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COPYRIGHT TROLLS, DEFINING THE LINE BETWEEN LEGAL RANSOM LETTERS AND DEFENDING DIGITAL RIGHTS: TURNING PIRACY INTO A BUSINESS MODEL OR PROTECTING CREATIVE FROM INTERNET LAWLESSNESS?

LUKE S. CURRAN

ABSTRACT

The scarlet letter of the term “troll” has long been affixed to the lapel of businesses within the patent context. This pejorative term, however, has had little relevance or widespread public recognition within the domain of copyright law until 2010. Since the awakening of the “copyright troll,” several non-author rights holders have recently adopted and propagated a substantially modified version of this sue-to-settle paradigm within the context of copyright law while introducing it to the scale of mass-litigation. Further, the amorphous term “copyright troll” traditionally characterizes a business practice of acquiring unenforced copyrights that are being infringed upon through various online media vehicles while monetizing the fundamental disconnect between the current copyright law and Internet users’ behavioral norms. Without typically authoring original works of expression, these businesses seek to extract rapid settlements from a nexus of antiquated intellectual property laws while chilling free speech and disincentivizing innovation. As a result of creative manipulation, both the original policy-backed intentions instilled by the Framers within the 1976 Act and the delicate balance between hyper- and hypo-enforcement have been patently disrupted. Moreover, the ramifications of “troll” litigation tactics have ensnared countless innocent users into costly litigation and settling unwarranted claims to avoid being perpetually associated with the illegal activity of online copyright infringement. As the scope of online copyright infringement continues to exponentially expand, this legal uncertainty acts as a catalyst for those willing to probe the outskirts of the Act. This comment focuses on three specific businesses publicly labeled as “copyright trolls,” details their evolution from hyperlinking to peer-to-peer file-sharing, and analyzes the current state of copyright law in the realm of the digital marketplace.

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INTRODUCTION

Imagine yourself in 2010. You are casually enjoying a coffee while surfing your preferred online news sources for the latest newsworthy article on a topic that interests you. Suddenly, you locate an article that piques your interest and you decide to share it online through your website, blog, social network, or with any discourse community of your choice. Through any one of these media vehicles, you choose to directly quote a portion of the story and include a hyperlink to the news article so others may read it in full. Regardless of the medium used to share the content, like countless Internet users, you could potentially find a settlement letter in your mailbox claiming that you infringed upon a copyright, which is punishable up to \$150,000 in statutory damages.¹

Take yourself to present day. Perform a standard Internet search of your favorite television series or movie and include the phrase “watch online free.” In seconds, you will be able to stream or download almost any film or TV series online without paying a noncommercial use levy. You will be practicing the most basic form of online copyright infringement, along with thousands of other Internet users on a daily basis.² As a result, the next time you step outside to check your mailbox, you may find a settlement letter pressuring you to pay several thousand dollars in order to avoid costly litigation in federal court.³

* © Luke S. Curran 2013. J.D. Candidate, January 2015, The John Marshall Law School. B.F.A. in Electronic Media, University of Cincinnati, Cincinnati, Ohio. I would like to personally thank the staff of The John Marshall Review of Intellectual Property Law for their invaluable editorial assistance and direction. Further, I would like to specifically express my gratitude to Alan Cooper for providing inspiration and creative guidance in preparing this comment. Any mistakes found in this article are my own.

¹ Remedies for Infringement: Damages and Profits, 17 U.S.C. § 504(c)(2) (2012).

² See David Price, *Technical Report: An Estimate of Infringing Use of the Internet*, ENVISIONAL 2 (Jan. 2011), http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (approximating that BitTorrent accounted for nearly half of the 23.8% of global Internet that infringed in 2009). BitTorrent represented 11.4% of global Internet traffic, cyberlocker traffic accounted for 5.1% of infringing traffic, video streaming sites accounted for 1.4%, and other P2P file-sharing networks were responsible for the remainder. *Id.* at 2–3.

³ Letter from Paul Duffy, Attorney & Counselor at Law, Duffy Law Grp. (Apr. 18, 2013), available at <http://fightcopyrighttrolls.com/2013/04/23/lw-system-v-hubbard-from-adam-urbanczyk-signed-agreed-order-to-the-new-breed-of-demand-letters/comment-page-1/> [hereinafter Duffy Law Letter] (stating that the Paul Duffy Firm is authorized to accept the sum of \$2,400 as full settlement for the client’s infringement claims); Letter from Paul Duffy, Attorney & Counselor at Law, Prenda Law Inc. (Nov. 2012), <http://www.scribd.com/doc/113957135/Prenda> (claiming within the settlement letter that an alleged infringer ignored the settlement and the Northern District of Illinois entered a

Recently, several businesses have been publicly branded as “copyright trolls,” including companies such as Righthaven,⁴ Prenda Law,⁵ and Malibu Media.⁶ The amorphous term “copyright troll” has been traditionally defined in legal publications and the national media as “a non-producer who merely has acquired the right to bring lawsuits against alleged infringers” and threatens to file copyright infringement claims in order to induce rapid settlements against large groups of anonymous defendants without the intention of proceeding to trial on the merits.⁷ Furthermore, these companies have commenced an influx of litigation based upon the claim that reposting a news article or allegedly downloading online content is a form of copyright infringement.⁸ This can potentially transform the average “cybernaut[]” into a “grand larcenist”⁹ among a “nation of constant infringers,”¹⁰ because on a typical day, “even the most law-abiding American engages in thousands

judgment of \$1.5 million against him); Letter from Mike Meier, Attorney, Copyright Law Grp. (Jan. 12, 2012), http://diertrolldie.files.wordpress.com/2012/03/clg_settlement_ltr_01833.pdf (offering to settle an infringement claim for \$2,500 for downloading Plaintiff’s copyrighted adult film); Letter from Paul Lesko, Attorney at Law, Simmons Browder Gianaris Angelides & Barnerd LLC (June 2013), http://diertrolldie.files.wordpress.com/2013/08/lesko_settleltr_02501il.pdf (seeking a \$4,000 settlement to avoid prosecution for online copyright infringement).

⁴ See, e.g., Eva Galperin, *EFF Seeks to Help Righthaven Defendants*, ELEC. FRONTIER FOUND. (Aug. 25, 2010), <https://www.eff.org/deeplinks/2010/08/eff-seeks-righthaven-defendants> (labeling Righthaven a copyright troll for filing hundreds of online copyright infringement suits yearly for the sole purpose of pressured settlement through the threat of statutory damages awards).

⁵ See, e.g., Kurt Opsahl, *EFF to Represent Bloggers Against Copyright Troll*, ELEC. FRONTIER FOUND. (Mar. 11, 2013), <https://www.eff.org/press/releases/eff-represent-bloggers-against-copyright-troll>. Prenda Law was named a “copyright troll” due to tactics that include “targeting large groups of anonymous ‘John Doe’ defendants for downloading files on BitTorrent, seeking their identities, and exploiting the massive damages in copyright law in order to pressure defendants into settling quickly.” *Id.*

⁶ *Malibu Media Lawsuit*, PIETZ LAW FIRM, <http://pietzlawfirm.com/copyright/malibu-media-lawsuit/> (last updated Jan. 4, 2013). The Pietz Law Firm has publicly labeled Malibu Media as a copyright trolling company and represents John Doe defendants in the Eastern District of Michigan, the Northern District of Illinois, the District of the District of Columbia, the Eastern District of California, and the Southern District of California. *Id.*

⁷ *Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 3038025, at *1–2 (E.D. Pa. June 18, 2013) (emphasizing that a copyright troll is traditionally defined as a non-producer who has acquired the right to bring lawsuits against alleged copyright infringers); see also Order Issuing Sanctions at 5, *Ingenuity 13, LLC, v. John Doe*, No. 2:12-cv-8333-ODW(JCx) (C.D. Cal. May 6, 2013) [hereinafter *Ingenuity Sanctions Order*] (stating that a particular copyright troll exploited copyright law by accusing individuals of illegally downloading a protected work, offering to settle the claim for a calculated cost just below “the cost of a bare-bones defense,” and forcing the alleged infringers to settle in order to avoid a “paralyzing social stigma”).

⁸ See, e.g., Michael Masnick, *Just Under 100,000 Sued In Mass Copyright Infringement Suits Since Start of 2010*, TECHDIRT (Jan. 31, 2011, 8:40 AM), <http://www.techdirt.com/articles/20110129/23354512882/just-under-100000-sued-mass-copyright-infringement-suits-since-start-2010.shtml> (emphasizing that between January 1, 2010 and January 31, 2011, 99,924 “John Does” have been sued for online copyright infringement).

⁹ John Tehranian, *Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 538, 539 (2007). Professor Tehranian stresses that heavy Internet users or cybernauts’ “ease of digital reproduction has enabled piracy on a scale never before witnessed in human history” while identifying a “fundamental disconnect between our copyright laws and our copyright norms [that] has grown increasingly apparent and has highlighted the need for reform.” *Id.* at 538, 543.

¹⁰ *Id.* at 543.

of actions that likely constitute copyright infringement.”¹¹ The objective of copyright law is to create public benefits by “promot[ing] the Progress of Science” through the creation and publication of free expression.¹² According to the U.S. Supreme Court, copyright law is designed to “create incentives for creative effort.”¹³ Conversely, this law also creates a latent financial incentive for entrepreneurs to monetize a protected work that is being allegedly infringed by engaging in large-scale litigation, even when the harm experienced by the rights holder is nominal.

Further, viewing copyright law in the realm of the Internet, this technology can be bifurcated into a “dual purpose,” which grants users the choice between infringing and utilizing the Internet for its “perfectly lawful and socially desirable uses.”¹⁴ This legal partition raises the central issue: whether the companies publicly stigmatized as “copyright trolls” are defending creative rights or turning online piracy into an extortionate mass-litigation business model in the epoch of statutory damages.

Part I of this comment will briefly provide background on the relevant copyright law and outline the recent precedent established by two landmark copyright troll companies. Part II will examine the progression of the copyright troll business model against its effects on digital rights in the sphere of Internet lawlessness. Part III will survey several solutions and propose a substantial revision to the existing approach to regulating this form of mass-litigation leading to pressured settlements. Part IV sets forth a brief conclusion stressing the importance of closing the divide separating online users’ behavioral norms and the protections afforded to copyright owners in order to manifest a careful balance between the interests of authors and the interest of the audience.

I. BACKGROUND

A. Copyright Act of 1976

As mentioned in the Introduction, the United States Constitution empowers Congress with the authority “[t]o promote the Progress of Science and useful Arts, by

¹¹ *Id.* at 543 (observing that “widespread use of peer-to-peer (P2P) file-sharing technology, which has enabled ordinary Americans to become mass copyright infringers with spectacular ease, has brought the law/norm gap to light”).

¹² U.S. CONST. art. I, § 8, cl. 8; *see also* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (noting that constitutional framers intended copyright itself to be the “engine of free expression,” and in creating a “marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”).

¹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (viewing copyright use through its effect upon the potential market for or value of the work in a commercial setting).

¹⁴ Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 578–79 (2008) (referring to technology as intrinsically neutral in a business setting because it is not “inherently pernicious” and can be employed for perfectly lawful purposes). The article raises the issue of whether society can reach a “happy medium” and foster both authorship by enforcing copyrights while promoting technological innovation. *Id.* at 579.

securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁵ This excerpt of the Constitution is historically recognized as the “Intellectual Property Clause.”¹⁶ The Copyright Act of 1976 (“Copyright Act”) regulates copyrighted works,¹⁷ and safeguards “original works of authorship fixed in any tangible medium of expression,”¹⁸ which includes but is not limited to literary works and motion pictures.¹⁹ These protections grant rights holders a bundle of exclusive rights, including the right to create reproductions, derivative works, and distributions of the copyrighted work.²⁰ Infringement claims can be successfully brought against “anyone who violates any of the exclusive rights of the copyright owner,”²¹ unless the infringer has a valid defense.²²

The Copyright Act also affords rights holders two options for remedies in the event there is an infringement on any of the owner’s exclusive rights.²³ The copyright owner may elect to recover either: 1) actual damages resulting from the infringement, which are accompanied by any profits gained by the violator that are

¹⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁶ *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1137 (N.D. Cal. 2002) (noting that courts refer to this constitutional provision as the intellectual property clause due to the protections it affords to creative works).

¹⁷ 17 U.S.C. § 102(a) (2012).

¹⁸ 17 U.S.C. § 101. The statute states:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.

¹⁹ 17 U.S.C. § 102(a) (indicating that works of authorship include the following: “(1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works”).

²⁰ 17 U.S.C. §§ 107–122 (covering limitations on exclusive rights and scope of exclusive rights). The Copyright Act states:

[A] “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101.

²¹ 17 U.S.C. § 501 (stating that “the legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411 [17 USCS § 411], to institute an action for any infringement of that particular right committed while he or she is the owner of it”).

²² 17 U.S.C. § 107 (noting that fair use is an affirmative defense to a copyright infringement suit that allows the use of a copyrighted work by a person other than the rights holder for “purposes such as criticism, comment, news reporting, teaching, scholarship, or research”).

