Search case, enforcement of rights acquired by copyright trolls would impede innovation without protecting author rights. The threat that overbroad copyright can pose to some socially valuable uses of copyrighted works online is substantial if copyright trolls can hold up unauthorized derivative works for the purpose of receiving an overvalued settlement rather than participating in good-faith negotiations to reach reasonable licensing terms.

unlawful distribution).

167. See, e.g., Authors Guild v. Google, Inc., Brief of Google Inc. in Support of Motion for Final Approval of Amended Settlement Agreement, No. 1:05 CV 8136 (DC), Docket No. 941, 2010 WL 563049 (S.D.N.Y. Feb. 11, 2010).

168. 770 F. Supp. 2d at 670–71. The Authors Guild alleged that Google's digitizing books and then displaying snippets amounted to unlawful reproductions and distributions, respectively. *Id.* at 678.

169. Jennifer Howard, *Google Begins to Scale Back Its Scanning of Books from University Libraries*, CHRON. HIGHER EDUC. (Mar. 9, 2012), <http://chronicle.com/article/Google-Begins-to-Scale-Back/131109/>.

170. Moreover, Google should not get a free pass to infringe simply because it "promises this amazing resource." Lichtman, *supra* note 166, at 56.

171. See *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 tradeoff."); see also Greenberg, *supra* note 39, at 1053; Randal C. Picker, *Copyright Law and Technology: Déjà Vu All Over Again*, 2013 WIS. L. REV. ONLINE 41 (2013). But see Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891 (2012) (arguing that judicial decisions, private enforcement, and public dialogue generally overemphasize the harms of copyright infringement at the expense of innovation).

Another example of this danger is the incorporation of copyrighted works in entertainment, particularly music and film. Though it might seem that trolls are unlikely to be overcompensated for the copyrighted work if trolls target major content producers (e.g., music publishers, newspapers, film studios), this is not necessarily true. Acquiring all necessary licenses is prohibitively expensive for some types of creative works, such as music sampling—a process by which a new sound recording incorporates a portion of a previous sound recording.¹⁷² The practice has long been part of musical innovation and was instrumental to rap music's development.¹⁷³ Prospectively, record labels cannot afford to clear every sampled sound. They had relied on the infringement being either a fair use or actionable but unenforced. As copyright catalog companies¹⁷⁴ have taken to acquiring old sound recording rights and enforcing against samplers, many samplers have “settled out of court, likely due to fear of the potential for injunctions on the sale of the underlying album or worse, criminal sanctions.”¹⁷⁵ In the process, sampling has become too expensive for most artists or too risky for record companies. That is an unfortunate but anticipated consequence when a copyright catalog firm has a good faith licensing program. Enforcement and licensing protects copyright incentives and rewards authors. But when a troll claims a licensing program only as a pretext for litigation, as has been alleged of Bridgeport Music and others, copyright law is enforced to the detriment of innovation and without the justification of author incentives. Indeed, even before the broader recognition of copyright trolls, Tim Wu argued that, by extracting millions of dollars from samplers in settlements and court judgments, outfits like Bridgeport were “turning copyright into the foe rather than the friend of musical

172. See Mark Katz, *Music in 1s and 0s: The Art and Politics of Digital Sampling*, in CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 137–57 (2004); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 275–77 (1996).

173. See John Lindenbaum, *Music Sampling and Copyright Law* (Apr. 8, 1999) (unpublished B.A. thesis, Princeton University), available at <http://www.princeton.edu/~artspol/studentpap/undergrad%20thesis1%20JLind.pdf>; see also Jesse Kriss, *The History of Sampling*, JK LABS (May 2004), <http://jklabs.net/projects/samplinghistory/>.

174. Not to be confused with collecting societies like ASCAP, these are entities like Bridgeport Music.

175. Crum, *supra* note 30, at 953.

innovation.”¹⁷⁶

Based on the threats that trolls pose to the copyright system—primarily by chilling speech and discouraging innovation—copyright policy interests favor raising a barrier to troll-related activities. This Article proceeds, in Parts III and IV, to discuss several possible measures to mitigate troll-imposed societal costs. Part III discusses fair use’s historical development, its statutory mooring, and the doctrine’s implications for troll-related litigation. Specifically, Part III.B explains why the two primary factors in fair use analysis and additional non-statutory policy considerations cut in favor of a fair use presumption. Part IV then considers challenges to a fair use presumption and evaluates limitations on alternative solutions to the troll problem. That Part concludes by identifying copyright’s fair use doctrine as the best tool for addressing trolls—in no small part because the judicially crafted doctrine remains incredibly robust and flexible and can be applied to address copyright trolls without the need for legislative action.

III. PRESUMPTIVELY FAIR USES

This Part now turns to the applicability of the fair use doctrine in dissuading copyright troll actions. It begins by describing the doctrine’s equitable origins and its evolution from the bench; it then articulates the bases by which courts evaluate fair use today and explains that the doctrine remains flexible and robust, though it generally informs a predictable result. This Part next applies fair use to troll-related litigation, focusing on the two statutory factors that have been most important historically and also accounting for non-statutory policy considerations. It concludes with a brief discussion of why these three factors inform a fair use presumption in litigation brought by a copyright troll.

A. Fair Use Origins and Development

The fair use doctrine provides an “equitable rule of reason,”¹⁷⁷ originating from the bench in response to

176. Wu, *supra* note 30.

177. *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 448 (1984); H.R. Rep. No. 94-1476, p. 65

copyright's grant of a limited monopoly. The doctrine is a defense to an act that would otherwise constitute infringement. The doctrine began to take shape almost three hundred years ago in English courts of equity.¹⁷⁸ Its American origins are traced to Justice Story's 1841 opinion in *Folsom v. Marsh*,¹⁷⁹ in which he famously stated that "a fair and bona fide abridgement" that made a "real, substantial condensation of the materials, and [contributed] intellectual labor and judgment" did not infringe the copyright in the underlying work. As the Supreme Court recounted 150 years later, Justice Story sought to determine whether an abridger's use was fair by "distill[ing] the essence of law and methodology from the earlier cases: 'look[ing] to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.'"¹⁸⁰ Over time, judges expanded the doctrine into an affirmative defense to infringement. It was codified in Section 107 of the 1976 Copyright Act—not to alter the boundaries of the fair use doctrine but to legitimize it.¹⁸¹

In evaluating fair use, Congress instructed courts to start by weighing four non-exclusive factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁸²

(1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

178. *See, e.g.*, Gyles v. Wilcox, 26 Eng. Rep. 489 (1740) (introducing the idea of "fair abridgement"); *see also* WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6–17 (1985); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1410 (2011) ("As the prehistory of fair use makes plain, copyright owners' rights have been subject to and defined by the public's fair use rights since the beginnings of statutory copyright.").

179. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

180. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (quoting *Folsom*, 9 F. Cas. at 348).

181. *Campbell*, 510 U.S. at 577 (citing H.R. Rep. No. 94-1476, at 66 (1976); S. Rep. No. 94-473, at 62 (1975)).

182. 17 U.S.C. § 107 (2006).

Next, courts are to consider additional factors in light of copyright's policy objectives.¹⁸³ These non-statutory factors are boundless, yet when considered they tend to concern matters like whether the defendant acted in good faith or whether the author's industry standards supply non-economic incentives to create.¹⁸⁴ As a limitation on the ownership over speech,¹⁸⁵ the doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."¹⁸⁶

Fair use analysis is fact-intensive and turns heavily on both the specifics of a case and the court's understanding of the doctrine, which is "so flexible as virtually to defy definition."¹⁸⁷ Application varies across, and within, the circuit courts, and the four Supreme Court majority opinions evaluating fair use have been employed to inconsistent ends. As a result, the fair use doctrine has been characterized as woefully uncertain—"billowing white goo"¹⁸⁸—and Section 107 has been criticized as nothing more than "the right to hire a lawyer."¹⁸⁹ Recently,

183. To be sure, courts often fail to consider non-statutory factors in fair use analysis. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 564 (2008) ("Commentators have long called upon courts to look to additional factors, such as 'fairness,' and in the opinions studied, the courts themselves frequently acknowledged that the section 107 test is illustrative rather than limitative. Yet only 17.0% of the opinions [studied] explicitly considered one or more additional factors, and only 8.8% stated that the additional factor was relevant to the fair use determination."); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2620 (2009) ("It is curious, though, how reluctant courts have been to consider factors beyond those set forth in § 107 in the fair use caselaw.").

184. Other non-statutory considerations are discussed further *infra* Part III.B.3.

185. See *infra* Part IV.C.

186. *Campbell*, 510 U.S. at 577 (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

187. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012) (quoting *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996)).

188. Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008). See also David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 287 (2003) (arguing that reliance on the four statutory factors is but a "fairy tale").

189. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004); Case Note, *Copyright Law—Fair Use—Ninth Circuit Holds That Breakaway Church Cannot Invoke Fair Use to Reprint Copyrighted Book Suppressed by*

however, four major empirical studies have demonstrated a lot more method than madness—that the adjudication of fair use is more predictable and measurable than generally believed.¹⁹⁰ As Neil Netanel explains, much of the doctrine’s “apparent inconsistency stems from the dramatic transformation of fair use doctrine over time.”¹⁹¹ When fair use decisions are analyzed in the gestalt over two centuries of jurisprudence, they appear rudderless and unpredictable. But when isolated into episodic parts contributing to the whole—the most recent being the post-*Campbell* era—consistency is much more apparent.¹⁹²

B. Applying Fair Use to Trolls

Trolls’ relatively recent arrival in the copyright system means that few courts have considered fair use defenses to the infringement actions brought by trolls. But the fair use doctrine is applicable to trolls, regardless of the copyright rights they hold,¹⁹³ and to all types of defendants—even those who reproduce an entire work verbatim.¹⁹⁴ This Part looks at the few troll-related cases that have evaluated fair use and focuses specifically on how the doctrine should be applied in

Parent Church—Worldwide Church of God v. Philadelphia Church of God, 114 HARV. L. REV. 1807, 1807 (2001) (“Fair use doctrine might rightly be considered a full-employment act for copyright attorneys.”).