²³ 17 U.S.C. § 504 (2012).

attributable to the infringement; or 2) statutory damages.²⁴ Statutory damages are typically within the range of \$750 to \$30,000 as the court considers just.²⁵ Conversely, if the rights owner establishes the burden of proving that the infringer acted willfully,²⁶ the court in its discretion may increase the damages award up to \$150,000.²⁷ The “legal or beneficial owner of an exclusive right under a copyright” can sue for copyright infringement.²⁸

B. Vexatious Litigation: Awakening the Copyright Troll

The Copyright Act has adopted an acutely protective approach enabling copyright holders to “preserve or capture a large proportion of the economic rents generated by their intellectual property.”²⁹ As a result, online copyright trolls creatively exploit copyright safeguards by employing a profit-based model for litigation in order to “maximize the economic profits that result from their exclusivity”³⁰ while completely disregarding the fundamental copyright protections for any other purpose.³¹ Mirroring the patent trolls’ modus operandi,³² copyright trolls procure an expansive range of copyrights that are being infringed and find large groups of alleged third party-infringers.³³ They then pressure such alleged infringers into settlement through the threat of statutory damages. They do not send

²⁴ 17 U.S.C. § 504.

²⁵ 17 U.S.C. § 504(c)(1).

²⁶ 17 U.S.C. § 504(c)(2). But, “[i]n a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages.” *Id.*

²⁷ *Id.*

²⁸ *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc); *see also* 17 U.S.C. 501(b).

²⁹ Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689, 690 (2006); *see also* Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1493 (2004) (noting that “copyright protection has only expanded over time and that trend is likely to continue or even accelerate”).

³⁰ Thomas *supra* note 29, at 693 (emphasizing that intellectual property law “also induces rent-seeking behavior” as copyright holders take steps to increase profits by pursuing legal strategies that maximize intellectual property related revenues).

³¹ *See id.* at 692–93 (explaining that patent trolls are “nonproductive patent consolidators who acquire patents allegedly for the purpose of extorting a substantial settlement or judgment from productive companies”).

³² 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, 189–90 (2006) (defining a patent troll as a person or entity who acquires ownership of a patent “without the intention of actually using it to produce a product”). The patent troll then either “licenses the technology to a person or entity that will incorporate the patent into a product, or it sues a person believed to already have incorporated the technology in a product without permission. . . . Critics argue that patent trolls do not promote innovation and are causing excessive, baseless litigation.” *Id.*

³³ First Amended Complaint for Copyright Infringement at 1, *Voltage Pictures, LLC v. Vasquez*, No. 1:10-cv-00873 (D.D.C. Apr. 22, 2011), ECF No. 143-1. Voltage Pictures filed a copyright infringement suit against 24,595 defendants for illegally distributing the movie “The Hurt Locker.” *Id.*

cease and desist letters to the accused individuals, nor do they send Digital Millennium Copyright Act (“DMCA”) takedown notices to Internet Service Providers (“ISPs”).³⁴ Notably, the general public has recently affixed the scarlet letter of the copyright troll to the lapel of three companies with mass-litigation business models.

C. Righthaven LLC, The Hyperlink Trolling Firm

Steve Gibson founded Righthaven LLC on January 14, 2010.³⁵ A Las Vegas-based lawyer and the company’s Chief Executive Officer,³⁶ Gibson sought to “take advantage of copyright’s draconian damages in order to bully Internet users into forking over money” and website domain names.³⁷ The company would seek out various newspapers that owned the copyrights to articles that were being reposted or referenced online by readers, primarily the *Las Vegas Review-Journal* (“LVR-J”), and send settlement letters to the hyperlinkers.³⁸ These letters used the threat of statutory damages as a fulcrum to pressure these readers into settlement for approximately \$2,000–\$5,000.³⁹ Strategically, this settlement range is substantially less than the costs incurred by litigating a copyright infringement suit and is accompanied by the benefit of precluding the possibility of losing the suit.⁴⁰ By 2011, Righthaven demonstrated its initial success by filing 276 copyright infringement suits, which accrued approximately \$352,500 in money settlements based on 141 cases.⁴¹

³⁴ See Richard Esguerra, *Righthaven’s Brand of Copyright Trolling*, ELEC. FRONTIER FOUND. (Sept. 2, 2010), <https://www.eff.org/deeplinks/2010/09/righthavens-own-brand-copyright-trolling> (observing that traditionally, copyright holders send cease and desist letters to allow the website operator or targeted user to remove the infringing content instead of filing a lawsuit without warning); 17 U.S.C. § 512(c), (g) (2012) (providing the alleged infringer with notice of the copyright violation places limitations on liability relating to material online).

³⁵ Incorporation information for Righthaven, LLC, NEV. SECRETARY ST., <http://nvsos.gov/sosentitysearch/CorpSearch.aspx> (search “Righthaven” under entity name, select “Righthaven LLC” hyperlink); see also John P. Pullen, *Las Vegas’s Copyright Crapshoot Could Maim Social Media*, FORTUNE (Jan. 6, 2011), <http://tech.fortune.cnn.com/2011/01/06/las-vegass-copyright-crapshoot-could-maim-social-media/>. Righthaven is owned by two entities: Net Sortie Systems, a limited liability company owned by Steve Gibson, and SI Content Monitor, which is owned by the same group that owns the Las Vegas Review-Journal. *Id.*

³⁶ Pullen, *supra* note 35.

³⁷ See Esguerra *supra* note 34 (referring to the maximum statutory damages award and requests to transfer rights to defendants’ domain names); *Righthaven, LLC v. DiBiase*, No. 2:10-cv-01343-RLH-PAL, 2011 WL 1458778, at *5 (D. Nev. Apr. 15, 2011) (observing that “Congress has never expressly granted plaintiffs in copyright infringement cases the right to seize control over the defendant’s website domain”).

³⁸ See Esguerra, *supra* note 34 (noting that Righthaven’s strategic formula of bringing several hundred lawsuits in Nevada federal court on behalf of newspaper publishers and alleging copyright infringement).

³⁹ See Galperin, *supra* note 4.

⁴⁰ See Opsahl, *supra* note 5 (observing that by filing a large volume of minor infringement claims against out-of-state defendants, Righthaven places the defendants in a situation where litigating the copyright suit exceeds the value of the disputed claims).

⁴¹ *Welcome to Righthaven Lawsuits*, RIGHTHAVEN LAWSUITS, <http://www.righthavenlawsuits.com> (last visited Oct. 5, 2013). Righthaven Lawsuits documents a

However, this sue-first strategy was abruptly halted with *Righthaven LLC v. Democratic Underground, LLC*, due to the pivotal contention over “standing to bring [suit].”⁴² Although Righthaven previously overcame similar attacks including personal jurisdiction or subject matter jurisdiction as seen in *Righthaven LLC v. Majorwager.com*,⁴³ the Democratic Underground (“DU”) case represented the beginning of Righthaven’s fall towards insolvency.⁴⁴ In that case, Righthaven filed an infringement suit against DU for a post on its website containing an excerpt from a LVR-J article accompanied by a link to the full article.⁴⁵ On June 14, 2011, the U.S. District Court for the District of Nevada dismissed Righthaven’s case in its entirety based upon the procedural dispute of subject-matter jurisdiction and lack of standing, which ultimately dismantled Righthaven’s business model.⁴⁶ The court reasoned that since Righthaven was the assignee of the copyright in question under a

comprehensive catalogue of cases filed by Righthaven LLC. *Id.* The website conservatively estimates the total settlement figure based on an educated calculation of an average of \$2,500 per case settled. *Id.*; see also Michael Masnick, *Righthaven Copyrights “Sold” Back to Stephens Media for \$80k To Pay Legal Fees*, TECHDIRT (Mar. 18, 2013, 7:39AM), <http://www.techdirt.com/articles/20130316/02363422348/righthaven-copyrights-sold-back-to-stephens-media-80k-to-pay-legal-fees.shtml>.

⁴² *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972 (D. Nev. 2011). The court addresses the Strategic Alliance Agreement and the question of Righthaven’s standing to pursue the copyright infringement claim because “the right to sue is not one of the exclusive rights, transfer solely of the right to sue does not confer standing on the assignee.” *Id.* at 972–73. Pursuant to Section 501(b) of the Copyright Act, “only the legal or beneficial owner of an exclusive right under copyright law is entitled, or has standing, to sue for infringement.” *Id.* (citing *Silvers v. Sony Pictures Entm’t.*, 402 F.3d 881, 884 (9th Cir. 2004)); see also *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991) (saying that “the Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf.”).

⁴³ *Righthaven, LLC v. Majorwager.com, Inc.*, No. 2:10-CV-00484-GMN, 2010 WL 4386499, at *5 (D. Nev. Oct. 28, 2010). In a number of cases, the courts found that the court has personal jurisdiction over defendants when that the infringement occurred in the United States, the copyright was registered in the United States, and the defendant(s) have not overcome the presumption of reasonableness. See *Righthaven, LLC v. Mostofi*, No. 2:10-CV-01066-KJD-GWF, 2011 WL 1098971, at *3 (D. Nev. Mar. 22, 2011); *Righthaven, LLC v. Indus. Wind Action Corp.*, No. 2:10-CV-00601-RLH-PAL, 2010 WL 3829411, at *1 (D. Nev. Sept. 24, 2010); *Righthaven, LLC v. Vote for the Worst, LLC*, No. 2:10-CV-01045-KJD, 2011 WL 1304463, at *4 (D. Nev. Mar. 30, 2011).

⁴⁴ Plaintiff Righthaven LLC’s Motion for Stay of Judgment Pending Appeal Pursuant to Fed. R. of App. P. 8(a) at 14–15, *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. June 20, 2011), available at http://www.wired.com/images_blogs/threatlevel/2011/09/righthavenbankruptcy.pdf. The Motion states that judgment enforcement efforts to seize and liquidate assets directed at Righthaven during a pending appeal would “strike at the very foundation of the company and would likely force Righthaven to seek bankruptcy protection.”

⁴⁵ *Democratic Underground*, 791 F. Supp. 2d at 971. DU hosts a news website allowing Internet users to freely post comments about news articles and permits users to post hyperlinks to other websites. *Id.* In that case, a user posted a link to a full article on DU’s website that included a portion of a LVR-J article about Nevada politics and the Tea Party effect on Sharon Angle’s senatorial campaign. *Id.*

⁴⁶ *Id.* at 971–72 (Righthaven formed a Strategic Alliance Agreement with LVR-J, which granted Righthaven an exclusive license to exploit “[a]ssigned Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the . . . Assigned Copyrights other than the right to proceeds in association with a Recovery.”) (emphasis in original).

Strategic Alliance Agreement (“SAA”) with LVR-J,⁴⁷ only the “beneficial owner of an exclusive right under copyright law is entitled, or has standing to sue.”⁴⁸

D. Prenda Law, The Porn Trolling Firm

Prenda Law has also joined the ranks among the companies labeled as copyright trolls by learning vicariously from the Righthaven business model before filing a number of pornography-related infringement suits for clients such as AF Holdings, LLC, and Ingenuity 13, LLC.⁴⁹ On August 6, 2012, in *AF Holdings LLC v. Does*,⁵⁰ the U.S. District Court for the District of Columbia granted Prenda Law’s motion to compel an Internet Service Provider (“ISP”) to comply with plaintiff’s subpoena because it was not an “undue burden.”⁵¹ Consequently, the ISP was required to disclose information regarding the identity of 1,058 individuals who allegedly downloaded and distributed the plaintiffs’ obscure adult film entitled “Popular Demand” through BitTorrent.⁵² As a result, Prenda Law’s business model was not disrupted, and the firm continues to disperse extortionate settlement letters to alleged infringers, many of whom settle out of fear of being associated with pornography.⁵³ The plaintiffs could not easily rid themselves of the suit, as the court

⁴⁷ *Id.* (SAA governed future copyright assignments between Righthaven and LRV-J, detailed the relationship between the parties, outlined the rights and responsibilities of each party, and it limited and explained the intent behind the assignment executed in July 2010).

⁴⁸ *Id.* at 972–74, 976 (noting that the SAA prevents Righthaven from obtaining any of the exclusive rights necessary to maintain standing in a copyright infringement action because Righthaven did not “obtain any rights other than the bare right to sue”).

⁴⁹ Joe Patrice, *Judge Threatens Alleged Copyright Troll With Jail Over Porn Complaints*, ABOVE THE LAW, (Feb. 12, 2013, 12:47 PM), <http://abovethelaw.com/2013/02/judge-threatens-alleged-copyright-troll-with-jail-over-porn-complaints/>. Prenda Law is a successor to Steele Hansmeier that files a “number of suits on behalf of clients such as AF Holdings, alleging copyright infringement” against “John Does” to secure settlements because the average person accused of downloading porn prefers to avoid public record. *Id.* AF Holdings is incorporated in the Caribbean, which makes its corporate structure much more difficult to probe and does not take measures to ensure copyright theft actually took place. *Id.*

⁵⁰ *AF Holdings LLC v. Does*, 286 F.R.D. 39, 64 (D.D.C. 2012).