190. Beebe, *supra* note 183; Samuelson, *supra* note 183; Netanel, *supra* note 4 (mapping the chronological development of the fair use doctrine and finding that the question of transformative use has come to dominate use analysis); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (confirming “the centrality of transformative use,” noting that when copying is only partial it weighs in favor of a fair use defense, and finding that having a commercial use does not weigh against the defendant).

191. Netanel, *supra* note 4, at 730.

192. See *infra* Parts III.B.1–2.

193. This is true even though the Copyright Act specifically mentions news reporting and commentary as unauthorized uses that lend themselves to being fair, and the Supreme Court has stated that “informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.” *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 496–97 (1984).

194. Such an application of fair use aligns with what Jane Ginsburg calls the doctrine’s “extraordinary expansion” during the past two decades. Jane C. Ginsburg, *Copyright 1992–2012: The Most Significant Development*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 465, 497–98 (2013) (answering the titular question with *Harry Potter*, whose author “is, after all, the poster child for copyright” and whose “success reassures us of the centrality of individual creativity in the copyright scheme”).

such litigation.¹⁹⁵ It identifies two statutory factors and an additional non-statutory factor, plus an occasionally applicable fourth consideration, as weighing heavily against trolls and favoring a fair use presumption. First, this Part looks at the absence of market harm because the copyright holder has no market other than litigation. Second, it argues that the infringing use is for a different purpose and thus transformative. Third, it addresses why troll litigation undermines copyright policy objectives, and argues that the law therefore is not required to protect them. Finally, this Part discusses the relevance of a plaintiff's bad faith or litigation misconduct in fair use analysis. Finding that each of the four factors discussed tip heavily in favor of defendants, this Part concludes that courts should presume fair use in litigation brought by copyright trolls.

The following analysis ignores factors two and three because the nature of the copyrighted work is too variable to discuss in the abstract, and, for reasons stated *infra*, the amount and substantiality used is immaterial in troll-related litigation. Moreover, as also explained *infra*, fair use outcomes overwhelmingly turn on the transformativeness and market harm; however, non-statutory considerations (i.e., the catch-all “fifth factor”) are discussed because the statute left judges with the authority to flexibly apply fair use in the service of copyright policy goals.

195. Of the six Righthaven decisions that addressed fair use, none was favorable for Righthaven. *See* Righthaven LLC v. Democratic Underground, LLC, No. 2:10-cv-01356 (D. Nev. Mar. 9, 2012); Righthaven, LLC v. Hoehn, 792 F. Supp. 2d 1138 (D. Nev. 2011); Righthaven LLC v. Jama, No. 2:10-cv-1322-JCM-LRL, 2011 WL 1541613 (D. Nev. Apr. 22, 2011); Righthaven LLC v. Choudhry, No. 2:10-cv-2155-JCM-PAL, 2011 WL 1743839 (D. Nev. May 3, 2011); Righthaven LLC v. Realty One Group, Inc., No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010); Righthaven LLC v. Klerks, No. 2:10-cv-00741-GMN-LRL, 2010 WL 3724897 (D. Nev. Sept. 17, 2010). And four of the *Righthaven* fair use decisions resolved in the defendant's favor at the summary judgment stage. Though a relatively recent departure from the common law treatment of fair use as a factual matter for the jury, courts commonly resolve fair use at the summary judgment stage. *See* Katz v. Chevaldina, 900 F. Supp. 2d 1314, 1316 n.4 (S.D. Fla. 2012); *see also* Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 530 (9th Cir. 2008); Ned Snow, *Fair Use as a Matter of Law*, 89 DENV. U. L. REV. 1 (2011). Moreover, in *Jama*, the court rebuked Righthaven for its business practices: “Plaintiff's litigation strategy has a chilling effect on potential fair uses of Righthaven-owned articles, diminishes public access to the facts contained therein, and does nothing to advance the Copyright Act's purpose of promoting artistic creation.” 2011 WL 1541613, at *5.

1. No Market Harm

Fair use analysis takes into account the harm that defendants pose on the plaintiff's potential markets out of a concern that the secondary work will undermine the plaintiff's incentive to create in the first place.¹⁹⁶ It is not enough that the defendant's use indirectly reduces the plaintiff's market by casting the original in a bad light, such as by parody or criticism.¹⁹⁷ Instead, the fair use doctrine looks to whether the secondary work merely supplants the market for the original.¹⁹⁸ It is much more likely that a "cognizable market harm to the original will occur" when the defendant's use is a "mere duplication for commercial purposes."¹⁹⁹ Between 1984 and 1994, the message from the Supreme Court was that fair use hinged on this factor. First, in *Sony Corp. v. Universal City Studios, Inc.*,²⁰⁰ the Court stated in dictum that when the infringer's use is commercial, it creates a presumption of harm to the copyright holder's potential markets.²⁰¹ Moreover, the Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege."²⁰² The Court repeated this presumption a year later in *Harper & Row Publishers, Inc. v. Nation Enterprises*²⁰³ and explicitly stated that potential market harm "is undoubtedly the single most important element of fair use."²⁰⁴ *Sony* and *Harper & Row* were seen as delivering a

196. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–91 (1994) (fair use doctrine requires courts to consider whether widespread conduct of the sort the defendant engaged in will negatively affect potential market for original); *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 566–67 (1985).

197. See *Campbell*, 510 U.S. at 591–92 ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.").

198. *Id.* at 591; *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

199. *Campbell*, 510 U.S. at 591.

200. *Sony*, 464 U.S. 417.

201. *Id.* at 451.

202. *Id.*

203. *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539 (1985). However, the Court seemed to temper the presumption against commercial uses. See *id.* at 562. (quoting *Sony*, 464 U.S. at 451) ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. '[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'").

204. *Id.* at 566.

deathblow to commercial fair uses because, together, they created a presumption of market harm and established that the existence of market harm would heavily tip the fair use analysis against a finding that it was fair.²⁰⁵

However, this presumption of harm disappeared following the Supreme Court's 1994 decision in *Campbell v. Acuff-Rose Music*, except regarding "slavish duplication for commercial purposes."²⁰⁶ Courts now instead ask whether the plaintiff has suffered "a harm cognizable under the Copyright Act."²⁰⁷ Specifically, has demand for the copyrighted work been usurped or substituted by the infringement?²⁰⁸ For example, courts have held that commercial harm caused by effective parody or criticism, market competition resulting from software reverse engineering, and digital text analysis of student papers are not cognizable harms.²⁰⁹

Campbell left in place *Harper & Row's* shifting of the burden to the defendant to "demonstrate the absence of harm to potential markets, including harm that might be caused by other users and harm even to potential markets for derivative works that the copyright holder might never wish to exploit."²¹⁰ It is less clear by whom the burden is borne with a noncommercial use. In such cases, some courts have required a copyright holder to prove market harm,²¹¹ while others have held that even with noncommercial uses "[d]efendants have the overall burden of proof to show that no substantial damage was caused to the potential market."²¹²

205. Market harm is no longer the preeminent fair use factor; that is now transformativeness, as discussed in the next Section.

206. Netanel, *supra* note 4, at 722.

207. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

208. *Id.*

209. Matthew Sag, *The Phantom Tollbooth—Are Workable Markets for Library Digitization Licenses Just Around the Corner?* (May 10, 2013), <http://matthewsag.com/the-phantom-tollbooth-are-workable-markets-for-library-digitization-licenses-just-around-the-corner/> (citing *Campbell*, 510 U.S. at 591–92; *Sony Comp. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000)).

210. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 64 (2010); *see Campbell*, 510 U.S. 569.

211. *See, e.g., Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385–86 (6th Cir. 1996).

212. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1242 (N.D. Ga. 2012) (holding that the "unlicensed copying of 75 excerpts from Plaintiffs' copyrighted books for nonprofit educational use by professors and students at Georgia State University in 2009" was a fair use and finding that "there is no persuasive evidence that Plaintiffs' ability to publish high quality scholarly books would be appreciably diminished by the modest relief from academic permissions

Potential markets are seemingly endless because an undivided copyright can be sliced up into nearly an infinite number of exclusive licenses. Even if copyright owners choose not to actively license a work, or intentionally withhold licensing because they do not want the work to find an audience or be altered, courts have held that an infringing use likely harms a market that the copyright owners *could* exploit. “Even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the ‘potential market’ and, second, because he has the right to change his mind.”²¹³

For example, J.D. Salinger famously refused to license any derivative uses of his characters and zealously enforced against infringers, most recently in *Salinger v. Colting*.²¹⁴ The case involved the unauthorized writing and publication of *60 Years Later: Coming Through the Rye*,²¹⁵ which told the story of a seventy-six-year-old Holden Caulfield, the central character in Salinger’s coming-of-age masterpiece *The Catcher in the Rye*,²¹⁶ referred to as “Mr. C,” and his ninety-year-old author, a “fictionalized Salinger.”²¹⁷ In interviews and on the back cover of the U.K. edition, author Fredrik Colting billed the book as a sequel²¹⁸ to *The Catcher in the Rye*, one of the bestselling books of the twentieth century.²¹⁹ After Salinger sued for copyright infringement, Colting claimed his derivative work was a fair use. In particular, Colting argued that *60 Years Later* was a parody of *The Catcher in the Rye* and a commentary on the

payments which is at issue in this case”).

213. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (citing *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)).

214. 607 F.3d 68 (2d Cir. 2010).

215. The book was written and published by Fredrik Colting, using the pen name John David California. See JOHN DAVID CALIFORNIA, *60 YEARS LATER: COMING THROUGH THE RYE* (2009).

216. J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

217. *Colting*, 607 F.3d at 71–72.

218. *Id.* at 72.

219. First published in 1951, *The Catcher in the Rye* continues to sell about 250,000 copies each year. See Charles McGrath, *J.D. Salinger, Literary Recluse, Dies at 91*, N.Y. TIMES, Jan. 28, 2010, <http://www.nytimes.com/2010/01/29/books/29salinger.html>; see also Louis Menand, *Holden at Fifty: “The Catcher in the Rye” and What It Spawned*, NEW YORKER, Oct. 1, 2001, http://www.newyorker.com/archive/2001/10/01/011001fa_FACT3.

enigmatic Salinger.²²⁰ The district court accepted neither argument.²²¹ The Court found that the work was not sufficiently transformative and that the market harm cut slightly against Colting, even though Salinger had been explicit over six decades that he had no interest in exploiting any markets in a sequel.²²²

However, there is a key difference between a copyright owner—particularly an owner who is the original author—refusing to license a work because he wishes to limit its dissemination or alteration and a troll who purchases another author’s copyright simply to profit by suing infringers. The former is supported by a natural right or labor theory of copyright;²²³ the latter finds no support in any philosophical basis for the copyright system, as will be discussed in Part III.B.3.

To begin, it is debatable whether a copyright troll—either one who purchases a copyright or obtains it through creation—has suffered an actual harm.²²⁴ Though a troll suffers a cognizable injury if a use infringes one of its exclusive rights in the work under Section 106, courts still could find no market harm. In other words, though injury is cognizable, it is too speculative in the absence of a bona fide licensing program, and, therefore, courts need not accept that an infringing use automatically harms a potential market for the work.²²⁵ (This

220. *Colting*, 607 F.3d at 73–74.

221. *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

222. *Id.* at 256–68. The trial court held that Colting’s use was not a fair use, *id.* at 268, and the Second Circuit agreed. 607 F.3d at 74. While agreeing that Colting likely was unable to make out a meritorious fair use defense, the appellate court vacated and remanded because the district court had applied the incorrect standard in granting Salinger’s motion for a preliminary injunction. *See id.* at 74–83.

223. This theory, based on John Locke’s “Two Treatises of Government,” premises copyright protection on a work being the fruit of one’s labor and therefore naturally under his or her ownership. *See, e.g.*, Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL’Y 283 (2012); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891 (2006).

224. The rationale for saying that a troll has not suffered a cognizable injury is a bit circular: infringement of a copyright owned for the sole purpose of litigation does not result in the type of harm that the Copyright Act seeks to prevent, and therefore, a troll, who acquires a copyright for the sole purpose of litigation, has not suffered a cognizable harm.

225. *See, e.g.*, *Righthaven, LLC v. Jama*, No. 2:10-cv-1322, 2011 WL 1541613, at *5 (D. Nev. Apr. 22, 2011) (holding that Righthaven “failed to allege that a ‘market’ exists for its copyright at all” and “failed to show that there has been any

is distinct from standing requirements, which present only a jurisdictional threshold to troll-related litigation.)²²⁶ Indeed, one *Righthaven* court²²⁷ presumed a lack of market harm based on a copyright troll having but one business goal: to extract profits via litigation; the troll has no interest in seeking other markets.²²⁸ Even if *Righthaven* could show that a user had interfered with one of its potential markets, *Righthaven* still needed to prove the degree of harm caused to a potential market.²²⁹ The Seventh Circuit made a similar move in ruling on a motion to dismiss that *South Park*'s parody of a viral video was a fair use because the plaintiff failed to produce any evidence of harm to “any real market (with real, non-Internet dollars).”²³⁰

Normally, the burden of proof in asserting an affirmative defense, including fair use, is on the defendant. This understanding of fair use analysis flips that presumption and essentially amounts to proving damages. But the fair use

harm to the value of the copyright” because *Righthaven* is not operating as a newspaper and cannot claim the *Review-Journal*'s market).

226. See *infra* Part IV.B.1.

227. *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. 2011).

228. If *Righthaven* had been interested in further exploiting the newspaper copyright, then *any* infringing use could have adversely affected an identifiable potential market—even a market that *Righthaven* had no desire to enter. But *Righthaven* only sought to exploit its bare right to recover for past infringements, and thus *no* possible use would harm *Righthaven*'s potential markets.

229. See *Hoehn*, 792 F. Supp. 2d 1138, *vacated in part by* *Righthaven, LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013) (finding that the court lacked jurisdiction to reach the merits of defendant's fair use argument because the plaintiff lacked standing). In *Hoehn*, the defendant, a user of the website *madjacksports.com*, reproduced in the site's forum an entire column by the then-publisher of the *Review-Journal*, titled “Public Employee Pensions—We Can't Afford Them.” *Id.* at 1142. Judge Philip Pro was not willing to accept *Righthaven*'s contention that because *Hoehn* reproduced the entire copyrighted work that he had “caused a substantial impairment on the potential market” and “fulfilled the demand for the original.” *Id.* at 1150. Moreover, even assuming that *Hoehn*'s complete reproduction enabled potential readers to see the story on *madjacksports.com* site instead of the *Review-Journal*'s website, the court refused to accept that the potential supplanting of readers even raised an issue of material fact as to this prong of the fair use analysis:

Righthaven has not presented any evidence of harm or negative impact from *Hoehn*'s use of the Work on the Website between November 29, 2010 and January 6, 2011. Merely arguing that because *Hoehn* replicated the entirety of the Work the market for the Work was diminished is not sufficient to show harm.

Id. at 1150–51.

230. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693–94 (7th Cir. 2012).

doctrine does not mandate analyzing market harm in a vacuum. For example, Justin Hughes has argued that “economically sounder fair use analysis takes account of when the unauthorized use occurs in the copyright term” because the harm on potential markets is likely to be greater earlier in the copyright term than later.²³¹ Similarly, the harm on potential markets is likely to be greater when the copyright owner is not collecting copyrights solely for litigation purposes.

In providing some relief on speech restrictions, the fair use doctrine assumes that copyright owners will either license their work or forego licensing to retain control. This well-founded premise makes economic harm likely when a work is infringed. But it does not hold when the copyright owner’s established business is litigation. If the copyright owner neither has a bona fide interest in licensing the work nor seeks to control its use out of reputational concern or other authorial interest, what, if any, economic loss actually accrues to the owner? It is difficult to think of a scenario in which the answer is any more than “none.” Thus, there is no justification for assuming market harm. Moreover, “Congress intended copyright markets to exclude fair uses and handed the courts the intentionally open-ended mission of declaring the farthest frontiers of the copyright market.”²³² Accordingly, the plaintiff should bear the burden of proving market harm,²³³ just as copyright law already requires that he prove he owns a valid copyright in the work and that the defendant infringed it.²³⁴

2. Transformative Per Se

In *Campbell v. Acuff-Rose Music*,²³⁵ the Supreme Court sought to reconstrue²³⁶ the emphasis it placed on market harm

231. Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 778 (2003).

232. *Id.* at 793.

233. This burden of proof could be carried by simply showing that the copyright was acquired for more than litigation purposes, such as the copyright owner’s interest in licensing future uses or creating derivative works or limiting distribution of an unpublished work.

234. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 548 (1985)).

235. 510 U.S. 569 (1994).

236. Beebe argues that this muted reproach led to disastrous results for fair use jurisprudence and that the Court, rather than obscure the contours of the doctrine in trying to avoid the awkwardness of overruling dicta only a decade old, should have “explicitly rescinded and replaced” the market-harm language from

in *Sony* and *Harper & Row*. In the process, the Court breathed life back into commercial fair uses by emphasizing the importance of transformativeness:

The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.²³⁷

Since *Campbell*, when courts have discussed transformativeness,²³⁸ a determination that the use was transformative overwhelmingly has led to an overall finding of fair use.²³⁹

But what is a transformative use? The Court in *Campbell* defined it as a use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²⁴⁰ Yet the Court's language

Sony and *Harper & Row*. See Beebe, *supra* note 183, at 596–97.

237. *Campbell*, 510 U.S. at 579 (internal citations omitted).

238. Or a corollary known as "productive use."

239. Beebe, *supra* note 183, at 605–06; Netanel, *supra* note 4, at 736–46.

240. *Campbell*, 510 U.S. at 579. The Court relied heavily on an essay by then-U.S. District Judge Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), in which Leval argued:

The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of

left much to be debated. The three obvious interpretations are that a work is transformative if it has a different purpose than the original, if it adds expressive content to the original, or if it bears some mixture of new purpose and new content. The correct combination is unclear.²⁴¹ The best guide, then, would be the courts that have applied *Campbell*.

Looking at district and appellate court decisions between 1995 and 2010, Neil Netanel found that transformativeness turned on new *purpose*, not new *content*.²⁴² Whereas new expressive content sometimes bolstered a claim that the work was transformative, absent a new purpose the argument was almost certain to fail.²⁴³ Moreover, almost a quarter of the cases in which the courts found the use to be “unequivocally transformative” involved complete copying without alteration.²⁴⁴ So long as the use was for a new purpose, the use almost always was found to be transformative. This was true across a wide variety of expressive purposes:

They have included replication of literary or graphic works to serve as an information tool; replication of artistic works to illustrate a biography; reproducing a fashion photograph originally made for a lifestyle magazine in a painting to make a comment about the mass media; copying and displaying a photographic portrait originally made as a gift

activity that the fair use doctrine intends to protect for the enrichment of society.

Id. at 1111.

241. See Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem “Transformed”: Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y 251, 256–68 (1998).

242. Netanel, *supra* note 4, at 747–48; see also Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOC’Y 309, 325 (2005) (“[T]he concept of transformative ‘purpose’ . . . seems to consist of a different functional use of the original work than that intended by its creator, rather than some sort of reconfiguration of the work itself”); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008) (evaluating appellate cases between 1995 and 2007 and similarly finding that “courts generally emphasize the transformativeness of the defendant’s purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work”).

243. Netanel, *supra* note 4, at 747–48 (noting that of the eighty-two reported opinions during that period that addressed the definition of transformative use by more than mere recital of *Campbell*, “only three stated that altered expression without different expressive purpose can qualify as transformative”).

244. *Id.* at 748.

item for the subject's family and friends for purposes of entertainment and information; a football team's display of artwork that the team previously used as its logo without the artist's permission in a "museum-like setting" in the lobby of the team's corporate headquarters; copying a work to criticize its author; and, of course, copying a work to parody or criticize the work.²⁴⁵

One possible explanation is that the transformative label is merely code for "any use [judges] think ultimately fair, as long as a finding of transformativeness is perceived to be necessary to avoid the presumption of market harm attaching to commercial uses."²⁴⁶ Another is that transformativeness is an exceptionally broad concept, as demonstrated by the transformative-because-it-does-anything-different rationale of *Kelly v. Arriba Soft Corp.*²⁴⁷ and *Perfect 10, Inc. v. Amazon, Inc.*²⁴⁸ Regardless of the explanation, fair use defenses in recent years have turned on whether the use is transformative. A copyright owner is unlikely to defeat a fair use defense unless he wins on this factor.