⁵¹ *Id.* at 50 (holding that the complaint sufficiently alleged prima facie allegations of copyright infringement and since there are no named defendants, the plaintiff must obtain information necessary to identify the alleged copyright infringers in order to proceed with the lawsuit); *see also* FED. R. CIV. P. 45(c)(3)(A)(iv) (stating that “on timely motion, the issuing court must quash or modify a subpoena that . . . subjects a person to undue burden”); *In re AOL, LLC*, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008) (holding that “[w]hen a non-party claims that a subpoena is burdensome and oppressive, the non-party must support its claim by showing how production would be burdensome”).

⁵² *AF Holdings*, 286 F.R.D. at 54 (recognizing that BitTorrent is an online peer-to-peer file-sharing protocol that allows users to download files through a “piecemeal system with multiple pieces of data coming from peer members [] usually referred to as a ‘swarm’ . . . [and] any seed peer that has downloaded a file prior to the time a subsequent peer downloads the same file is automatically a source for the subsequent peer so long as that first seed peer is online at the time the subsequent peer downloads a file”) (first alteration in original).

⁵³ *See* Patrice, *supra* note 49.

determined that personal jurisdiction and joinder were not appropriate issues at that procedural juncture.⁵⁴

Most notably, on March 26, 2013, in *CP Productions v. Glover*,⁵⁵ the U.S. District Court for the Southern District of Indiana granted Prenda Law's motion for default judgment against a defendant,⁵⁶ who failed to defend in the action despite being served with a Summons.⁵⁷ Accordingly, the court awarded Prenda Law's client, CP Productions, the maximum award for statutory damages amounting to \$150,000 and attorneys' fees due to the default judgment regarding the alleged willful infringement of the rights holder's copyright.⁵⁸

II. ANALYSIS

A. The Origins of the Incentive: From Copy-“right” to Copy-“wrong”

The Internet has enabled non-rights holders to effortlessly disseminate copyrighted materials to much larger audiences than the drafters of the Copyright Act could have possibly foreseen. The widespread use of online file-sharing technologies has exposed a deep chasm, which created a fundamental disconnect between what copyright law prohibits and what is generally accepted on the

⁵⁴ *AF Holdings*, 286 F.R.D. at 46, 50 (finding that evaluating the defendants' jurisdictional defenses at this procedural time is premature because it is purely speculative); *see also* *Arista Records LLC v. Does 1–19*, 551 F. Supp. 2d 1, 11 (D.D.C. 2011) (“not[ing] that [while] the remedy for improper joinder is severance and not dismissal . . . the Court also finds that this inquiry is premature without first knowing Defendants' identities and the actual facts and circumstances associated with Defendants' conduct”); *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d 332, 343 (D.D.C. 2011) (concluding that “at this nascent stage of the case, the plaintiffs have sufficiently alleged that the infringing activity at issue in each of the cases may involve multiple computers, based in various jurisdictions, which are using the BitTorrent protocol to make available for sharing the same copyrighted content”).

⁵⁵ Plaintiff's Request to Enter Default at 1, *CP Prods. Inc. v. Gerald L. Glover, III*, No. 1:12-cv-00808-JMS-DML (S.D. Ind. Mar. 26, 2013) (CP filed two requests for the court to enter default judgment.).

⁵⁶ Order at 1, *CP Prods. Inc. v. Gerald L. Glover, III*, No. 1:12-cv-00808-JMS-DML (S.D. Ind. Mar. 26, 2013) [hereinafter *CP Order*] (granting the default judgment by holding that “CP's allegations in the Amended Complaint—which the Court takes as true due to Mr. Glover's default—are sufficient to establish that CP is entitled to statutory damages for Mr. Glover's willful infringement of CP's copyright, and for attorneys' fees and costs under the Copyright Act”); *see also* FED. R. CIV. P. 55(a) (stating that “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default”).

⁵⁷ *CP Order*, *supra* note 56 (granting CP's motion for Default Judgment after its Second Request to Enter Default, reasoning that Mr. Glover did not respond to CP's Motion for Default Judgment and, therefore, takes CP's allegations in the amended complaint as true).

⁵⁸ Final Judgment at 1, *CP Prods. Inc. v. Gerald L. Glover, III*, No. 1:12-cv-00808-JMS-DML (S.D. Ind. Mar. 26, 2013).

Internet.⁵⁹ In this strife to balance the author's creativity and "the public's access to the products of their genius," Congress has inadvertently carved out a lucrative channel for imaginative copyright trolls to aggressively exploit.⁶⁰ Moreover, the once indiscernible targets for copyright trolls can now be unveiled by tracking Internet Protocol addresses and log databases. These indiscernible targets materialize as potential defendants through subpoenas during discovery.⁶¹ Recognizing this obstruction to innovation, in June 2013, President Obama personally condemned practices used by patent and copyright trolls of inundating the courts with infringement claims, by stating that these companies "don't actually produce anything themselves," and instead create a business model "to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them."⁶² Accordingly, this section will examine the progression of the copyright troll, judicial opinions, and legal arguments derived from three unique businesses operating under the guise of digital rights defenders in order to analyze the status of copyright trolls under the applicable legal structure introduced above.

B. Copyright Troll Tactics: the Legal Ransom Letter and Unequal Bargaining Power

The archetypical copyright troll employs a distinct series of Machiavellian stratagems, which lay the foundations for the copyright-lawsuit "factories" and incentivize the mass-litigation business model.⁶³ First, Righthaven propagated the

⁵⁹ See Tehranian, *supra* note 9, at 543 (identifying a "balanced struggle between copyright maximalists and skeptics" resulting in a "policy stalemate" that is profound yet unappreciated; thus, creating the need for reform).

⁶⁰ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (observing that "the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved").

⁶¹ See Tehranian, *supra* note 9, at 549 (reexamining the rationality of our intellectual property structure because ISPs "made previously undetectable 'sharing' both visible and traceable," which expanded enforcement of copyright law).

⁶² See Office of the Press Secretary, *Fact Sheet: White House Task Force on High-Tech Patent Issues* (June 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

⁶³ See *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 971 (D. Nev. 2011). Righthaven alleged that after the Work in question was published on DU's website, it purchased the copyright to the article from the LVR-J owner, Stephens Media, and filed a copyright infringement suit against the infringer. *Id.*; see also *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413, at *2 (D. Nev. Oct. 18, 2010). In that case the court noted,

[A]fter [defendants] displayed the Work, plaintiff Righthaven obtained a transfer of rights for the Work from the Review Journal. Righthaven then filed for and received a copyright registration for the Work . . . Righthaven [then] filed a complaint against defendants alleging a single cause of action for copyright infringement pursuant to 17 U.S.C. § 501.

Id.

most vital instrument in a troll's arsenal, the extortionate settlement letter.⁶⁴ Second, Righthaven's unequal bargaining power was primarily embodied within the threat of statutory damages, which were used to coerce everyday hyperlinkers into quick settlements to avoid costly litigation.⁶⁵ Despite Righthaven's insolvency, two pivotal cases⁶⁶ represent more than simply the involuntary dissolution of a litigious company. Rather, they stand for a lucrative opportunity to the observant copyright troll.⁶⁷

On October 18, 2010, in *Righthaven LLC v. Realty One Group, Inc.*, the United States District Court for the District of Nevada granted the defendant's motion to dismiss after holding that the form of hyperlinking Righthaven belligerently prosecuted was ultimately lawful under the Fair Use doctrine.⁶⁸ In that case, a licensed realtor displayed an unauthorized hyperlink to a LVR-J publication on his Internet blog, which provided home ownership information to the general public.⁶⁹ Righthaven attempted to initiate its vicious cycle and sent the realtor the boilerplate settlement letter.⁷⁰ The realtor, however, substantially disrupted the traditional troll cycle by declining the settlement and contesting the case at the pretrial level.⁷¹ Subsequently, Righthaven was forced to break the sue-to-settle strategy and argue that when the realtor reproduced the first eight sentences of a thirty-sentence news article accompanied by a hyperlink on his blog, this activity constituted willful

⁶⁴ See Esguerra, *supra* note 34 (asserting that "Righthaven isn't sending cease and desist letters or DMCA takedown notices that would allow the targeted bloggers or website operators to remove or amend only the news articles owned by Righthaven. Instead, Righthaven starts with a full-fledged lawsuit in federal court with no warning").

⁶⁵ *Id.* (asserting further that "Righthaven is relying on the fact that [its] victims may face huge legal bills through crippling statutory damages and the prospect of paying Righthaven's legal fees if they lose the case[, therefore,] many victims will [likely] settle with Righthaven for a few thousand dollars regardless of their innocence").

⁶⁶ *Realty One Group*, 2010 WL 4115413, at *3; *Righthaven LLC v. Mostofi*, No. 2:10-CV-1066-KJD-GWF, 2011 WL 2746315, at *3 (D. Nev. July 13, 2011).

⁶⁷ See generally Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 727–28 (2005). Professor Hughes looks to the business of suing one's own customers propagated by the recording industry, which sought to "enforce copyright norms against individual consumers—the individual P2P users offering and downloading music files." *Id.* Initially, the recording industry began suing individual P2P users as an ancillary revenue stream because their online activities "forced the recording industry to reassess its strategy" regarding online infringers. *Id.*

⁶⁸ *Realty One Group*, 2010 WL 4115413, at *3. The court discussed fair use:

[when] determining . . . fair use of the copyright, district courts consider several factors including: (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.

Id. at *2.

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ *Id.*

copyright infringement subject to statutory damages.⁷² However, the court found that the defendant's online activity did not infringe upon Righthaven's copyright as a matter of law, which enabled the Fair Use doctrine to collapse one of the tenuous pillars supporting Righthaven's formulaic business model.⁷³

Ultimately, on July 13, 2011, in *Righthaven LLC v. Mostofi*, the maimed troll made a final attempt to remedy the critical issue of standing to sue in a transparent effort to amend their complaint after it was found that Righthaven was not the exclusive rights holder.⁷⁴ In that case, a website owner was sued for copyright infringement based off of a publication in which he allegedly changed the title of an original work owned by the LVR-J entitled "Court Reprimands Lawyer Over Misleading Ads," to an alternate title: "Las Vegas Lawyer Reprimanded for False Advertising."⁷⁵ Within the amendment, Righthaven "attempt[ed] to impermissibly amend the facts to manufacture standing."⁷⁶ The court noted that "[it] may allow parties to amend defective allegations of jurisdiction, [but] it may not allow the parties to amend the facts themselves."⁷⁷ Accordingly, the court granted the website owner's motion to dismiss, which signified one of the final debilitating strikes against the already injured troll.⁷⁸

In sum, Righthaven's systematic business operations were officially labeled with an indelible mark by U.S. District Court Judge Hunt as "disingenuous, if not outright deceitful . . . [making] multiple inaccurate and likely dishonest statements to the court."⁷⁹ Further, Righthaven was also ordered to show cause why it should

⁷² *Id.* at *1–2 (observing that "although [defendant's] blog gathers varied information and provides it to the public free of charge, the purpose of providing that information is commercial in nature. Therefore, the court finds that this factor weighs against the fair use of the copyrighted information").

⁷³ *Id.* at *2 (finding that the defendant's use of the copyrighted material is "likely to have little to no effect on the market for the copyrighted news article" because he directed readers to the full text of the Work, which supports a finding of fair use).

⁷⁴ *Righthaven LLC v. Mostofi*, No. 2:10-CV-1066-KJD-GWF, 2011 WL 2746315, at *3 (D. Nev. July 13, 2011). "[Righthaven] argue[d] that the amendment it executed with Stephens Media . . . fixes any possible errors in the original SAA that would prevent Plaintiff from having standing in this matter." *Id.*

⁷⁵ *Id.* at *1.

⁷⁶ *Id.* at *3. The court also held that "[w]hile these exclusive rights may be transferred and owned separately, the assignment of a bare right to sue is ineffectual because it is not one of the exclusive rights. . . . [T]ransfer solely of the right to sue does not confer standing on the assignee." *Id.* at *2.

⁷⁷ *Id.* at *3. Also, the court provides an illustration of this point:

[a]s an example, a party who misstates his domicile may amend to correctly state it. This is an amendment of the allegation. However, that party is not permitted to subsequently move in order to change his domicile and amend accordingly. This would be an amendment of the jurisdictional facts, which is not allowed.

Id.

⁷⁸ *Id.* at *5. The court also held that viewed that in light of Righthaven's SAA business model, comprised of the assignment for the bare right to sue, the "Court shall not consider the amended language of the SAA, but the actual assignment and language of the SAA as it existed at the time the complaint was filed." *Id.* at *3.

⁷⁹ Order at 15, *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011) (No. 116), *available at* <https://www.eff.org/node/58496> (noting that "[m]aking this failure

not be sanctioned for its flagrant misrepresentations to the court.⁸⁰ Although the courts left this particular troll dismembered, to a copyright troll, these cases represent an opportunity to further develop this business model in order to circumvent issues of standing and the Fair Use doctrine.⁸¹ Correspondingly, as the divide between the Copyright Act and users' online social norms expands, technology presents the observant troll with the prospect of partnering with a new industry.⁸²

C. Titanic in the Fog: From Carte Blanche Discovery to Dead but Still Standing

Regrettably, Righthaven's failure bred a new wave of copyright brutes—the pornography trolls—which have proven to be more patently nefarious than their hyperlinking predecessors.⁸³ Prenda Law, taking a page directly from their fallen patriarch's playbook, strategically evaded the Fair Use and standing pitfalls, at least initially.⁸⁴

Learning from Righthaven's shortcomings, this Chicago-based anti-piracy firm is operating on a much larger scale.⁸⁵ Prenda Law's predatory practice entails gaining the identities of thousands of alleged pornography downloaders per subpoena to an ISP, sending them settlement letters, and not making any effort to hide from public scrutiny.⁸⁶ On October 15, 2012, John Steele, a Prenda Law attorney, stated in an interview to *Forbes Magazine* that he has filed over 350 of these suits, made "a few million dollars" in settlements, and is currently suing approximately 20,000 John

more egregious, not only did Righthaven fail to identify Stephens Media as an interested party in this suit, the Court believes that Righthaven failed to disclose Stephens Media" as an interested party in any of its approximately 200 cases already filed).

⁸⁰ *Id.*

⁸¹ 17 U.S.C. § 107 (2012).

⁸² See Ginsburg, *supra* note 14, at 579. Ginsburg further explains that:

[t]he more infringement becomes integrated into the innovator's business plan, however, the less likely the entrepreneur is . . . to persuade a court of the neutrality of its venture. . . . [B]usinesses built from the start on inducing infringement will be held liable; judges will frown on drawing one's start-up capital from other people's copyrights.

Id.

⁸³ *Id.* (noting that entrepreneurs may draw inferences from the Court's precedent in order to make copyright infringement into a "business asset").

⁸⁴ *Ingenuity 13, LLC v. Doe*, No. C 12-4450 MMC (MEJ), 2012 WL 4110991, at *6-7 (N.D. Cal. Sept. 18, 2012). The court granted Prenda Law's motion for expedited discovery while withstanding a motion to dismiss. *Id.* The court held that the plaintiff pled a prima facie case of copyright infringement by establishing valid copyright ownership and copying of constituent elements of the original copyrighted work. *Id.*

⁸⁵ Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made 'A Few Million Dollars' Pursuing (Sometimes Innocent) 'Porn Pirates'*, *FORBES* (Oct. 15, 2012, 2:09 PM), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.

⁸⁶ *Id.* (reporting that Prenda Law attorney, John Steele, "almost proudly" stated in an interview with *Forbes* that he is "considered the original copyright troll").

Does.⁸⁷ Additionally, highlighting Prenda Law’s amplified fear tactics, its settlement letters contain claims that similar infringement suits have led to judgments exceeding \$200,000.⁸⁸ Further, Prenda Law’s settlement letters claim that similar cases “regularly involve over \$100,000 in legal fees and costs.”⁸⁹ Finally, in addressing the alleged infringers, Prenda Law’s legal ransom letters stated, “your name will be forever associated with the outcome of the matter, particularly if you prevail . . . [and] [d]ue to the sensitive nature of this issue, and our desire to avoid unnecessary embarrassment, we will be glad to provide more detailed information about this case.”⁹⁰ Employing the threat of being perpetually linked to a suit involving pornography copyright infringement, accompanied by the claim that the matter will be “followed closely in the national media,” Prenda Law’s success in settling cases rapidly surpassed that of the newspaper trolls.⁹¹

However, several audacious John Does have read past Prenda Law’s extortion rhetoric and chosen the road less traveled: confronting the troll. This atypical John Doe behavior, coupled with the efforts of non-profits like the Electronic Frontier Foundation,⁹² has received California’s attention and revealed this misuse of the civil justice system⁹³—specifically, Prenda Law’s ability to file muddy claims that still lead to the discovery phase, which opens the floodgate for another fusillade of threat letters.

In the realm of illegal downloading, the Fair Use doctrine provides no defense to willful online infringement; thus, making it more difficult to combat this “legal shakedown.”⁹⁴ Fortunately, alleged infringers are fighting back because, in many instances, the possibility exists that the Internet subscriber accused of the infringement did not even download the lascivious film in question.⁹⁵

⁸⁷ *Id.* (comparing Prenda Law’s tactics “to the one employed by the recording industry years ago to sue people who were amassing huge music libraries through peer-to-peer sharing rather than buying CDs”).

⁸⁸ Duffy Law Letter, *supra* note 3 (stating that an internet account holder rejected the offered settlement, made the argument that someone else had downloaded the content, and at trial the jury “disregarded” the defense and returned a verdict against the user for \$222,000 in damages).

⁸⁹ *Id.*

⁹⁰ *Id.* (stating that friends, family members, and blog sites are not reliable sources of legal advice and should not be consulted).

⁹¹ *Id.* (claiming the Prenda law firm is “famous” for pursuing pornography infringement cases).

⁹² *About EFF*, ELEC. FRONTIER FOUND., <https://www.eff.org/about> (last visited Sept. 7, 2013) (describing a non-profit comprised of lawyers, policy analysts, activists, and technologists that defend users’ digital rights while educating the press and public).

⁹³ *See* Order Vacating Prior Early Discover Orders and Order to Show Cause at 2–3, *Ingenuity 13 v. John Doe*, No. 2:12-cv-8333-ODW(JCx) (C.D. Cal. Dec. 20, 2012), *available at* <http://www.popehat.com/wp-content/uploads/2013/03/December20OSC.pdf> (Judge Otis Wright ordered Prenda to explain why discovery is warranted to reveal the identity of John Does and quashed Prenda Law’s previously issued subpoenas).

⁹⁴ *Id.* at 2 (stressing that the Court has a “duty to protect the innocent citizens of this district from this sort of legal shakedown, even though a copyright holder’s rights may be infringed by a few deviants”).

⁹⁵ *Id.* Judge Wright emphasized that *Ingenuity 13*:

Must demonstrate to the Court . . . how it would proceed to uncover the identity of the actual infringer once it has obtained subscriber information—given that the

The U.S. District Court for the Central District of California Judge Otis Wright revealed the troll's true colors by exposing key flaws in the Prenda Law "fishing-expedition discovery" model.⁹⁶ In addressing the potential for discovery abuse during another attempt by Prenda Law to uncover the identities of John Does through expedited discovery requests, Judge Wright stated, "IP address alone may yield subscriber information . . . [b]ut that will only lead to the person paying for the Internet service and not necessarily the actual infringer, who may be a family member, roommate, employee, customer, guest, or even a complete stranger."⁹⁷ In vacating the prior early discovery orders to "minimize the harassment . . . of innocent citizens,"⁹⁸ Judge Wright subsequently ordered Prenda Law to explain how it can "guarantee to the Court that any such subscriber information would not be used to simply coerce a settlement from the subscriber (the easy route), as opposed to finding out who the true infringer is (the hard route)."⁹⁹

Furthermore, in response to the argument that users have the ability to access the wireless Internet connections of others (whether they are password protected or not), Prenda Law has made the creative argument that defendants were negligent in not properly securing a router.¹⁰⁰ However, according to established precedent, theories of copyright liability do not include negligence—only direct, vicarious, and contributory infringement.¹⁰¹ On January 29, 2013, in *AF Holdings LLC v. Rogers*, the U.S. District Court for the Southern District of California explained that "it is no more likely that the subscriber to an IP address carried out a particular computer function . . . than to say an individual who pays the telephone bill made a specific telephone call."¹⁰² In that case, an alleged pornography downloader uncovered

actual infringer may be a person entirely unrelated to the subscriber—while also considering how to minimize harassment and embarrassment of innocent citizens.

Id.

⁹⁶ *Id.* (viewing with the "public interest in mind, the Court is reluctant to allow . . . discovery when all a plaintiff has is an IP address—the burden is on the plaintiff to find other ways to more precisely identify the accused infringer without causing collateral damage.").

⁹⁷ *Id.* ("Under Ninth Circuit precedent, a plaintiff should ordinarily be allowed discovery to uncover their identities, but discovery may be denied if it is (1) clear that discovery would not uncover the identities, or (2) that the complaint would be dismissed on other grounds.").

⁹⁸ *Id.* at 2–3.

⁹⁹ *Id.* at 2 (shifting the burden on Prenda Law to find "other ways to more precisely identify the accused infringer without causing collateral damage" given the subject matter of the legal accusations and the economics of defending a pornography infringement lawsuit).

¹⁰⁰ *AF Holdings LLC v. Rogers*, No. 12cv1519 BTM(BLM), 2013 U.S. Dist. LEXIS 11929, at *8 (S.D. Cal. Jan. 29, 2013) (arguing "Defendant was negligent in either (1) failing to secure his internet connection, thereby allowing someone to use his internet account to copy and share Plaintiff's Video over the BitTorrent protocol, or (2) permitting someone to use his internet connection to infringe Plaintiff's copyright.").

¹⁰¹ *Liberty Media Holdings, LLC v. Tabora*, No. 12 Civ. 2234 (LAK), 2012 WL 2711381, at *6–7 (S.D.N.Y. July 9, 2012) (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930–31 (2005)). "The Copyright Act creates a cause of action in favor of the owner of a copyright for direct copyright infringement. Moreover, those who 'infringe[] vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it' are secondarily liable 'on a theory of contributory or vicarious liability.'" *Id.* at *2.

¹⁰² *AF Holdings*, 2013 U.S. Dist. LEXIS 11929, at *4–5 (citing *In re BitTorrent Adult Film Copyright Infringement Cases*, No. 11-3995(DRH)(GRB), 2012 WL 1570765, at *9 (E.D.N.Y. May 1,

Prenda Law's hidden but exceptionally vulnerable Achilles tendon. Consequently, the court granted the defendant's motion to dismiss due to the risk of "false positives," "an allegation that an IP address is registered to an individual is not sufficient in and of itself to support a claim that the individual is guilty of infringement."¹⁰³

As a result, Prenda Law is "dead but still standing" for a multitude of reasons, primarily because they have been ordered to appear in court to explain their activities while they attempt to dismiss any pending actions in order to avoid adverse rulings.¹⁰⁴ On April 2, 2013, Prenda Law attorneys committed corporate suicide by exercising their Fifth Amendment privileges against forced testimony.¹⁰⁵ In

2012) (emphasizing that courts seek to "distinguish between subscribers and infringers" because 61% of U.S. homes have access to wireless internet; thus, the IP address subscriber may often be innocent of infringement associated with the IP address)).

¹⁰³ *Id.* at *5–6 (courts limit discovery for Doe defendants in online infringement cases to ensure that potentially innocent subscribers are not "needlessly humiliated and coerced into unfair settlements."); *see also* *Disc. Video Ctr., Inc. v. Does 1–29*, 285 F.R.D. 161, 166 (D. Mass. Aug. 10, 2012) (recognizing "the improper assertion . . . that subscribers are Defendants is significant in that it might well cause innocent subscribers (understandably concerned about the prospect of the threatened public identification as a copyright infringer of [adult films]) to accede to unreasonable settlement demands"); *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (noting the "risk of false positives" gives rise to potential unjust settlements coerced from innocent defendants who want to avoid having their names publicly associated with illegally downloading pornography).

¹⁰⁴ *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-8333-ODW(JCx), 2013 U.S. Dist. LEXIS 17693, at *14 (C.D. Cal. Feb. 7, 2013). The "Court perceives that Plaintiff may have defrauded the Court. At the center of this issue is the identity of a person named Alan Cooper and the validity of the underlying copyright assignments" because the Plaintiff filed a copyright assignment signed by Alan Cooper on behalf of the Plaintiffs. *Id.* The court continues by saying:

If it is true that Alan Cooper's identity was misappropriated and the underlying copyright assignments were improperly executed using his identity, then Plaintiff faces a few problems. First, with an invalid assignment, Plaintiff has no standing in these cases. Second, by bringing these cases, Plaintiff's conduct can be considered vexatious, as these cases were filed for a facially improper purpose. And third, the Court will not idle while Plaintiff defrauds this institution. Accordingly, the Court hereby ORDERS [plaintiff] TO SHOW CAUSE why he should not be sanctioned . . . for violating the Court's [] Order instructing AF Holdings to cease its discovery efforts[,] . . . alleging copyright infringement . . . without conducting a reasonable inquiry . . . [and] perpetrating fraud on the Court by misappropriating the identity of Alan Cooper and filing lawsuits based on an invalid copyright assignment.

Id. at *14–16.