In two *Righthaven* cases,²⁴⁹ the judge assumed that a defendant's use is transformative whenever the copyright is owned by a copyright troll.²⁵⁰ Though an apparently novel

245. *Id.* at 748–49.

246. Sag, *supra* note 190, at 57. It is worth noting, however, that the results of Netanel's study do not support this hypothesis.

247. 336 F.3d 811 (9th Cir. 2002).

248. 508 F.3d 1146 (9th Cir. 2007).

249. See *Righthaven LLC v. Choudhry*, No. 2:10-cv-2155-JCM-PAL, 2011 WL 1743839, at *4 (D. Nev. May 3, 2011); *Righthaven, LLC v. Jama*, No. 2:10-cv-1322-JCM-LRL, 2011 WL 1541613, at *2 (D. Nev. Apr. 22, 2011).

250. In *Righthaven LLC v. Jama*, for example, the Center for Intercultural Organizing (CIO), an Oregon-based nonprofit dedicated to educating United States immigrants about immigration-related issues, had posted on its website every word of an article originally published in the *Review-Journal* that discussed whether Las Vegas-area law enforcement were targeting racial minorities. 2011 WL 1541613, at *1. About three weeks after CIO republished the article on its website, the *Review-Journal* purportedly assigned the copyright to Righthaven. *Id.* When Righthaven filed suit, CIO defended on fair use grounds. Even though the copyrighted work was reproduced in its entirety, the court held that "a reasonable trier of fact could only reach one conclusion—that the alleged infringement qualifies as fair use." *Id.* at *5. The court's rationale was that the first, second, and fourth factors clearly weighed in favor of fair use because: the defendant's use was for a different purpose than the plaintiff's and thus transformative, and also was noncommercial; the nature of the underlying work was informational and therefore entitled to thinner copyright protection; and the plaintiff failed to allege a market for the work. *Id.* at *2–5. The court found the

statement of the law,²⁵¹ this understanding of the relevant owner's purpose makes policy sense because trolls do not create, reproduce, distribute, perform, or ex ante license. This is unlike when a copyright owner refuses to license a work because he wants to limit the work's dissemination or alteration.²⁵² A troll's only reason for suing infringers is to profit, and, for reasons discussed throughout, that disrupts copyright incentives and undermines copyright policy goals.²⁵³ Therefore even a use that is arguably the same as that of the original copyright owner (disseminating news to educate the public in the *Righthaven* cases) would be transformative because the current copyright owner is only using the work for

third factor weighed neither for nor against fair use. *Id.* at *3–4.

251. Judge Mahan did not explain his rationale. *See id.* at *2; *Choudhry*, 2011 WL 1743839, at *4. I am aware of no other judicial opinions holding that the plaintiff's purpose for the work, if different than the previous copyright owner, is the one against which the alleged infringer's purpose is measured. Of course, typically when fair use is asserted, the plaintiff owned the work at the time it allegedly was infringed and, even if suing on an action that accrued before the plaintiff obtained the exclusive right allegedly infringed, the copyrighted work's purpose did not change as a result of the copyright assignment. Thus, it is unlikely that many other courts would have confronted this issue yet.

252. *See, e.g., Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110–20 (9th Cir. 2000). *Worldwide Church of God* involved a splinter church denomination that had printed and distributed without authorization about 30,000 copies of *Mystery of the Ages*. The book had been written by the founder of the Worldwide Church of God (WCG), Herbert Armstrong, who bequeathed all his property, including any copyright claim he had to the book, to the church upon his death in 1986. Two years after Armstrong's death, WCG stopped distributing the book and disposed of excess inventory copies out of a concern that the book, which “conveyed outdated views that were racist in nature,” was an “ecclesiastical error.” 227 F.3d at 1113. Shortly thereafter, two former WCG ministers broke away and formed the Philadelphia Church of God (PCG); they claimed to strictly follow Armstrong's teachings and that *Mystery of the Ages* was central to their religious practice. PCG never sought permission to print and distribute the book and tried to defend an infringement suit by arguing that PCG's use was fair because the book was unavailable without their unauthorized duplication and distribution. *Id.* at 1116–20. The Ninth Circuit rejected PCG's defense. On the first factor, the court found that PCG's use was not transformative because the copying of the book “in its entirety bespeaks no ‘intellectual labor and judgment’” but “merely ‘supersedes the object’ of the original,” *id.* at 1117 (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D. Mass. 1841)), and the use had the “same intrinsic purpose” as the original. Additionally, the court found that PCG's use was commercial because though they did not sell *Mystery of the Ages*, distribution of the book “enabl[ed] the ministry's growth,” and more members meant more financial contributions to the church. *Id.* at 1118. This factor weighed against fair use, as did the second and third factors. The fourth factor was, “at worst, neutral.” *Id.* at 1120.

253. *See supra* Part II.C; *infra* Part III.B.3.

litigation purposes.²⁵⁴ Thus, the only use that would not be transformative would be using the copyrighted work for litigation.²⁵⁵

The rationale is sound when a troll registers the copyrighted work after identifying infringements and purchasing the infringed work. Statutory damages can only be sought for infringements that occur after the relevant work is registered with the Copyright Office.²⁵⁶ When a copyrighted work is registered by a troll, the relevant time of infringement is any point after the troll has stepped in, and, accordingly, it is the troll's purpose to which the infringing purpose should be measured. However, when the underlying work already was registered by the previous owner, such as might typically be the case with a book or sound recording, it is more difficult to justify comparing the derivative work's purpose to the troll's purpose if the infringement occurred before the troll's acquisition of the copyright. In such circumstances, the transformativeness factor may not tip in the defendant's favor. However, courts should then, as permitted by Section 107, place greater weight on the market harm factor and on additional policy considerations, which are discussed immediately below.

3. Non-Statutory Policy Considerations

Though courts usually limit fair use analysis to the four factors expressly articulated in the Copyright Act,²⁵⁷ they need not do so.²⁵⁸ The statutory factors are “illustrative and not limitative.”²⁵⁹ Fair use also invites consideration of public

254. See, e.g., *Jama*, 2011 WL 1541613, at *5 (finding that the defendant's use was noncommercial and transformative because “though the former owner, the [Review-Journal], used the article for news-reporting, the court focuses on the current copyright owner's use, which, at this juncture, has been shown to be nothing more than litigation-driven”).

255. As discussed in detail, *infra* Part IV.A, this is impossible under Article III standing requirements and Section 501(b) of the Copyright Act.

256. 17 U.S.C. § 412 (2006).

257. See *supra* note 183.

258. H.R. Rep. No. 102-836, at 9–10 (1992).

259. H.R. Rep. No. 102-836, at 9–10 (1992). Some courts have explicitly recognized this congressional language. See *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 529 (9th Cir. 2008) (“When conducting a fair use analysis, we are not restricted to these factors; rather, the analysis is a flexible one that we perform on a case-by-case basis. Moreover, we do not consider these factors in isolation but weigh them together, in light of the copyright law's purpose ‘to

policy interests.²⁶⁰ The fair use doctrine is, after all, an equitable rule of reason that, as the *Campbell* Court noted, “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²⁶¹ Often, the statutory factors are sufficient—an imperfect but instructive guide that helps courts resolve fair use defenses with a framework for consistency. But some circumstances demand a more expansive fair use inquiry. “The ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts be better served by allowing the use than by preventing it.”²⁶² Thus, to the extent that courts consider non-statutory factors, they must do so “in light of the objectives of copyright law.”²⁶³

Since 1976, courts have considered a variety of non-statutory factors, including whether: the defendant copied “in good faith or with evasive motive,”²⁶⁴ the copying conformed to industry custom,²⁶⁵ the copyrighted work was publicly

promote the progress of science and art by protecting artistic and scientific works while encouraging the development and evolution of new works.”) (citation omitted); *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (“These factors are not meant to be exclusive, but rather illustrative, representing only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses.”) (citation and internal quotation marks omitted); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 448 (C.D. Cal. 1979) *rev’d on other grounds*, 659 F.2d 963 (9th Cir. 1981) (The factors are “simply illustrative and not limitive”).

260. *See Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992); Lichtman, *supra* note 166, at 70–71.

261. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

262. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (citation and internal quotation marks omitted).

263. *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 232 (D. Mass. 2009) (quoting *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003)).

264. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981); *see also Fisher v. Dees*, 794 F.2d 432, 436–37 (9th Cir. 1986) (“Because fair use presupposes ‘good faith’ and ‘fair dealing,’ courts may weigh the propriety of the defendant’s conduct in the equitable balance of a fair use determination.”). Good faith likely has been evaluated more than any other non-statutory factor. *See, e.g., Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *Bill Graham Archives LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324 (S.D.N.Y. 2005); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992); *Tin Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826 (S.D.N.Y. 1990); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 214 (D. Mass. 1986).

265. *See, e.g., Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980).

funded,²⁶⁶ or non-monetary incentives motivate authorship in the relevant field.²⁶⁷ Non-statutory factors often are cut from whole cloth—which is exactly what Congress intended. As the House Report to the 1976 Copyright Act stated:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, their courts must be free to adapt the doctrine to particular situations on a case-by-case basis.²⁶⁸

In other words, as William Patry and Richard Posner put it, “Judges made it and judges can adapt it to changed conditions. . . .”²⁶⁹

266. See, e.g., *Wojnarowicz v. Am. Family Ass’n*, 745 F. Supp. 130, 146 (S.D.N.Y. 1990) (“[I]t is highly significant to the scope of fair use that plaintiff accepted public funds to support his artwork. This fact broadens the scope of the fair use exemption because of the strong public interest, protected by the First Amendment, in free criticism of the expenditure of federal funds.”).

267. See, e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1240 (N.D. Ga. 2012) (finding it relevant to a fair use analysis that “[l]imited unpaid copying of excerpts will not deter academic authors from creating new academic works” and that “[t]he slight limitation of permissions income caused by the fair use authorized by this Order will not appreciably diminish Plaintiffs’ ability to publish scholarly works and will promote the spread of knowledge”); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 74 F.3d 1512, 1524 (6th Cir. 1996) (“More than one hundred authors declared on record that they write for professional and personal reasons such as making a contribution to the discipline, providing an opportunity for colleagues to evaluate and critique the authors’ ideas and theories, enhancing the authors’ professional reputations, and improving career opportunities. . . . The fact that incentives for producing higher education materials may not revolve around monetary compensation is highly relevant. Copyright law seeks to encourage the use of works to the greatest extent possible without creating undue disincentives to the creation of new works. The inclusion of excerpts in coursepacks without the payment of permission fees does not deprive authors and inventors of the rewards that the record indicates authors value, such as recognition.”), *rev’g*, 99 F.3d 1381 (6th Cir.) (en banc).

268. H.R. Rep. No. 94-1476, at 66 (1976).

269. William F. Patry & Richard Posner, *Fair Use and Statutory Reform in the*

The emergence of troll-related litigation is just such a “changed condition” for which the goals of copyright law would be better served by permitting the infringing use than by prohibiting it—or, worse, punishing it. That is because when trolls use copyright law as a stick for extracting profits via settlements and litigation on commercially valueless copyrights or weak claims, their interests are directly adverse to the policy goals underlying the Constitution’s Copyright Clause.²⁷⁰

First, no copyright theory supports the trolls’ purpose for enforcing against use of its proprietary expression. The dominant view of copyright—utilitarianism—views congressionally-provided incentives as a means to the end of richer culture²⁷¹—appropriate incentives that lead to the creation of more and better original works of authorship.²⁷² Natural rights or labor theory, on the other hand, is based on the premise that a creative work is a part of its author, and therefore the author has the moral right to control how the work is used, with or without copyright law.²⁷³ And economic theory understands financial rewards as essential to encouraging creation.²⁷⁴ Trolls are supported by none of these copyright theories. They are not motivated by the market exploitation of exclusive rights, only the enforcement rights; in this way, they work against copyright incentives for other authors.²⁷⁵ A troll also typically is not the copyright’s original owner and therefore cannot claim any natural right to use of the work. And, finally, though economic interests motivate

Wake of Eldred, 92 CAL. L. REV. 1639, 1645 (2004).

270. U.S. CONST. art. I, § 8, cl. 8; *see also* Greenberg, *supra* note 39, at 1065–67.

271. *See, e.g.*, *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

272. *See* Greenberg, *supra* note 39, at 1066 n.176.

273. *Id.* at 1066 n.175; *see* sources cited *supra* note 223. With the exception of the Visual Artists Rights Act of 1990, the United States copyright system has rejected such moral rights. Natural rights, however, was a prevalent theory in late eighteenth-century common law copyright. *See* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 982–83 (2007) (“Several states had already enacted statutes protecting copyrights on the ground that ‘there being no property more peculiarly a man’s own than that which is produced by the labour of his mind.’”).

274. Greenberg, *supra* note 39, at 1066 n.174.

275. *See supra* Part II.C.

trolls, that motivation is independent from the economic promise that encouraged the original creation of the work whose rights they seek to enforce and is not the type of incentive that copyright law contemplates.

Second, copyright trolls, like their patent counterparts, exploit the legal system to obtain unjustified compensation that may far exceed the actual value of the infringed copyright. Though hold-up is not as obvious and pervasive a concern with copyright trolls as it is in the patent system, the potential for hold-up is significant,²⁷⁶ and overcompensation of trolls' copyrights undermines the incentive system for both amateur authors and sophisticated commercial entities. Overcompensation often will come at the expense of speakers who will be deterred from making a fair use of copyrighted material. Additionally, innovators will be discouraged from creative works or technological developments like Google Book Search that incorporate copyrighted material, particularly when the product carries with it prohibitive transaction costs and includes the use of commercially dead and orphan works.²⁷⁷ In this sense, trolls interfere with two primary copyright goals: providing "the economic incentive to create and disseminate ideas,"²⁷⁸ and balancing the enforcement of rights conferred to authors with technological innovation.²⁷⁹ Thus, to the extent that a troll uses its copyrights to bottle up expression or hold up innovation, copyright policy goals guide courts to be wary of finding that the secondary use is not a fair use.

For these reasons, fair use analysis heavily weighs against a copyright troll. Individually, the statutory factors for market harm and transformative purpose and the additional non-statutory policy considerations should guide a court presiding

276. See *supra* Part II.C.2.

277. Though by definition orphan works are those copyrighted works whose owners cannot be located feasibly, it is foreseeable that a copyright troll would find the investment in locating the orphan owner and paying a small fee for the copyright to be worthwhile if, by obtaining a catalog of these orphan copyrights, the troll could hold up the creator of the innovative technology and receive a windfall payment far exceeding the value of the copyrighted work.

278. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 558 (1985)).

279. See sources cited *supra* note 171. Copyright law "in fact does efficiently work to achieve the dual goals of supporting authorship on the one hand and supporting technological innovation on the other." Lichtman, *supra* note 166, at 57.

over troll-related litigation to find that the defendant's use is fair.²⁸⁰ Taken together, these factors urge shifting the burden in such litigation to require the plaintiff troll to prove that a use was not fair.²⁸¹

4. Bad Faith?

There is another consideration. In a generic copyright action, when the court inquires into whether a party acted in good faith, the court typically looks to the defendant's conduct.²⁸² However, courts also may consider the plaintiff's actions, and, when they do, generally look for weak claims and misconduct, from before the act of infringement until issuance of a final judgment.²⁸³ Such behavior tends to be *sui generis*. But the key question is not whether the plaintiff committed a specific act; it is whether the plaintiff's conduct evinced an intention to initiate claims that are unlikely to succeed on the merits for an improper reason (e.g., as a speech restraint or for settlement value) or to misrepresent legal documents to make the plaintiff's claim appear stronger than it is. In *Rosemont Enterprises, Inc. v. Random House, Inc.*,²⁸⁴ for example, the

280. As discussed earlier in this Section, the second and third factors are not material to this analysis.

281. Shifting the burden in troll-related litigation would not represent a "radical change in traditional copyright doctrine" because, as Netanel has noted, "the question of which party has the burden of proof on fair use was unsettled until the relatively recent triumph of the market-centered approach." Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 84 (2001); see also Ned Snow, *Proving Fair Use*, 31 CARDOZO L. REV. 1781 (2010).

282. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994); *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 562 (1985); *Fisher v. Dees*, 794 F.2d 432, 436–37 (9th Cir. 1986); *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324 (S.D.N.Y. 2005).

283. The copyright bad faith standard is best defined in the context of fee-shifting. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (stating in dicta that the factors a court should consider in determining bad faith include "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence"); see also *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 240 F.3d 116, 124–26 (2d Cir. 2001); *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 493–94 (9th Cir. 1985), *overruled on other grounds*. But courts may inquire into bad faith before the issuance of a final judgment (and indeed do so in evaluating the reasonableness of notice-and-takedown filings under 17 U.S.C. § 512).

284. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

Second Circuit found that the defendant's use was fair, at least in part, because the plaintiff "act[ed] in bad faith [by] seeking to prevent the publication of a legitimate biography of Howard Hughes" through enforcement of its copyrights in magazine articles about Hughes.²⁸⁵ The purpose of this inquiry is to protect the copyright system and litigation process from inappropriate exploitation. Considering that courts sometimes weigh a defendant's bad faith against fair use,²⁸⁶ it is appropriate to treat plaintiffs similarly.

Though bad faith is not innate to trolls, it has been alleged of three trolls that this Article discusses. In *Field v. Google*,²⁸⁷ the court said that while the defendant acted in good faith by including an opt-out mechanism for its web-caching system, the plaintiff acted in "marked contrast" by taking "a variety of affirmative steps to get his works included in Google's search results, where he knew they would be displayed with 'Cached' links to Google's archival copy and [by] deliberately ignor[ing] the protocols that would have instructed Google not to present 'Cached' links."²⁸⁸ That is, the plaintiff's conduct ensured that the infringement would occur, and thus demonstrated bad faith. At issue in *Righthaven LLC v. Democratic Underground, LLC*²⁸⁹ was not the act of infringement but whether the plaintiff intentionally concealed the limited nature of the copyright it had received and the profit-sharing agreement it made with the holder of the actual exclusive right infringed.²⁹⁰ Righthaven was ordered to show cause for "why it should not be sanctioned for this flagrant misrepresentation to the

285. *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (discussing *Rosemont*, 366 F.2d 303).

286. *See, e.g., Harper*, 471 U.S. at 563 (finding that the defendant having "knowingly exploited a purloined manuscript" weighed against fair use); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (holding that the defendant did not make a fair use of the plaintiff's source code after obtaining it from the Copyright Office by lying); *cf. Robinson v. Random House, Inc.*, 877 F. Supp. 830, 846 (S.D.N.Y. 1995) (finding that, though the alleged infringer acted in bad faith by "fail[ing] to use quotation marks, footnotes or citations" when directly copying 25 percent to 30 percent of the copyrighted book and by misleading the copyright owner and the court, the statutory factors all weighed against fair use even without the militating effect of the bad faith determination).

287. 412 F. Supp. 2d 1106 (D. Nev. 2006).

288. *Id.* at 1123.

289. *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011).

290. That being the newspaper publisher. *Id.* at 976.

Court.”²⁹¹ And in one of the cases brought by Prenda Law, the court sanctioned the plaintiff’s attorneys for, among other things, lying to the court, submitting a forged document into evidence, and obfuscating facts about litigation practices, relationships, and financial interests.²⁹² The court also referred the attorneys’ misconduct to the United States Attorney for the Central District of California, the Criminal Investigation Division of the Internal Revenue Service, and the attorneys’ respective state and federal bar organizations.²⁹³ In each case, the court rebuked conduct by the plaintiff or the plaintiff’s attorney acting as his agent that would support a finding of bad faith.

To be sure, this additional non-statutory factor is more limited in applicability than the three other factors discussed in this Part. To begin, particularly in the porn copyright troll cases involving defendants who knowingly downloaded copyrighted material with no interest in making a fair use, often plaintiffs and defendants were both acting in bad faith. It also is unclear what weight to accord good faith and bad faith determinations. Justice Story said that good faith does not bar a finding of infringement,²⁹⁴ and the Supreme Court said in *Harper & Row* that “[f]air use presupposes ‘good faith’ and ‘fair dealing.’”²⁹⁵ But the Second Circuit later said, in applying *Campbell*, that a finding of bad faith “cannot be made central to fair use analysis.”²⁹⁶

However, courts continue to inquire into whether the parties acted in good faith. And to the extent the question of bad faith matters, it should be another thumb on the scale in troll-related litigation. When trolls act in bad faith, it warrants attention for the reasons that bad faith usually is a concern in litigation²⁹⁷—plus the fact that in using the courts as a lever to

291. *Id.* at 979.