¹⁰⁵ *See, e.g.*, Transcript of Record, *Ingenuity 13 LLC v. John Doe, et al.*, No. CV 12-8333 ODW (C.D. Cal. Apr. 2, 2013), *available at* <http://fightcopyrighttrolls.com/2013/04/02/most-of-prenda-appears-in-judge-wrights-courtroom-only-to-plead-the-fifth-furious-judge-ends-hearing-after-12-minutes/> (The court raised allegations of fraud, attorney misconduct, and the firm having a financial interest in the outcome of the litigation, and in response the attorneys comprising Prenda Law pled the Fifth.).

response, Judge Wright stated “this court’s focus has now shifted dramatically from the area of protecting intellectual property rights to attorney misconduct.”¹⁰⁶

Moreover, on May 6, 2013, in the United States District Court for the Central District of California, Judge Wright issued sanctions against Prenda Law attorneys stating, “Plaintiffs have outmaneuvered the legal system. They’ve discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video.”¹⁰⁷ Judge Wright further recognized that “for these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn. So now, copyright laws originally designed to compensate starving artists allow, [sic] starving attorneys in this electronic-media era to plunder the citizenry.”¹⁰⁸ The court noted that once it realized Plaintiffs engaged in a “cloak of shell companies and fraud” that the court went to its “battlestations” by referring the matter and attorneys to their respective state and federal bars, the United States Attorney for the Central District of California, the Criminal Investigation Division of the Internal Revenue Service, and the judges before whom these attorneys have cases pending.¹⁰⁹ As a result of the effects of Judge Wright’s sanctions-order benchslap, a subpoena issued to Comcast

¹⁰⁶ *Id.* at 6 (stressing that this form of attorney misconduct “is much more of a concern now to this court than what this litigation initially was about”); *see also* Order Issuing Sanctions at 5, *Ingenuity 13, LLC, v. John Doe*, No. 2:12-cv-8333-ODW(JCx) (C.D. Cal. May 6, 2013) [hereinafter *Ingenuity Sanctions Order*]. The “[p]laintiffs’ filing of cases using the same boilerplate complaint against dozens of defendants raised the Court’s alert. It was when the Court realized Plaintiffs engaged their cloak of shell companies and fraud that the Court went to battlestations.” *Id.* at 2. There are no official owners or officers for these two offshore entities at issue; conversely, the “[p]rincipals are the de facto owners and officers.” *Id.* at 4. The court continues:

This nationwide strategy was highly successful because of statutory-copyright damages, the pornographic subject matter, and the high cost of litigation. Most defendants settled with the Principals, resulting in proceeds of millions of dollars due to the numerosity of defendants. These settlement funds resided in the Principals’ accounts. . . . No taxes have been paid on this income. . . . The Principals have shown little desire to proceed in these lawsuits when faced with a determined defendant. Instead of litigating, they dismiss the case. When pressed for discovery, the Principals offer only disinformation—even to the Court.

Id.

¹⁰⁷ *Id.* at 1. The court found that the Principals’ “enterprise relies on deception.” *Id.* at 8. The evidence shows that the Principals ignored a Court Order vacating discovery in hopes that “the ISPs were unaware of the vacatur and would turn over the requested subscriber information.” *Id.* Additionally, there is the issue of the “Alan Cooper forgery,” where the Principals “stole the identity Alan Cooper” and fraudulently signed copyright assignments using his signature while “holding him out to be an officer of AF Holdings.” *Id.* at 5, 8. Furthermore, the Principals “anticipated that the Court would blindly approve their early-discovery requests, thereby opening the door to more settlement proceeds.” *Id.* at 8. Finally, the court emphasized that “though Plaintiffs boldly probe the outskirts of the law, the only enterprise they resemble is RICO.” *Id.* at 10.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.* at 2. The Principals took substantial measures to “obfuscate other facts, especially those concerning their operations, relationships, and financial interests.” *Id.* at 8. Furthermore, the “Principals’ web of disinformation is so vast that the Principals cannot keep track” because their explanations of their financial interests and operations “constantly vary.” *Id.*

during the investigation of this “anti-piracy” law firm has potentially unearthed one of Prenda Law’s most egregious ploys.¹¹⁰ Specifically, an alarmingly large number of the torrents detailed in Prenda Law’s infringement suits originated from a Pirate Bay user operating under the pseudonym “Sharkmp4.”¹¹¹ Furthermore, the subpoenas encompassing the Comcast IP address 75.72.88.156 employed by “Sharkmp4” revealed that the account holder to this IP address belonged to Steele Hansmeier PLLC, which is the firm currently known as Prenda Law.¹¹² These unearthed facts fortifies the allegation that Prenda Law is seeding the very content they hyper-aggressively protected and, like a “honeypot,” luring pornography pirates into their vicious cycle.¹¹³ However, it is essential to note that just because the courts have stopped this particular troll, the Copyright Act still affords the generous opportunity for a new subset of troll to learn from this fallen fiend.¹¹⁴

D. Malibu Media, The Discovery Controversy Continues: Challenging A “Porn Purveyor’s” Evidence of Smut-Sharing at Bellwether Trial

Malibu Media, LLC, mirroring Prenda Law, has employed an almost duplicative predatory practice with a few distinct alterations.¹¹⁵ Malibu Media actually produces adult erotica and has further refined and maximized the guilty-until-proven innocent paradigm to its fullest potential.¹¹⁶ In 2012, Malibu Media filed over 360 copyright infringement lawsuits against approximately 6,000 individuals in order to extract

¹¹⁰ *Copyright Troll Ran Pirate Bay Honeypot, Comcast Confirms*, TORRENTFREAK (Aug. 15, 2013), <http://torrentfreak.com/copyright-troll-ran-pirate-bay-honeypot-comcast-confirms-130815/> (noting that Comcast confirmed through a subpoena that this famous anti-piracy law firm has been directly linked to a Pirate Bay user that hosted adult content).

¹¹¹ *Id.*

¹¹² *Id.* (stating “Comcast returned the subscriber details that matched the IP-address at the time the files were uploaded” and the IP address in question was identified as the Comcast account owned by Steele Hansmeier PLLC, which is directly linked to Prenda Law).

¹¹³ *Id.* Defendant’s counsel employed Delvan Neville, the owner of Amaragh Associates. *Id.* Amaragh Associates utilizes a BitTorrent monitoring suite called EUPSC2k, which uses a “variety of software components conceptualized, developed, and maintained in order to collect data about both unauthorized and authorized distributions of any kind of file that could be shared via the BitTorrent protocol.” Declaration of Delvan Neville at 1, *First Time Videos, LLC v. Oppold*, 6:12-CV-01493-CEH-KRS (M.D. Fla. June 3, 2013) [hereinafter Neville Declaration]. Within Neville’s expert affidavit, he concluded that “the purpose of sharing the file by sharkmp4 appears to have been in an effort to induce infringement for the purposes of monetization of copyrights of commercially low value.” *Id.* at 30.

¹¹⁴ Neville Declaration, *supra* note 113, at 30.

¹¹⁵ *See, e.g., Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 30648, at *16–17 (E.D. Pa. Jan. 3, 2013) (In this case, Malibu Media is the transferee of the exclusive rights to various copyrighted pornographic films created by the company X-Art and prosecutes alleged BitTorrent downloaders of said adult films.).

¹¹⁶ *Id.* at 2–5 (Malibu Media filed copyright infringement complaints against large groups of John Does participating in “swarms” of computer-users who downloaded and shared pieces of motion pictures with each other, sent subpoenas to ISPs that had assigned the IP addresses that were associated with the alleged illegal downloads of their copyrighted works, and sought settlements from the alleged infringers.).

quick settlements.¹¹⁷ Specifically, Malibu Media's copyright troll solution engenders a few new colligative properties: the "six strikes" Copyright Alert System ("CAS") and enhanced infringer surveillance software acting as the solutes, which are dissolved into the solvent—the "serial copyright infringers."¹¹⁸ This concentrated copyright enforcement solution yields this new troll on the block with larger settlements while enabling them to strategically trickle through the discovery phase with their newfound viscosity.¹¹⁹

First, in February 2013, the "six strikes" CAS was implemented by a number of major ISPs in an effort to deter online piracy and notify content owners.¹²⁰ This graduated alert system operated by the nonprofit Center for Copyright Information ("CCI") enables rights holders to monitor peer-to-peer ("P2P") file-sharing networks, detect when a user is infringing upon a protected work, and send the ISP a notification of the violation.¹²¹ Subsequently, the ISP relays this information to the alleged infringer's ISP address in the form of a notification, which administers one of the "six strikes."¹²² Furthermore, Malibu Media is attempting to test this new anti-

¹¹⁷ See, e.g., *Malibu Media's Massive Fraud*, FIGHT COPYRIGHT TROLLS (Nov. 10, 2012), <http://fightcopyrighttrolls.com/2012/11/10/malibu-medias-massive-fraud/>. The Pietz Law Firm tracks Malibu Media's lawsuits and represents the interests of John Does who have been sued by the company. *Id.*

¹¹⁸ See, e.g., *Malibu Media*, 2013 WL 30648, at *3–5. Malibu Media filed complaints against three groups of fourteen to twenty-two John Doe defendants who have downloaded and shared copyrighted adult films owned by the plaintiff. *Id.* at *2. Defendants participated in "BitTorrent Swarms," which are initiated when a computer-user called an "initial seeder" obtains a target computer file, divides it into segments, assigns a unique identifier called a "hash" to each segment, and uploads the segmented file onto a BitTorrent website. *Id.* at *4–5. Other users then access the website, upload the segments of the file on their personal computers, and distribute these segments with each other. *Id.* Thus, all of the seeders and peers are collaborating in what is identified as a "swarm." *Id.* When a peer has downloaded every segment of the original file, software on the user's computer will reassemble them into a viewable video. *Id.* at *4.

¹¹⁹ *Id.* at *37–38 (denying defendants' Motions to Dismiss because Malibu has provided material in order to show a "pattern or practice" of online copyright infringement by "making an allegation which may become evidence to support its claim to relief").

¹²⁰ *UA Law Professor Explains New '6-Strikes' Copyright Alert System*, UNIV. ARIZ. NEWS, <http://uanews.org/blog/ua-law-professor-explains-new-6strikes-copyright-alert-system> (last visited Oct. 5, 2013) (explaining that the Six Strikes system was launched in an "effort to crack down on online piracy" by targeting activity like illegal sharing and downloading of music and films, which has come "under fire" by many copyright experts due to its "format and for the way it was developed and implemented").

¹²¹ *Id.* (The system is operated by the "nonprofit Center for Copyright Information (CCI), which was essentially set up as the result of a grand bargain between most major Internet service providers and a set of content owner companies, such as movie studios and record labels" in an effort to deter online copyright infringement.).

¹²² *Id.* The CCI claims this is an education system, whereby the education gets more strident as a result of an IP address being associated with reoccurring infringements. *Id.* Initially, a pop-up alert appears on the downloader's computer stating that someone on the computer has been unlawfully sharing files and to stop. *Id.* The downloader receives two alerts that are intended as "initial education," subsequently, it escalates to the level where the user must sign in to remove the pop-up, and in some instances the user has to watch an educational video about copyrights. *Id.* The final two strikes are entitled to "mitigation." *Id.* CCI claims that mitigation is "intended to really get your attention by doing things like slowing down your bandwidth, or the amount of speed you have connecting to the Internet. After the sixth strike, nobody really knows what happens." *Id.*

piracy enforcement instrument among many others by seeking to gain information relating to the strikes through a subpoena to ISPs, such as Verizon Online, LLC.¹²³ Moreover, the CAS agreement engenders no provision that prohibits rights holders from using the information collected during the six strikes process in copyright infringement suits.¹²⁴

Addressing the second solute, Malibu Media is bolstering its tactics by enhanced software surveillance of these alleged infringers in order to primarily target persistent infringers that perform website-rips, which are large multi-gigabyte downloads containing a number of copyrighted videos.¹²⁵ Thus, when examining the solvent's reaction, Malibu Media gains unparalleled bargaining power and can extract larger settlements from alleged infringers, reportedly between \$7,500–13,500, due to the potential for multiple infringement claims.¹²⁶

On June 10, 2013, in *Malibu Media, LLC, v. John Does 1, 6, 13, 14 and Bryan White*, the United States District Court for the Eastern District of Pennsylvania held what was to be a Bellwether bench trial to examine the sufficiency of the evidence gathered by this particular troll regarding the BitTorrent downloads of the plaintiff's

¹²³ See, e.g., Plaintiff's Motion to Enforce Subpoena at 6–7, *Malibu Media, LLC, v. Verizon Online, LLC*, No. 2–12-cv-02078-MMB (E.D. Pa. Apr. 19, 2012) [hereinafter *Malibu Motion to Enforce*] (Plaintiff seeks “six strike notices sent to the applicable subscribers” because they are relevant to “prove a pattern of infringement and/or notice that infringement is occurring.”).