292. *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *3–5 (C.D. Cal. May 6, 2013).

293. *Id.* at *5.

294. *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841).

295. *Harper & Row Publishers, Inc. v. Nation Ent.*, 471 U.S. 539, 562 (1985).

296. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 n.2 (2d Cir. 2004).

297. Namely that it wastes judicial resources and unfairly burdens the other party. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 274–75 (1975) (Brennan, J., dissenting) (discussing the propriety of shifting fees when the losing party acted in bad faith); *Potnick v. Eastern State Hosp.*, 701 F.2d 243, 244 (2d Cir. 1983); *see also Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1426 (1st Cir. 1992).

extract settlements, typically on weak claims or valueless works, trolls hinder the cultural progress upon which copyright law is premised. As discussed above, the harms trolls impose on speech and innovation are the type that the fair use doctrine is judicially designed to guard against. Accordingly, a finding that a plaintiff acted in bad faith should bolster a fair use presumption.

IV. CHALLENGES AND ALTERNATIVES

Thus far, this Article has outlined the arrival of the copyright troll, evaluated the potential costs and benefits to this new participant in the copyright system, and argued that the equitable nature of the fair use doctrine, as applied to trolls, should inform a fair use presumption. This is a simple concept rooted in a historical understanding of fair use as a flexible doctrine that calls for new evaluations in response to changed circumstances. In analyzing its merit, this Part turns first to potential criticisms before considering alternative solutions to the troll problem and finally concluding with a defense of fair use.

A. Potential Criticisms

There are several potential criticisms of a fair use presumption. This Part addresses a procedural concern and a substantive concern. First, identifying trolls and shifting the burden to them will have unintended consequences—that is, removing one tax on copyright incentives will impose another. Second, the broad application of a fair use presumption in troll-related litigation will, at times, dramatically overreach and protect clearly infringing conduct; for example, those illicitly downloading porn. I address each argument in turn.

1. Burdening Legitimate Copyright Owners

The primary procedural objection to this approach is that it turns an affirmative defense into something that, rather than being proven by the defendant, must be rebutted by the plaintiff. Any time a defendant asserts fair use and alleges that the plaintiff is a copyright troll, the plaintiff will face the expense of rebutting this presumption. This is true for all

plaintiffs in copyright infringement actions, not only trolls. Thus, at the same time that a fair use presumption would protect copyright incentives by safeguarding copyright users and creators from legal claims brought by copyright owners whose only aim is to profit from litigation, it would reduce copyright incentives by increasing the cost of copyright enforcement.

This concern, however, is mitigated by practical and procedural considerations. First, a legitimate copyright plaintiff could cheaply and quickly overcome the presumption that he is a copyright troll. The plaintiff would simply need to show the existence of a bona fide licensing program or that he did not acquire the copyrighted work solely for litigation purposes.²⁹⁸ A showing of either would remove the troll label and thereby rebut the presumption of fair use. Second, though affirmative defenses typically must be proven by the defendant, the litigation process frequently subjects plaintiffs to presumptions that must be rebutted. The burden on the plaintiff starts with the presumption that no cause of action exists at all.²⁹⁹ There also are affirmative defenses that raise a presumption that the plaintiff cannot pursue judicial relief.³⁰⁰ With laches, for example, the presumption is based on

298. An affidavit swearing to business practices likely would suffice. This would be similar to how a plaintiff must proceed, under the laws of many states, after a defendant files an anti-SLAPP motion. *See* CAL. CIV. PROC. CODE § 425.16(b)(1)–(2); GA. CODE ANN. § 9–11–11.1(a)–(b); M.G.L.A. 231 § 59H. On the occasion that a plaintiff swore, under the threat of being held in contempt, that it was not a copyright troll but the defendant believed otherwise, the burden would shift back to the defendant to disprove the accuracy of the sworn statement.

299. A plaintiff rebuts this initial presumption with a “short and plain statement” of entitlement to relief. Fed. R. Civ. P. 8. The complaint must plead enough facts that, if true, enable the court to reasonably infer the defendant’s liability. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

300. *See, e.g.,* *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) (explaining that a presumption of bad faith must be rebutted by the plaintiff who failed to disclose a potential claim in a bankruptcy proceeding); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (holding that a six-year delay in filing a patent infringement action establishes a laches presumption and burdens the patentee to prove that delay was not unreasonable or prejudicial to the defendant); *Markham v. Int’l Ass’n of Bridge, Structural and Ornamental Iron Workers*, 901 F.2d 1022, 1028 (11th Cir. 1990) (interpreting 29 U.S.C. § 464(c) to “explicitly state[] that a trusteeship may enjoy a presumption of validity if imposed after a hearing or ratified”); *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 233–34 (5th Cir. 1984) (barring a Jones Act claim because the statute of limitations had run and the plaintiff could not rebut the presumption that his claim was barred by laches).

equitable concerns and arises in intellectual property cases, despite the cost to plaintiffs.³⁰¹ As Judge Learned Hand famously said:

It must be obvious to everyone familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.³⁰²

Judge Hand's statement seems incredibly apt when discussing copyright trolls nearly one hundred years later. And, like with the laches defense, the added costs of a fair use presumption do not outweigh the benefits of removing trolls from the copyright system.

2. Overbroad Protection of Infringers

The chief substantive criticism is that a fair use presumption would remove liability from numerous works that would not qualify as fair uses but for the fact that the copyrighted work is owned by a troll (e.g., wholesale copying of a news article without added expression or downloading a pornographic film on a peer-to-peer site). In other words, absent the troll, the infringement is not a fair use, but because the plaintiff is a troll, the use is fair.

The best response to this criticism is that the cost of trolls on the copyright system must be viewed in the aggregate—just as the *Harper & Row* Court said that the market harm of a minor, isolated infringement should be “multiplied many times” because the challenged use could become widespread.³⁰³ Fair use is best understood as an equitable means to the end of

301. See *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231–34 (6th Cir. 2007) (discussing application in other circuit courts of the laches doctrine to copyright actions).

302. *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916).

303. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 568–69 (1985).

promoting copyright policy goals. To the extent that trolls undermine copyright incentives—by extracting profits from defendants who engaged in colorably fair uses, which, in turn, chills speech and discourages innovation—fair use analysis tilts overwhelmingly against the troll’s enforcement of its copyright. That is true regardless of whether a particular defendant made a fair use. This approach admittedly calls for a more expansive application of fair use. But Congress explicitly left to the courts the authority to continue developing the fair use doctrine; the 1976 Act did not expand or contract fair use, but the courts may.

Additionally, this criticism has the feel of a scarecrow. To be sure, there is little, if any, merit to an argument that downloading porn without authorization for consumption only is a fair use. However, when that porn has been seeded on peer-to-peer sites to induce infringement, as has been alleged of the shell companies in the *Prenda* cases,³⁰⁴ courts have the authority to find that by exploiting copyright for litigation purposes the copyright owner forfeited any claim that the infringement harmed the market for the work. Similarly, when a plaintiff has engaged in litigation misconduct (e.g., forging documents), a court should aim to deter such conduct, and excusing liability on the basis of fair use would be effective and yet not as severe as sanctions or other options. It also is important to remember that the overbroad protection of infringers would vanish immediately if the troll adopted a legitimate licensing program and thereby lost its troll status. After all, the copyright troll, as defined by this Article, does not include the RIAA or music collecting societies. Those organizations could enforce against copyright infringers, and fair use protection would not extend beyond its historically squishy boundaries. The presumption’s benefit is only broad when the plaintiff is a troll, and that is justified based on an understanding that trolls bear a greater cost upon the copyright system than those infringing the copyrighted work of trolls.

B. Alternatives to Fair Use

Looking at the *Righthaven* cases, it might appear that

304. See *supra* note 35.

copyright's fair use doctrine is not the best available vehicle for addressing the troll problem. Standing requirements, which led numerous courts to dismiss Righthaven complaints,³⁰⁵ could be strengthened as a barrier to non-author plaintiffs. Or, perhaps, common law prohibitions on champerty or First Amendment protections are capable of limiting trolls. Alternatively, statutory damages could be reformed in an effort to remove what trolls have seen as "ripe fruit to be plucked."³⁰⁶ This Part considers the merits of each of these measures, but concludes that none provide as effective of a protection against trolls as the tailored application of fair use discussed in Part III.

1. Standing

The standing doctrine generally asks not whether the plaintiff has made a valid or timely claim but whether the plaintiff is the proper person to pursue such a claim.³⁰⁷ Section 501(b) of the Copyright Act further narrows the scope of suitable plaintiffs in an infringement action by prohibiting individuals from suing to enforce a copyright unless they are the legal owners of an exclusive right under the copyright.³⁰⁸ While copyright owners generally may transfer or assign an exclusive license for any portion of a copyright's divisible bundle of rights, an assignment consisting solely of the bare right to sue is not an exclusive right and, thus, is insufficient to

305. See *supra* text accompanying note 160.

306. MCFARLANE, *supra* note 44, at 79.

307. A vast body of standing case law has developed based both on prudential concerns and constitutional constraints limiting the jurisdiction of the federal courts. One of six general barriers to judicial redress is a bar on third-party standing except where there exists a relationship between the litigant and the third-party and an obstacle to the third party asserting the right. See *Craig v. Boren*, 429 U.S. 190 (1976). While the former appeared true in the *Righthaven* cases because of the sharing of profits with the copyright assignor, the latter requirement could not be met because the type of obstacle that the *Review-Journal* et al. could assert—i.e., that it is costly to monitor and enforce against infringement—would not be sufficient. The other barrier particularly relevant to *Righthaven* is the requirement that a plaintiff show cognizable personal injury. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). If *Righthaven* only held the right to sue the infringer, what harm could *Righthaven* show it suffered to a Section 106 exclusive right? However, though *Righthaven* lacked standing, most copyright trolls will be able to obtain it. See *supra* text accompanying notes 313–315.

308. See 17 U.S.C. § 501(b) (2006); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982), *superseded by rule and statute on other grounds*.

establish standing.³⁰⁹ A right to sue can follow only from the assignment of an exclusive right provided by Section 106 of the Copyright Act (e.g., the right to distribute the copyrighted work in all media, now known or later developed, throughout the universe,³¹⁰ or a smaller subset thereof). Coupled with Article III standing requirements,³¹¹ if an individual obtained only the naked right to sue and no exclusive right to exploit the copyrighted work, infringement would not create a cognizable personal injury for that individual. Her right to exploit the work is not harmed because, in fact, she only has an empty enforcement expectation—an interest that cannot be injured. These requirements led at least eight district court judges in three circuits to find that Righthaven lacked standing to sue infringers because it obtained only “the bare right to bring and profit from copyright infringement actions.”³¹²

However, this deficiency was unique to Righthaven’s formation. The parties simply failed to draft a proper assignment.³¹³ The troll can easily overcome a similar standing challenge by obtaining more than the naked right to sue infringers.³¹⁴ So long as an assignee acquires some exclusive right enumerated in Section 106, he is permitted to sue to recover for a past infringement of that exclusive right.³¹⁵ Thus, when a troll acquires an exclusive right that has been infringed, the standing doctrine provides little protection against troll-related litigation. Moreover, standing provides no bar to claims brought by trolls who created the work for the

309. See *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013); *Silvers*, 402 F.3d at 890; *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980–81 (2d Cir. 1991).

310. This is a fairly standard clause in copyright transfers. See, e.g., AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* (2002); Dionne Searcey & James R. Hagerty, *Lawyerese Goes Galactic as Contracts Try to Master the Universe*, WALL ST. J., Oct. 29, 2009, <http://online.wsj.com/article/SB125658217507308619.html>.

311. U.S. CONST. art. III.; see also *Bowles v. Russell*, 551 U.S. 205, 212 (2007); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *supra* note 307.

312. *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972 (D. Nev. 2011); see also *supra* note 160.

313. *Democratic Underground*, 791 F. Supp. 2d at 973–76.

314. Which the *Las Vegas Review-Journal* demonstrated it would be willing to do. See *supra* text accompanying notes 160–61.

315. See *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980–81 (2d Cir. 1991).

specific purpose of inducing infringement.³¹⁶

2. Champerty

Common law prohibitions on champerty and maintenance offer another potential limitation on copyright trolls. As discussed in Part II.B, the common law prohibited a stranger from carrying on litigation at his own expense in return for a share of the litigation proceeds.³¹⁷ But today these limitations present only a minimal hurdle to trolls. First, the prohibitions are rarely enforced, even when the parties' actions directly implicate the law.³¹⁸ Second, the prohibitions prevent only non-lawyers from financing litigation to gorge upon the profits.³¹⁹ They do not restrain lawyers from enforcing copyrights on contingency,³²⁰ nor do they prohibit anyone—lawyers or non-lawyers—from acquiring copyrights merely to profit from enforcing against infringers. Thus, champerty laws could be applied only to prevent non-lawyers from financing copyright enforcement litigation without acquiring an exclusive right under the Copyright Act.

3. First Amendment

Copyright's speech restrictions are likely to lead some defendants to claim that their infringing uses were constitutionally protected and therefore cannot give rise to liability. This argument is likely particularly from defendants who make a derivative use of the copyrighted work in their own creative expression.³²¹ And, indeed, many private rights of action are limited by the First Amendment, including “the laws of trademarks, trade secrets, the right of publicity, defamation, the right of privacy, tortious interference with business relations, intentional infliction of emotional distress, a private right of action for damages caused by illegal wiretapping, and,

316. *Supra* note 33.

317. *See supra* notes 95–97.

318. *See supra* text accompanying note 100.

319. *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121, 125 (2003); *Painter*, *supra* note 99.

320. *See supra* text accompanying note 98.

321. Conversely, the defense clearly is unavailable in many cases of complete reproduction without alteration, particularly file-sharing.

in some instances, personal and real property.”³²² Accordingly, one could argue that First Amendment values trump any claim a copyright troll has to enforce against an infringer.

However, unlike the aforementioned laws, copyright is not subject to any First Amendment standard of review.³²³ As the Supreme Court has stated repeatedly, the idea/expression dichotomy and the fair use defense are copyright’s “built-in First Amendment accommodations.”³²⁴ The Court suggests that, absent these protections, a question would exist as to whether copyright law is a constitutionally impermissible speech restriction. In light of these internal safety valves, however, the Court has said that no additional First Amendment scrutiny is necessary.³²⁵ Some commentators disagree with this rationale,³²⁶ but the Court is unlikely to change course any time soon.³²⁷ Thus, the First Amendment, except as its values are promoted by fair use and the idea/expression dichotomy, adds no potential limits to the trolls’ copyright claims.

4. Statutory Damages

At least one commentator has argued that trolls could be excised from the United States copyright system by amending the law to remove the availability of statutory damages.³²⁸ In

322. Neil Weinstock Netanel, *Copyright and the First Amendment—What Eldred Misses and Portends*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 130 (Jonathan Griffiths & Uma Suthersanen, eds.) (2005).

323. *See generally* Netanel, *supra* note 281.

324. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)); *see also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

325. *See Golan*, 132 S. Ct. at 890–91; *Eldred*, 537 U.S. at 219–21.

326. *See, e.g.*, Netanel, *supra* note 281; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

327. This rationale was reasserted last term in *Golan*, 132 S. Ct. 873.

328. *See* DeBriyn, *supra* note 11, at 108 (“Removal of statutory damages is the best remedy for both compensating copyright holders and protecting individuals from copyright troll suits for several reasons. First, actual damages are a more accurate measure of the damage caused by infringement than statutory damages. Second, copyright holders are adequately protected without statutory damages. Most importantly, without statutory damages, copyright trolls would lose the incentive to litigate as a business model.”); *see also* Neil Wilkof, *Navigating IP Law in Israel*, in IP CLIENT STRATEGIES IN THE MIDDLE EAST AND AFRICA 186 (2009), available at 2009 WL 2029101, at *5 (arguing that Israel’s new copyright

nineteenth-century England, after all, statutory damages facilitated Thomas Wall's business, which fell apart after Parliament repealed copyright's statutory damages provision.³²⁹ However, such a solution would carry its own consequences. United States copyright law historically has been concerned with the difficulty of proving damages.³³⁰ As the Copyright Office indicated in a 1961 report: "[T]he value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove."³³¹ Though it likely has become easier to prove actual damages following the data revolution,³³² in many cases providing actual damages remains difficult.³³³ Statutory damages, as provided by Section 504 of the Copyright Act, are intended to ensure that copyright owners obtain at least some compensation for infringing activity.

Many scholars and judges argue that statutory damages are poorly anchored to actual damages,³³⁴ leading to absurdly large judgments in file-sharing cases. However, the need for reforming copyright's statutory damages provision extends far beyond their allure to trolls.³³⁵ Among other things, reform

law increasing statutory damages would encourage copyright holders to sue infringers who were not causing any actual damages to the copyright holder—"An Invitation for Copyright Trolls").

329. See *supra* text accompanying note 49.

330. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

331. STAFF OF COPYRIGHT OFFICE, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 102 (Comm. Print 1961).

332. Compare Paul H. Hubbard, *Monetary Recovery Under the Copyright, Patent, and Trademark Acts*, 45 TEX. L. REV. 953, 954 (1967) with Samuelson & Wheatland, *supra* note 330, at 496 ("It is, in fact, remarkably common for courts to consider plaintiff's damages and defendant's profits as part of their assessment of the proper statutory damage award.").

333. See, e.g., *Grace v. Corbis-Sygma*, 487 F.3d 113, 119–20 (2d Cir. 2007); *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183 (1st Cir. 2004); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Md. 2004).

334. See, e.g., *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1048–49 (D. Minn. 2010) (stating that "although Plaintiffs were not required to prove their actual damages, statutory damages must still bear some relation to actual damages."); WILLIAM F. PATRY, 6 PATRY ON COPYRIGHT, § 22:199, at 22-450 ("[M]any court decisions have looked at actual damages as a factor in awarding statutory damages.").

335. See Samuelson & Wheatland, *supra* note 330; Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability*:

should look at reining in the availability of statutory damages in cases in which actual damages are clearly much less than could be recovered under the statute. However, any reform of statutory damages likely would be unpopular in Congress. Beyond being seen as an important tool for preserving author incentives for over a century, statutory damages are favored by the content industries, which have considerable clout in Washington.³³⁶ Even narrow reforms tailored at trolls likely would face strong resistance because of their potential adverse effects on entertainment companies.

The most thoughtful reform targeting trolls—Balganesh’s suggestion to require that non-author plaintiffs prove compensable harm before electing for statutory damages³³⁷—would remove a key incentive for trolls, but it also would increase the burden on many non-troll plaintiffs to prove damages. After all, the content industries are primarily made up of non-authors that purchase copyrights from the original authors and then develop those copyrighted works in numerous forms of media. Imagine a movie studio that purchases all rights related to a popular children’s book and then develops that book into a movie (with sequels) and licenses the rights to comics, toys, and music based on the movies. The underlying work is then infringed repeatedly: bootleg copies of the movie, an unauthorized off-Broadway musical, a street mural of the protagonist, etc. Neither the studio nor its licensees could sue the infringers without proving some degree of actual damages. They likely could overcome such a burden in most cases, and this could have the ancillary benefit of reducing outrageous jury awards in file-sharing cases.³³⁸ But needing to prove

Balancing Copyright and Innovation in the Digital Age, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 268 (2009); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregate Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004) (explaining that, while statutory damages reform should be on Congress’s agenda, courts need not wait for congressional action to address troll-related harms).

336. There is a reason that Lawrence Lessig referred to the Copyright Term Extension Act of 1998, which retroactively added twenty years to the copyright term for works already under copyright, as the “Mickey Mouse Protection Act.” See Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001); see also Samuelson, *supra* note 18, at 755; Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 3–10 (Fiona Macmillan ed., 2007).

337. See Balganesh, *supra* note 18, at 773–78.

338. See *supra* note 41.

damages would increase the costs of enforcing copyrights of commercially valuable works, thereby reducing incentives for works more likely to have been motivated by copyright and to add to the cultural catalog of creative expression as the Founders intended.