¹²⁴ Michael Masnick, *Copyright Troll Malibu Media Seeking 'Six Strikes' Info From Verizon in Lawsuit*, TECHDIRT (Apr. 3, 2013, 5:52AM), <http://www.techdirt.com/articles/20130402/18393522554/copyright-troll-malibu-media-seeking-six-strikes-info-verizon-lawsuit.shtml>. The CAS agreement lacks a provision that prohibits rights holders from filing a subpoena seeking disclosure of information gathered during Six Strikes process. *Id.* Malibu Media is the first company publicly labeled as a copyright troll to attempt to gather CAS information to identify alleged infringers. See also *Malibu Motion to Enforce*, *supra* note 123, at 6–7 (seeking DMCA notices and six strike notices sent to respective subscribers, Defendants' bandwidth usage, information about the correlation of the IP address to the subscriber, the reliability of the ISPs' correlating technique, and the content viewed by the Defendants that they also used P2P file-sharing websites to download).

¹²⁵ *Malibu Media, LLC—Friend or Foe?, Foe*, TORRENTLAWYER (Mar. 23, 2012), <http://torrentlawyer.wordpress.com/2012/03/23/malibu-media-copyright-troll-kotzker-lawsuit/> [hereinafter *Malibu Media* article] (emphasizing that Malibu Media is charging per video that has been allegedly downloaded instead of charging a fixed settlement amount per case, which many copyright trolls have done in the past); see also *Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 3038025, at *8 (E.D. Pa. June 18, 2013) (noting that Malibu Media had “expended considerable effort and expense to determine the IP addresses” of the allegedly infringing parties through the technology utilized by its consultants); Plaintiff's Written Response to the Court's Memorandum/Order at 18, *Malibu Media, LLC, v. John Doe Subscriber Assigned IP address 68.50.250.243*, No. 8:13-cv-00360-RWT (D. Md. Mar. 23, 2013) [hereinafter *Malibu Written Response*]. Malibu Media employs an IPP forensic company that harvests IP addresses from BitTorrent trackers using software to monitor John Does that download large numbers of pornographic films. *Id.* Malibu Media claims that “the detection technology employed by IPP, Ltd. is simply not a major concern of Plaintiff's. It is infallible and the process is not impeachable. If challenged, Plaintiff will prove these points.” *Id.*

¹²⁶ See *Malibu Media* article, *supra* note 125 (Malibu Media has developed a new “method” of determining how to calculate settlement amounts giving them a means to justify large settlements because in lieu of charging fixed settlement amounts per case, Malibu Media is charging per video allegedly downloaded).

adult films.¹²⁷ Judge Michael Baylson explained that the justification for a Bellwether trial is to act as an indicator of future court trends regarding online infringement claims brought against large groups of anonymous defendants.¹²⁸ Initially, the trial was comprised of three consolidated cases, originally totaling fifty-two defendants, but that number was drastically reduced to just three John Does because Malibu Media settled and voluntarily dismissed the remainder of the Does.¹²⁹ In that case, Does 1 and 13 admitted to liability and engaged in confidential settlement agreements prior to the trial.¹³⁰ Judge Baylson subsequently bifurcated the issue of damages with respect to Does 1 and 13, which enabled the court to enter a judgment of liability encompassing the three defendants while entering a judgment of damages only as to John Doe 16.¹³¹

In addressing the issue of willful copyright infringement, Judge Baylson found that remaining John Doe 16 had attempted to destroy electronic evidence of the online infringement and committed perjury when later admitting to pirating five downloaded works belonging to Malibu Media.¹³² The court held that, in this case, Malibu Media was the bona fide owner and producer of the copyrighted material and found the defendant liable for \$112,500 in statutory damages.¹³³ Consequently, this bench trial will not act as an accurate barometer of future court trends regarding large copyright troll cases because: 1) it was reduced to three viable defendants; 2) Malibu Media actually owned the specific copyrights; and 3) the risk of false positives was eliminated due to the defendants' admission to piracy.¹³⁴ Ultimately, the

¹²⁷ *Malibu Media*, 2013 WL 3038025, at *1; *see also* *Malibu Media, LLC v. Doe*, 902 F. Supp. 2d 690, 702 n.9 (E.D. Pa. 2012) (“Bellwether trials have long been recognized as an effective means of enhancing prospects of settlement or for resolving common issues or claims in complex litigations.”); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (“[T]he results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by jury verdicts. Common issues or even general liability may also be resolved in a bellwether context in appropriate cases.”). *See generally* Eldon E. Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2323 (2008) (providing extended explanations of the advantages and potential uses of Bellwether Trials).

¹²⁸ *Malibu Media*, 2013 WL 3038025, at *1 (explaining that a “Bellwether” Trial “would be the best way to achieve a resolution of numerous copyright infringement complaints filed in this district by Plaintiff Malibu Media, LLC,” which alleged that defendants downloaded its adult films without paying a licensing fee and were therefore liable for damages).

¹²⁹ *Id.* at *4–7, 11 (consolidating cases that allege Copyright Act violations by Defendants for downloading pornographic movies produced by Plaintiff for Bellwether trial, which included Does 6 and 14).

¹³⁰ *Id.* at *11.

¹³¹ *Id.* at *21–22.

¹³² *Id.* at *18, 25–26 (stating that in view of John Doe 16’s perjury and spoliation charges, there was no longer any justification for him to proceed anonymously and he identified himself as Bryan White).

¹³³ *Id.* at *26. In response to Bryan White’s perjury and the deletion of evidence, Judge Baylson awarded a “heavy dose of damages” to also act “as a deterrent to others.” *Id.* Regarding attorneys’ fees and costs, Malibu Media was awarded the stipulated amount of \$128,350 against Bryan White. *Id.*

¹³⁴ Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008). Professor Lahav states:

Bellwether trial did not challenge the pornography purveyor's evidence of file-sharing through advanced surveillance. Nothing material was determined in regards to troll practices and future court trends, and the defendants were equally culpable for this failure.¹³⁵

Conversely, simply because Malibu Media was able to successfully eliminate the risk of false positives because of defendants' admissions at the Bellwether trial does not mean that the results should be interpreted so as to publicly remove the insignia of the troll and rename them as zealous defenders of digital rights.¹³⁶ In that specific context, although Judge Baylson emphasized that Malibu Media did not fit the traditional definition of a copyright troll because it is the actual producer of the adult films, the credibility of its advanced surveillance software has yet to be truly challenged.¹³⁷ Thus, the aggressive tactics of this sophisticated rights holder remain intact, and allow it to continue to extract innumerable settlements from John Does while ensnaring the innocent into costly litigation.¹³⁸ Displaying a more refined manner of threatening statutory damages accompanied by fear of being associated with obscene material, Malibu Media has fine-tuned the sue-to-settle business model.¹³⁹

In a bellwether trial procedure, a random sample of cases large enough to yield reliable results is tried to a jury. A judge, jury, or participating lawyers use the resulting verdicts as a basis for resolving the remaining cases. Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to encourage settlement. Instituted as a formal procedure, bellwether trials offer an innovative way to achieve collective justice . . . because they realize the democratic policies animating the jury right and the aims of the substantive law. These trials promote a type of "group typical" justice that is at once participatory and collective.

Id.

¹³⁵ See, e.g., John Whitaker, *Bellwether Trial: Why it was a Bust*, COPYRIGHT INFRINGEMENT ADVISOR (June 13, 2013), <http://copyright.infringementadvisor.com/2013/06/bellwether-trial-why-it-was-bust.html> (explaining that the case was not a bellwether trial because there was nothing at issue, it was a bench trial where the involved parties admitted to liability, agreed on damages prior, and none of the relevant facts were contested).

¹³⁶ *Id.* See *Malibu Media, LLC, v. Assigned Ip Address 24.183.51.58*, No. 13-cv-205-wmc, 2013 U.S. Dist. LEXIS 128615, at *11–12 (W.D. Wis. Sept. 10, 2013) (imposing sanctions against Malibu Media for its traditional practice of attaching an unrelated exhibit to their claims against John Does, which contained graphic pornography titles allegedly downloaded, and for which Malibu Media did not own the copyrights).

¹³⁷ *Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 3038025, at *2 (E.D. Pa. June 18, 2013) (noting that a "copyright troll" has traditionally been defined in the media and legal publications as "a non-producer who merely has acquired the right to bring lawsuits against alleged infringers.").

¹³⁸ *Id.* at 26. Judge Baylson stated:

[T]he infringement cases brought by Malibu and other similarly situated companies have attracted a great deal of attention, not only of federal district judges but also of bloggers who assert that "copyright trolls" are using unscrupulous tactics and false accusations to collect millions of dollars from innocent and injured computer users. I do not have any opinion as to the truth of the situation as regards to other plaintiffs in other courts.

Id.

¹³⁹ *Id.* at 2.

Further, as evinced by their litigious nature, the objectives of companies like Malibu Media are not to go through discovery and the entire litigation process, despite their success in challenging the culpable John Does.¹⁴⁰ Instead, Malibu pursues an ancillary rapid-settlement business model by filing against an insurmountable number of John Does, inundating the courts and depriving them of the necessary revenues to operate.¹⁴¹

In sum, Malibu Media's reputation for vehemently defending its erotic content is not without a blemish.¹⁴² On September 10, 2013, the United States District Court for the Western District of Wisconsin imposed sanctions against Malibu Media for its regular practice of attaching an unrelated and mortifying "Exhibit C" to the 11 complaints listed in *Malibu Media, LLC, v. Assigned IP Address 24.138.51.58*.¹⁴³ Specifically, each of these respective exhibits "purports to include titles of other movies *not* subject to plaintiff's copyright, but downloaded by the as yet anonymous defendant and chosen by plaintiff to embarrass and harass [in order] to leverage settlement."¹⁴⁴

The court concluded that Malibu Media's "intent was to harass and intimidate defendants into early settlements by use of the salacious nature of others' materials, rather than the merit of its own copyright claims."¹⁴⁵ The court further noted that "[t]hese [I]nternet copyright infringement cases already give off an air of extortion, albeit legitimate since (at least as alleged) each 'John Doe' defendant *did* violate plaintiff's copyrights."¹⁴⁶ The court scrutinized counsels' copyright enforcement tactics for "purveyors of *pornographic* films (even 'classy' ones) by suing initially

¹⁴⁰ See, e.g., Whitaker, *supra* note 135, (stating that he hopes "a defendant who gets one of these letters will have the fortitude to stand up for what is right and push the issue all the way to a real trial in front of a real jury. Only then will we know how strong the plaintiff's case really is.").

¹⁴¹ Compare *Malibu Media, LLC v. Doe*, No. 8:12-cv-1667-T-27MAP, 2012 U.S. Dist. LEXIS 183969, at *1, 21 (M.D. Fla. Dec. 6, 2012) (severing defendants and dismissing claims against Does 1 and 4–28 reasoning that "by filing multi-defendant complaints, Malibu's lawsuits have deprived the court of hundreds of thousands of dollars in much needed revenue while burdening the docket with cases that are difficult to manage."), *with* *Media v. Doe*, No. 2:12-cv-267-UA-SPC, 2012 U.S. Dist. LEXIS 182212, at *1–2 (M.D. Fla. Dec. 27, 2012) (severing and dismissing all claims against Does 2–67 without prejudice leaving John Doe 1 remaining in the action), *and* *Malibu Media, LLC v. Doe*, 285 F.R.D. 273, 277–79 (S.D.N.Y. 2012) (denying motion to sever five John Does finding the defendants related because the pieces of film allegedly shared are traceable back to the same original file and the concept of joinder "must be able to adapt to the technologies of our time.").

¹⁴² See e.g., *Malibu Media, LLC, v. Assigned Ip Address 24.183.51.58*, No. 13-cv-205-wmc, 2013 U.S. Dist. LEXIS 128615, at *4 (W.D. Wis. Sept. 10, 2013) (identifying that Malibu Media, "a purveyor of so-called adult films, has joined many others in bringing lawsuits in federal courts against anonymous defendants" that allegedly downloaded adult films and the "graphic titles and content are enough to persuade many initially anonymous defendants to reach early settlements out of fear of being 'outed' should the lawsuit proceed.").

¹⁴³ *Id.* at *14–15.

¹⁴⁴ *Id.* at *3, 5–6 (recognizing that the attached "Exhibit C" "serves no pleading purpose and appears calculated principally to harass defendants in violation of Fed. R. Civ. P. 11(b)" (emphasis in original)).

¹⁴⁵ *Id.* at *4 (citing *Malibu Media, LLC v. Reynolds*, No. C 6672, 2013 U.S. Dist. LEXIS 31228, at *18–23 (N.D. Ill. Mar. 7, 2013) (highlighting cases that have recognized the pressure of suits alleging copyright infringement of pornographic films "to shame defendants into settlement agreements where they may otherwise have a meritorious defense.")).

¹⁴⁶ *Id.* at *13–14.

anonymous defendants.”¹⁴⁷ In this case, Judge William Conley was aware that these claims are “fraught with circumstances that could embarrass the putative defendant should they become public and strongly influence his or her decision to settle even a meritless suit just to make the case go away before being publically associated with their client’s film.”¹⁴⁸ The court recognized that “subpoena power may not be leveraged further by counsel to force earlier, larger settlements through explicit references to the alleged misuse of even more outrageous or potentially embarrassing materials copyrighted by a non-client.”¹⁴⁹

One may argue that Malibu Media should not be labeled with the pejorative copyright troll title because it is the actual producer of the copyrighted works. Malibu, however, evinces textbook troll tactics. It has even conceded in a response “it is possible that someone other than the subscriber is the infringer,” despite its previous assertion that “the detection technology employed by IPP, Ltd . . . is infallible and the process is not impeachable.”¹⁵⁰

III. PROPOSAL

With these issues in mind, academics, judges, and industry stakeholders have proposed several approaches to compromise the disingenuous efforts of various trolls by promoting accountability in copyright enforcement while restoring the framers’ original intent to the Copyright Act.¹⁵¹ This section will survey such proposals and argue for a resolution that will prevent author and non-author rights holders’ misuse of the judicial process at the discovery stage.