The alternative that requires no legislative action—judges reforming their application of Section 504 by looking to cases that have awarded smaller statutory damages³³⁹—has utility. But as a deterrent to trolls, the measure is limited because, even if universally adopted, such reform would only lessen profits for trolls, not remove them. Without erasing the availability of all litigation- and settlement-based profits for trolls, they will continue to find the copyright system profitable.

C. *The Case for Fair Use*

Despite the manner in which fair use analysis tilts overwhelmingly against a troll plaintiff, to date the defense has not been a panacea. Worse yet, Balganesch argues, the uncertainty of how courts will apply fair use was “structurally facilitative of Righthaven’s strategy.”³⁴⁰ The thinking goes like this: rarely would a court find a complete duplication without alteration to be a fair use and, even if a court might, presenting a fair use defense would be costly and the outcome uncertain. This, in turn, would lead even defendants with strong fair use defenses to settle claims and, prospectively, to avoid using the copyrighted work altogether.³⁴¹

There are at least two flaws with this argument. One is the premise that trolls only target users who reproduce a copyrighted work in its entirety. In many instances, Righthaven sued individuals who had only excerpted a copyrighted work.³⁴² Because the amount of the copyrighted

339. Consistent with what Pamela Samuelson and Tara Wheatland say are the penal, deterrent, and compensatory functions of the Copyright Act and the Supreme Court’s due process jurisprudence. See Samuelson & Wheatland, *supra* note 330, at 498–508.

340. Balganesch, *supra* note 18, at 743.

341. *Id.*

342. See, e.g., *Righthaven v. Democratic Underground*, No. 2:10-cv-01356-RLH (GWF) (D. Nev. Mar. 9, 2012) (holding that “the act of posting this five-sentence excerpt of a fifty sentence news article on a political discussion forum is a fair use pursuant to 17 U.S.C. § 107”).

work used is a relevant factor in fair use analysis, the fair use doctrine likely is more valuable to defendants who do not copy the entire work. Second, Balganesch's discussion of fair use overlooks the doctrine's emphasis on policy considerations in evaluating whether to excuse the infringing use and does not contemplate how the troll's interest in profiting solely from ex post licensing and litigation affects the analysis of market harm and transformativeness.

Nonetheless, Balganesch's argument highlights that fair use is a flexible doctrine, and will remain so without Congressional action. Its strength, as highlighted by this Article, is that judges can adjust it to keep the application of copyright law in line with policy goals as technology and circumstances change over time. But that strength also can be a weakness. Lack of uniform adoption of a fair use presumption would mean that some users still could be cast into the position of having to litigate a fair use defense. And, to be sure, unsophisticated copyright users and those sued by the so-called porn copyright trolls are still unlikely to assert a fair use defense in Court.³⁴³

But the benefit of judges more expansively applying fair use doctrine to copyright trolls is that such potential defendants likely will not get sued in the first place. Indeed, since Judge Otis Wright of the United States District Court for the Central District of California, in a scathing order, sanctioned Prenda Law for lying and forging the signature on a copyright assignment filed with the court,³⁴⁴ at least one other district court has come down hard on Prenda lawyers in similar porn copyright trolling.³⁴⁵ Prenda subsequently alleged that it

343. The former because they likely do not know about the scope of fair use and the latter because of the shame element.

344. *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *3–4 (C.D. Cal. May 6, 2013).

345. *See, e.g., AF Holdings LLC v. John Doe*, Nos. 0:12-cv-01445-JNE-FLN (D. Minn. June 20, 2013) (reopening five dismissed cases to reevaluate the settlements based on a concern that the plaintiff may have obtained discovery orders based on forged documents). *See also* Ken White, *Prenda Law: The Sound of One Shoe Dropping*, POPEHAT (May 20, 2013), <http://www.popehat.com/2013/05/20/prenda-law-the-sound-of-one-shoe-dropping/> (noting that the Ninth Circuit had ordered a Prenda lawyer's "application for admission be held in abeyance" pending Judge Wright's referring the attorney to the Minnesota State Bar and the Central District of California Standing Committee on Discipline). To be sure, Prenda's troubles were not related to Righthaven's primary pitfall—standing doctrine—or to the application of fair use proffered in this Article. Instead, Prenda's problems arose from a basic disregard of a lawyer's responsibilities as an

could not afford the \$237,000 appeal bond required by Judge Wright,³⁴⁶ despite previous reports that Prenda had raked in “a few million” dollars on these lawsuits.³⁴⁷ So long as some, particularly prominent, judges require trolls to rebut a fair use presumption, trolls quickly will find the copyright system much less attractive. Inverting the equation, trolls would be the ones worried about fair use’s uncertain application—practically, an anticipated presumption is no better for trolls than a guaranteed presumption. Either way, they have to evaluate the costly risk of being able to overcome a presumed fair use. Coupled with copyright law’s fee-shifting provision that enables meritorious defendants to recover fees and costs from plaintiffs,³⁴⁸ a few of these losses would quickly add up, as they did for Righthaven. This, in turn, would push trolls out of the system and reduce the risks that all authors face.³⁴⁹

Beyond being doctrinally sound, a fair use presumption also is theoretically sound. The leading theory of fair use is that the doctrine is a vehicle for authorizing reproductions and derivative uses when market failure would otherwise make it impossible for the secondary user to obtain a license to the copyrighted work.³⁵⁰ Put another way, if transaction costs are

officer of the court.

346. Joe Mullin, *Prenda Law is ‘Winding Down’ and Desperate to Avoid a Costly Appeal*, ARS TECHNICA (June 15, 2013, 9:15 AM), <http://arstechnica.com/tech-policy/2013/06/prenda-law-winding-down-is-desperate-to-avoid-a-costly-appeal/>.

347. Kashmir Hill, *How Porn Copyright Lawyer John Steele has Made a Few Million Dollars Pursuing (Sometimes Innocent) ‘Porn Pirates’*, FORBES, Oct. 15, 2012, <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.

348. See 17 U.S.C. § 505 (2006). For further discussion of how fee shifting could discourage a plaintiff from challenging a fair use, see Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 101 CAL. L. REV. (forthcoming 2014) (proposing that a plaintiff who sues after rejecting a reasonable license fee bear litigation costs).

349. Chief Judge Randall Rader of the Federal Circuit and law professors Colleen Chien and David Hricik have made a similar argument to curb patent troll abuses by shifting the costs of litigation. *Make Patent Trolls Pay in Court*, N.Y. TIMES, June 4, 2013, <http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html>; see also Colleen V. Chien, *Reforming Software Patents*, 50 HOUS. L. REV. 325 (2012).

350. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982) (“Only where the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market’s ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconsensual

prohibitively high—for example, Google cannot feasibly locate owners of orphan works that it wants to include in Google Book Search or a blogger writing critically of the local newspaper either could get permission to quote an editorial embarrassing to the newspaper—then fair use should step in so that the secondary use is allowed. Under the market-failure theory, trolls should be subjected to a fair use presumption because, by definition, they lack a bona fide licensing program and, therefore, the market has irreparably failed.

An alternative but related consequentialist theory of fair use is the public benefit theory, which says “fair use is justified by the broader societal goal of promoting substantive values such as critique, research, education, and dissemination of knowledge.”³⁵¹ Under the public benefit theory, trolls should be subjected to a fair use presumption because their litigation-based business does not promote the progress of culture and knowledge. Recall again the Google Book Search hypothetical: countless books that Google included in its online library were out of print and no longer commercially available, even though they were still under copyright.³⁵² For anyone with an Internet connection, Google Book Search would make these books readable again. Thus, the project serves societal goals of education and dissemination of knowledge. If trolls were able to obtain copyrights in those unavailable but protected works, they could hold up the entire project and keep the information in those books out of public discourse. Less abstractly, trolls threaten to chill speech related not only to colorably fair uses of protected expression but also to the ideas and facts included in the expression. Thus, under the public benefit theory, trolls should be required to overcome a fair use presumption because the societal costs of their activities outweigh the benefits and, moreover, may directly prevent access to valuable works.

A fair use presumption would flip troll economics on its head. Coupled with copyright law’s fee-shifting provision enabling meritorious defendants to recover fees and costs from plaintiffs, the fair use presumption would act as a substantial deterrent to trolls. Trolls would be the ones faced with making the cost-benefit evaluation before proceeding: is this potential

transfer. Thus, one of the necessary preconditions for premising fair use on economic grounds is that market failure must be present.”)

351. Joseph P. Liu, *Copyright and Time*, 101 MICH. L. REV. 409, 457 (2002).

352. See *supra* Part II.C.2.

infringement unlikely to qualify as a fair use, and is it worth the costs related to discovery and motion practice to overcome this preliminary burden of proof? Rebutting the presumption would cost time and money, removing the prospect of quick, profitable settlements for infringements of commercially valueless and cheap-to-acquire works. The presumption would prevent trolls from exploiting copyright law for purposes not contemplated by copyright law and would discourage them from frivolously participating in the copyright system altogether. This, in turn, would reduce the threat of chilled speech and curbed technological innovation—exactly the purpose for which judges crafted the fair use doctrine and Congress left flexible its application.³⁵³

CONCLUSION

Copyright trolls have made their presence known, in no more conspicuous a way than the hundreds of infringement actions brought by Righthaven. Their methods pose a substantial danger to the copyright system and the creative expression that it aims to engender. As in the patent system, copyright trolls threaten to raise the costs of creation and to frighten some contributors out of the market—both chilling speech and discouraging innovation. For the reasons discussed, the fair use doctrine is equipped to mitigate the spread of copyright trolls. Congress explicitly left to judges the authority to continue adapting fair use in the interests of equity and the promotion of copyright objectives. Finding that fair use raises a presumptive bar to troll-related litigation is both doctrinally and theoretically sound. It can also be done without needing to wait for legislative help,³⁵⁴ help that in the copyright realm has “an inconsistent track record at best.”³⁵⁵ Judges can, and should, start applying the fair use presumption now.

353. See *supra* text accompanying notes 257–63.

354. This Congress is the most gridlocked in history. See Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES, July 7, 2013, http://www.nytimes.com/2013/07/08/us/politics/in-congress-gridlock-and-harsh-consequences.html?pagewanted=all&_r=1& (“At this time in 2011, Congress had passed twenty-three laws on the way toward the lowest total since those numbers began being tracked in 1948. This year, fifteen have been passed so far.”).

355. Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 925 (2011).