¹⁴⁷ *Id.* at *14.

¹⁴⁸ *Id.* at *14.

¹⁴⁹ *Id.* (imposing a sanction against Malibu Media’s named “counsel and law firm, jointly, for each time Exhibit C was attached to a complaint and publicly filed in this court.”).

¹⁵⁰ Malibu Written Response, *supra* note 125, at 7, 18 (recognizing that information gathered through its advanced surveillance engenders the possibility of being incorrect because “the subscriber could be renting his or her house to a person using the subscribers [sic] internet to commit an infringement . . . [or] may have relatives or friends living with him or her who use the subscriber’s internet and are the infringers”).

¹⁵¹ Maria Pallante, *The Next Great Copyright Act*, 37 COLUM. J.L. & ARTS 315, 326 (2013). As the Register of Copyrights of the United States and Director of the U.S. Copyright Office, Ms. Pallante says that:

A twenty-first century copyright act requires twenty-first century enforcement strategies. These must respect the technical integrity and expressive capabilities of the Internet as well as the rule of law. It is possible and necessary to combine safeguards for free expression, guarantees of due process, and respect for intellectual property in the copyright law. As the Supreme Court recognized, “the Framers intended copyright itself to be the engine of free expression.”

Id.

A. The “Eliminate Statutory Damages” Approach

Several commentators have ardently suggested that the appropriate remedy to resolve the increasingly prevalent copyright troll issue is to simply eliminate the threat of statutory damages.¹⁵² This straightforward solution of removing the inducement to utilize a sue-to-settle business model appears, on its face, to be a strong deterrent to this type of litigation that seeks to extract money from copyright infringement.¹⁵³ However, this proposal raises more complex issues than it resolves. It is neither narrowly tailored nor the least restrictive means of achieving the desired result of remedying a recurring discovery abuse in a specific subset of copyright infringement cases.¹⁵⁴

The principal purpose of statutory damages within U.S. Copyright Law is to afford rights holders adequate compensation when actual damages suffered is exceedingly difficult, if not impossible, to prove.¹⁵⁵ Although removing statutory damages from the Copyright Act may arguably be an effective deterrent against trolls, high damages is only one of the threats employed, particularly in cases of pornography infringements.¹⁵⁶ As a result, companies such as Prenda Law and Malibu Media would still have substantial bargaining power. They would still be able to induce small settlements on a large scale regardless of user culpability.¹⁵⁷

¹⁵² Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 510 (2009). The authors state that:

As part of a more general revision of copyright law, Congress might even reconsider whether statutory damages serve a desirable purpose in copyright law The compensatory purpose of statutory damages continues to be important, but, owing to the 1976 Act’s creation of an enhanced level of authorized statutory damages for willful infringements, and the lack of principles to guide jury or judicial deliberations on statutory damages, awards have too often been arbitrary and inconsistent, and sometimes grossly excessive.

Id.

¹⁵³ Nate Anderson, *US Anti-P2P Law Firms Sue More in 2010 Than RIAA Ever Did*, ARS TECHNICA (Oct. 9, 2010, 1:57 PM), <http://arstechnica.com/tech-policy/news/2010/10/us-anti-p2p-law-firms-sue-more-in-2010-than-riaa-ever-did.ars> (noting that ISPs are challenging the “legitimacy of the entire detection process in court” because more than 24,000 John Doe Lawsuits were filed in 2010 alone).

¹⁵⁴ See Samuelson & Wheatland, *supra* note 152, at 499 (stating that statutory damages “clearly have a significant compensatory purpose” and Congress intended them to have a legitimate goal of deterrence).

¹⁵⁵ *Id.* at 446 n.22 (citing Stenographic Report of the Proceedings at the Third Session of the Conference on Copyright (Mar. 13–16, 1906), reprinted in 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT PT. E, at 227–35 (E. Fulton Brylawski & Abe Goldman eds., 1976)) (“The legislative history of the 1909 Act contains numerous expressions of concern about the difficulties of proving actual damages or defendant’s profits as a rationale for the adoption of a statutory damage provision.”).

¹⁵⁶ Duffy Law Letter, *supra* note 3 (noting that the settlement letter employs threats stating similar cases involve over \$100,000 in legal fees, defendants may be subject to a multi-year lawsuit, and his or her name will be “forever associated” with the lawsuit regardless of the outcome).

¹⁵⁷ *Id.* (using rhetoric to induce settlement within the demand letter claiming “this matter will be followed closely in the national media . . . [and] several websites publish every pleading filed in every one of our clients’ actions”).

Further, removing statutory damages would result in significant disruptions to other areas of copyright law.¹⁵⁸ On one end of the copyright remedies continuum, removing statutory damages will adversely affect

situations in which it [is] difficult for a copyright owner to prove what actual damages [were] sustained and what profits the defendant made or when it would be too expensive, for example, because of a possible need to hire an expert witness, to prove damages or profits in comparison with the amount that could be recovered.¹⁵⁹

Further, on the opposite end of the spectrum, eliminating statutory damages will drastically affect cases where egregious and massive copyright infringement operations exist.¹⁶⁰

A more operative means to a legitimate end would require courts to cabin excessive statutory awards in online cases by strictly scrutinizing willful infringement through a more rigid and less discretionary lens.¹⁶¹ This would still preserve the “dual purposes of compensation and deterrence” without drastically eliminating statutory damages from copyright law entirely and prevent “arbitrary, inconsistent, unprincipled, and grossly excessive awards.”¹⁶² For instance, when considering the appropriate amount of statutory damages, courts should adhere to principles derived from case law and consider: “(1) expenses saved and profits reaped by the infringer; (2) revenues lost by the plaintiff; (3) the strong public interest in

¹⁵⁸ See Samuelson & Wheatland, *supra* note 152, at 497–99 (suggesting that copyright reform is necessary because the complete removal of statutory damages is not warranted to fix a “damages regime” that has been inconsistently applied and often results in arbitrary awards when it also serves the benefits of compensation and deterrence).

¹⁵⁹ *Id.* at 499 (explaining that statutory damages serves the essential purpose of compensating rights holders that have an infringed copyright where the monetary burdens would exceed the benefits of calculating actual damages).

¹⁶⁰ *Id.* at 498 (The maximum statutory damages award of \$150,000 “may, in fact, be a paltry sum if there are millions in profits that could potentially be disgorged for infringement of a single work,” for instance, counterfeited software.).

¹⁶¹ See Pallante, *supra* note 151, at 15. Pallante advised that

Statutory damages should remain squarely in the next great copyright act irrespective of section 412. However, there may be plenty to do on the edges, including providing guidance to the courts (*e.g.*, in considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved).

Id.; see also *Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 465 (E.D. Pa. 1987) (The court looked to fellow courts in similar cases to determine factors to be examined when computing “just” statutory damages awards.).

¹⁶² See Samuelson & Wheatland, *supra* note 152, at 509 (stating that legislative reform is needed because courts ineffectively balance, without established guidelines, the “perceived need for some compensation when damages and profits are difficult to prove . . . and the need for a higher level of possible awards to be imposed on egregious infringers”); see also *Broad. Music, Inc. v. Spring Mt. Area Bavarian Resort, LTD*, 555 F. Supp. 2d 537, 544 (E.D. Pa. 2008) (discussing the twofold purpose of statutory damages are to “compensate the plaintiff for the infringement of its copyrights; and they deter future infringements by punishing the defendant for its actions.”).

insuring the integrity of the copyright laws; and (4) whether the infringement was willful and knowing or innocent and accidental.”¹⁶³

However, precisely defining the scope in which courts must assess statutory damages awards in copyright cases—although representing a pivotal step in the proper direction—will only mitigate the harms caused by trolls that reach the trial level.¹⁶⁴ Copyright trolls’ actual objectives embodied within infringement suits clearly have diverged from the idea of delivering justice through defending digital rights. Rather, they have become focused instead on procuring unenforced copyrights that are being allegedly infringed upon in order to acquire a discovery order.¹⁶⁵ Thus, the actual effect of these noxious firms’ activities results in undermining the primary policy goals of the Copyright Act by chilling free speech and disincentivizing innovation.¹⁶⁶ As a result, copyright trolls’ primary aim of simply reaching the pretrial discovery stage has remained intact, and has paved the way for a new and more perspicacious troll to learn vicariously.¹⁶⁷

¹⁶³ *Broad. Music*, 555 F. Supp. 2d at 544 (court extensively reviewed established precedent to articulate factors to examine statutory damages); see also *Original Appalachian Artworks*, 658 F. Supp. at 465 (citing *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 887 (W.D. Pa. 1985); *Rare Blue Music, Inc. v. Guttadauro*, 616 F. Supp. 1528 (D. Mass. 1985); and *Milene Music, Inc. v. Gotaucio*, 551 F. Supp. 1288 (D.R.I. 1982)).

¹⁶⁴ See Samuelson & Wheatland, *supra* note 152, at 500–01 n.307 (“It is fairly common for judges to recite a set of factors that should be considered in awarding statutory damages. This has not, however, necessarily led to soundly reasoned analyses about the level of award that was appropriate given the harm to the plaintiff.”); see also *Lowry’s Reports, Inc. v. Legg Mason*, 302 F. Supp. 2d 455, 461 (D. Md. 2004) (instructing jury on a number of factors to consider in awarding statutory damages, including the defendant’s wealth); *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1001 (D. Minn. 2011) (The court reduced the statutory damages award in a file-sharing case because the amount awarded for copyright infringement for personal use was “appalling.”).

¹⁶⁵ See Tehranian, *supra* note 9, at 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.”).

¹⁶⁶ *Id.* at 549. Professor Tehranian explains:

The expanded enforcement of copyright laws precipitated by the P2P revolution has forced us to reexamine the rationality of our reigning intellectual property regime. For example, the statutory damages provisions of the Copyright Act have enabled the RIAA to file multimillion dollar infringement suits against thousands of individuals, including many children and grandparents, on the basis of P2P activity. The cases rarely advance to an adjudication on the merits, as all but the bravest (or, perhaps, most foolhardy) defendants quickly settle instead of fighting the well-financed behemoth and the powerful threat of statutory damages—up to \$ 150,000 per infringing act.

Id.

¹⁶⁷ See Anderson, *supra* note 153 (emphasizing that US anti-P2P firms have applied the Recording Industry Association of America’s strategy of mass-litigation and will continue to grow “with no one in Congress standing up to publicly denounce the tactics.”); *Malibu Media, LLC, v. Assigned Ip Address 24.183.51.58*, No. 13-cv-205-wmc, 2013 U.S. Dist. LEXIS 128615, at *9 (W.D. Wis. Sept. 10, 2013) (reasoning that, when Malibu Media was ordered to show cause why the court should not issue Rule 11(b) sanctions, “[w]hile the court agrees with Malibu Media that there is only

A new sophisticated troll can effortlessly circumvent the existing precedent established by troll cases, specifically *Righthaven* and *Prenda Law's* Fair Use, standing, fraudulence, and ethics rulings. It can become more efficacious than its fallen predecessors by actually acquiring the exclusive bundle of rights afforded to copyright owners of illegally-downloaded online media, as done by Malibu Media.¹⁶⁸ Even though courts are beginning to recognize the “false positives” concern regarding the actual identity of the alleged infringer, this tends to only arise at the trial level.¹⁶⁹ Further, as technology develops and further erodes privacy rights, the risk of “false positives” may even disappear as the actual identities of alleged infringers become increasingly more available. This would compound the troll issue through hyper-enforcement of the Copyright Act.¹⁷⁰

B. The “Procedural Pause Button” Approach

This is a problem requiring a solution because the merits of Fair Use, standing, and the probability of false positives as prevailing defenses were only a pretext to an excessive enforcement issue that will continue to propagate.¹⁷¹ In order to ultimately

circumstantial evidence of ill intent, Malibu Media’s denials do not pass the smell test, and any denial of improper motive by its counsel does not pass the laugh test.”).

¹⁶⁸ *Compare* *Righthaven LLC v. Wehategringos.com*, No. 2:10-CV-01457-LRH-GWF, 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 *17–21 (D.S.C. Jan. 13, 2012) (finding *Righthaven* lacked standing because it did not own the exclusive rights afforded protection under copyright law because *Righthaven* was assigned the bare right to sue under the agreement made with various news publishers), *with* *Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 3038025, at *3 (E.D. Pa. June 18, 2013) (Malibu Media owns the valid copyrights registered with the United States Copyright Office), *and* *Malibu Media, LLC v. Does*, No. 12-2078, 2013 WL 30648, at *5 (E.D. Pa. Jan. 3, 2013) (noting that “the Fields founded Malibu Media, LLC . . . Brigham Field agreed to transfer all of his copyrights to the company. In an Affidavit, Colette Field attests that her and her husband’s intentions were always for Malibu Media to acquire “every single right associated with” Brigham Field’s copyrights.”).

¹⁶⁹ *AF Holdings LLC v. Doe*, 2013 WL 97755, at *20 (N.D. Cal. Jan. 7, 2013) (court denied plaintiff leave to amend complaint because there were no facts showing that the defendant infringed AF Holdings’ copyrighted material “apart from the facts . . . that the IP connection through which the material was downloaded [was] registered to Hatfield.”); *AF Holdings LLC v. Rogers*, No. 12cv1519 BTM(BLM), 2013 U.S. Dist. LEXIS 11929, at *4–5 (S.D. Cal. Jan. 29, 2013) (recognizing the issue of false positives); *In re BitTorrent Adult Film Copyright Infringement Cases*, No. 11-3995(DRH)(GRB), 2012 WL 1570765, at *4 (E.D.N.Y. May 1, 2012) (emphasizing the “risk of false positives gives rise to the potential for coercing unjust settlements from innocent defendants such as individuals who want to avoid the embarrassment of having their names publicly associated with allegations of illegally downloading.”); *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

¹⁷⁰ *See* *Tehrani* *supra* note 9, at 550 (“As surveillance technology grows more sophisticated, thereby allowing acts of infringement increasingly to come under the detection and enforcement power of copyright holders, we will be forced to confront the law/norm disparity.”).

¹⁷¹ *Id.* at 549. *Tehrani* forecasts that:

[B]y facilitating superior tracking of the use of copyrighted works, technology is now forcing us to address the uncomfortable and ultimately untenable law/norm disparity. While there may be a vast disparity between what activities the Copyright Act proscribes and what the average American might consider fair or

halt the disingenuous efforts of trolls disguised as digital rights defenders before the identities of innumerable alleged infringers are subpoenaed from ISPs and settlement letters are disbursed, the Copyright Act must be amended to prevent this form of chilling litigation.¹⁷² To prevent this misuse of the discovery stage by copyright trolls, a “procedural pause button” must be established. This “pause button” should be incorporated into the Copyright Act to provide for a limited evidentiary hearing, as opposed to notice pleading.¹⁷³ At the hearing, there will be an assessment geared to establish bad faith through an objective constellation of nonexclusive factors.¹⁷⁴

First, it should be specific to cases where non-author plaintiffs or rights holders evince troll tactics by generating an ancillary revenue stream through excessive enforcement while seeking to obtain the identities of large groups of alleged infringers from ISPs at the discovery stage.¹⁷⁵ Courts can identify these trolls by ordering non-author parties seeking copyright enforcement to provide sufficient evidence of actual ownership of the copyright. At the same time, it can expose any improper purpose, discovery abuse,¹⁷⁶ or copyright misuse from both author and non-

just, a lack of aggressive enforcement has long prevented this fundamental tension from coming to a head. As technology improves, however, and as privacy rights continue to erode, enforcement is becoming increasingly practicable.

Id.

¹⁷² See, e.g., Pallante *supra* note 151, at 9 (stressing the revision of the Copyright Act because the “dissemination of content is so pervasive to life in the 21st century, copyright issues are necessarily pervasive as well—from fair use in education to statutory licenses for new businesses, to the parameters of liability and enforcement online and in the home”); Righthaven LLC v. Jama, No. 2:10-cv-1322-JCM-LRL, 2011 WL 1541613, at *13 (D. Nev. Apr. 22, 2011) (Righthaven’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.”).

¹⁷³ FED. R. CIV. P. 8 (Federal courts used a much stricter standard called “fact pleading standard” until the Federal Rules of Civil Procedure were adopted in 1938, which allows parties drafting pleadings to state their claims in general terms without alleging detailed facts to support each claim and without worrying about hypertechnical details.)

¹⁷⁴ See e.g., Pallante *supra* note 151, at 5, 14 (suggesting the Copyright Act should be revised because there comes a time when the “subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments” while raising the issue of “whether Congress should create a streamlined adjudicative process to assist copyright owners with claims of small economic value”).

¹⁷⁵ See, e.g., Kurt Opsahl, *EFF Moves to Quash Subpoena in Copyright Troll’s Retaliatory Lawsuit*, ELEC. FRONTIER FOUND. (Apr. 18, 2013), <https://www.eff.org/deeplinks/2013/04/eff-moves-quash-subpoena-copyright-trolls-retaliatory-lawsuit> (noting that Prenda Law has successfully subpoenaed the identities of tens of thousands of potential online infringers during the discovery stage to mass-mail settlement letters).

¹⁷⁶ FED. R. CIV. P. 26(g). By signing a disclosure, or discovery request, response, or objection, the following occurs:

[A] party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry: . . . (B) with respect to a discovery request . . . it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument . . . [and is] (ii) not interposed for any improper

author plaintiffs.¹⁷⁷ Courts would then be able to inexpensively expose trolls before an inundation of legal ransom letters are disbursed. Any bad faith intent of the non-author plaintiffs would be revealed at the preliminary stage. Meanwhile, countless defendants will be safeguarded against receiving meritless settlement letters that force them to pay the high costs of litigation to defend against claims that should never have reached discovery, let alone settlement.¹⁷⁸

Second, courts will be able to identify whether the defendant has plausible non-infringement arguments by applying the principles extracted from precedent as discussed in Part II during the limited evidentiary hearing.¹⁷⁹ Before extortionate settlement letters can be mailed, courts will be presented with the opportunity to require parties to offer concrete proof of the online infringement associated with the account holder in question. This will include requiring rights holders to find alternative ways to more precisely identify the alleged infringer without creating collateral damage.¹⁸⁰

purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

Id.

¹⁷⁷ See, e.g., Pallante *supra* note 151, at 6. Pallante conceded that

Congress is acting responsibly when it makes discrete adjustments to the copyright law from time to time, but its more valuable role always has come from reviewing, and addressing as appropriate, the larger policy themes and developments that require attention. . . . The next great copyright act would not require Congress to start from scratch because, since 1998, it has put in motion a steady stream of preparatory work on core issues.

Id.; see also *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (noting that the copyright misuse defense may be extended to instances where “the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright”).

¹⁷⁸ See, e.g., Pallante *supra* note 151, at 30 (identifying that “1976 Act, which was a fair and remarkable achievement by many accounts, did not come close to the bleeding edge of technology” displayed by its “inadequacies [that] are already becoming apparent, and no prophet is needed to foretell the need for substantial restructuring of our copyright system before the end of this century”).

¹⁷⁹ See Samuelson & Wheatland, *supra* note 152, at 501–02. Samuelson suggests principles that illustrate what courts should do when awarding copyright statutory damages:

[1] Consider awarding the reduced minimum damages authorized for “innocent” infringements in close fair use cases or . . . cases in which the noninfringement claim was strong, even if [not ultimately successful; (2)] . . . Award the minimum statutory damages award [available] in cases of ordinary infringement when: [(a)] the plaintiff lost no profits and the defendant made no profits from the infringement, or when damages and profits are nominal or minimal; [(b)] the infringement was technical in nature; (c) the plaintiff or the plaintiff’s lawyer has engaged in misconduct; or (d) the defendant had a plausible fair use or other noninfringement argument (unless the plaintiff’s lost profits or defendant’s profits justify a larger award.

Id.

¹⁸⁰ *AF Holdings LLC v. Rogers*, No. 12cv1519 BTM(BLM), 2013 U.S. Dist. LEXIS 11929, at *4–5 (S.D. Cal. Jan. 29, 2013). The Court recognized that under FED. R. CIV. 11(b)(3):

Third, in order to elect statutory damages resulting from a download, courts should compel plaintiffs to supply more than a modicum of evidence that actual damages is difficult to measure.¹⁸¹ The plaintiffs will have a more difficult time pleading statutory, rather than actual, damages. In effect, the risk that IP address subscribers will receive a meritless settlement claim is minimized by placing a heavier but not undue burden on plaintiffs seeking copyright enforcement against large numbers of John Does in online infringement cases.

Applying all the factors above, the limited evidentiary hearing will act as a reasonableness standard for the courts to distinguish a legitimate author seeking enforcement from an illegitimate non-author seeking extortion.¹⁸² This procedural pause button would minimize the abuse of copyright remedies, limit the joinder of John Doe defendants, and protect their identities, all while restoring the original intent and policy-backed considerations instilled in the Act by the framers.¹⁸³

Plaintiff's counsel certified that to the best of his knowledge, this factual contention has evidentiary support. However, due to the potential for abuse in these types of cases, the Court wants to make sure that Plaintiff's contention is supported by evidence that goes beyond the identity of the subscriber to the IP address. Therefore, the Court orders Plaintiff to provide a more definite statement setting forth the factual basis for its allegation that Defendant used IP address 68.8.137.53 to infringe its copyright.

Id.

¹⁸¹ *Id.* at 502 (stressing that in cases of online infringement, the courts should require the parties to “offer proof of damages and profits, or, in the alternative, to demonstrate why damages or profits are sufficiently difficult to prove that it is justifiable to offer no such proof”).

¹⁸² Memorandum & Order at 10, Third Degree Films v. Does 1–47, No. 12-10761-WGY (D. Mass. Oct. 2, 2012). The Court explained:

Since its decision was issued in *Liberty Media*, this Court has entertained a profusion of filings in the mass copyright infringement cases on its docket. Upon further reflection and deeper understanding of the policy considerations at play, the Court now revisits and amends its holding in *Liberty Media*. The Court continues to maintain that joinder is technically proper under Rule 20(a). The Court now holds, however, that in light of its serious concerns regarding prejudice to the defendants as a result of joinder, it ought exercise the broad discretion granted it under 20(b) and sever the Doe defendants in this action and in similar actions before this Court.

Id.; see also Memorandum & Order at 9, Third Degree Films v. Does 1–72, No. 12-10760-FDS (ECF No. 28) (D. Mass. Nov. 5, 2012) (dismissing and severing numerous John Doe defendants in the interests of justice and judicial economy); Disc. Video Ctr., Inc. v. Does 1–29, No. 12-10805-NMG, at 10–11 (D. Mass. Nov. 7, 2012) (No. 31) (denying expedited discovery in consolidated order regarding three independent cases due to the plaintiff's inability to create a discovery plan); Order at 2, West Coast Prods. v. Does 1–535, No. 3:10-cv-00094-JPB-JES (N.D. Va. Dec. 16, 2010) (ECF No. 45) (severing all John Doe defendants except one because “merely committing the same type of violation in the same way does not link defendants together for purposes of joinder” while quashing all subpoenas).

¹⁸³ See Samuelson & Wheatland, *supra* note 152, at 451–52.

Congress made several changes in the new statutory damage regime that were intended to curb the potential for excessively large awards and strengthen the

CONCLUSION

Even though ethical investigations and class action lawsuits resulted in Righthaven and Prenda Law's insolvencies, the incentive for trolls remains, as vividly displayed by Malibu Media. Analogous to the patent system, copyright trolls will continue to unravel the fabric of intellectual property enforcement as long as the Copyright Act creates a profit for this behavior.

The ramifications of their litigation tactics under current law diverge from the framers' underlying purpose of the Act.¹⁸⁴ According to Maria Pallante, Register of Copyrights of the United States and Director of the U.S. Copyright Office,

Congress needs to see the evolution of technology and related businesses with some objectivity, and to consider, as appropriate, the rulings and the frustrations of the courts, before it can move forward. When it is ready to move, however, Congress should do so with both great deference to the principles of the past and great vision for the future.¹⁸⁵

Pallante further encourages "Congress not only to think about copyright law but to think big. The next great copyright act is as exciting as it is possible. Most importantly, it is a matter of public interest."¹⁸⁶ Accordingly, the Copyright Act must be amended in order to bridge the exploited gap between online user behavior and the protections afforded to rights holders. This will restore the incentive to "stimulate artistic creativity for the general public good."¹⁸⁷

compensatory purposes of such awards; yet, it also created a new higher range for statutory damages that could be awarded against willful infringers, which unfortunately opened up opportunities for excessive awards far beyond congressional intent.

Id.

¹⁸⁴ See Tehranian, *supra* note 9, at 549–50. Tehranian explains that:

The P2P example is just one way in which technology has enabled expanded enforcement of copyright laws—a trend that is accelerating as technology improves. Imagine a world where every act currently deemed infringing under the law were actually prosecuted. . . . The very technologies that enhance our media experiences are rapidly bringing us closer to the Panopticon state in which a near-total enforcement of intellectual property rights becomes viable.

Id.

¹⁸⁵ See Pallante *supra* note 151, at 1, 5 (addressing the need for the "next great copyright act" because there comes a time when the "subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments").

¹⁸⁶ *Id.* at 30.

¹⁸⁷ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).