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The Uneasy Case Against Copyright Trolls

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ARTICLES

THE UNEASY CASE AGAINST COPYRIGHT TROLLS

SHYAMKRISHNA BALGANESH*

ABSTRACT

The copyright troll and the phenomenon of copyright trolling have thus far received surprisingly little attention in discussions of copyright law and policy. A copyright troll refers to an entity that acquires a tailored interest in a copyrighted work with the sole objective of enforcing claims relating to that work against copiers in a zealous and dogmatic manner. Not being a creator, distributor, performer, or indeed user of the protected work, the copyright troll operates entirely in the market for copyright claims. With specialized skills in monitoring and enforcing copyright infringement, the troll is able to lower its litigation costs, enabling it to bring claims against defendants that an ordinary copyright owner might have chosen not to.

As a matter of law, the copyright troll's model usually complies with all of copyright's formal rules. Courts have as a result struggled to find a coherent legal basis on which to curb the copyright troll. In this Article, I show that the real problem with the copyright troll originates in the connection between copyright's stated goal of incentivizing creativity and the enforcement of copyright claims, which discussions of copyright law

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and policy fail to adequately capture. Copyright claims, much like other private law claims, are systematically underenforced. This underenforcement is neither purely fortuitous nor indeed marginal to the system, but instead operates as an important safety valve that introduces an informal breathing space into copyright's functioning. Over time, this underenforcement results in a balance between claims that are actionable and enforced, and those that are actionable but tolerated. It is precisely this balance that the advent of the troll disrupts, since it seeks to enforce claims that copyright owners would have otherwise tolerated.

This Article unpacks the connection between the incentive to create and the incentive to enforce in copyright to show why the troll's actions are indeed problematic, despite its formal compliance with copyright's legal rules. In so doing, this Article shows how the troll exploits the market for copyright claims and argues that a permanent solution to the problem will entail targeting the troll's incentive structure rather than using any of copyright's existing doctrines.

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I. INTRODUCTION

The “troll” is becoming a familiar figure in the world of intellectual property law. As an idea, it made its first appearance in patent law, where a “patent troll” today refers to a nonperforming patent owner who merely seeks to enjoin the use of an invention without itself using the invention or servicing the market for it—the proverbial “dog in the manger.”¹ Indeed, during oral argument in a Supreme Court case involving the legal standard for patent injunctions, one Justice seemed suitably amused by the term, comparing it to a “scary thing” lying in wait for innocent victims under the bridge.²

For all the attention that the troll has received in patent law however, its presence in copyright law, together with the allied practice of copyright trolling, has been largely ignored. References to “copyright trolls” in the literature have in the past been few and far between.³ The idea began to get a great deal of attention just this past year, when a Nevada-based company by the name of Righthaven LLC (“Righthaven”) came to develop a

1. See, e.g., John M. Golden, Commentary, “Patent Trolls” and Patent Remedies, 85 TEX. L. REV. 2111, 2112 (2007) (describing patent trolls as “a class of patent owners who do not provide end products or services themselves, but who do demand royalties as a price for authorizing the work of others”); Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1810 (2007) (discussing what makes a “patent troll”); Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961, 1023 (2005) (same); Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 458 (2012) (same); Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 368 (2010) (citing patent trolls as a transaction cost that can “stifle commercialization”); James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 192 (2006) (describing the characteristics of a “patent troll”); Marc Morgan, Comment, *Stop Looking Under the Bridge for Imaginary Creatures: A Comment Examining Who Really Deserves the Title Patent Troll*, 17 FED. CIR. B.J. 165, 165 (2008) (same); Sannu K. Shrestha, Note, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 115 (2010) (same).

2. Transcript of Oral Argument at 26, *eBay, Inc. v. MercExchange*, 547 U.S. 388 (2006) (No. 05-130).

3. For some early usage of the term, see John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 550 (2007) (“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 [of licensing rights].”), and Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 11–12 (2008).

business model that revolved around enforcing third party copyright claims against infringers, claims in which it had no more than an artificially tailored assignment of rights.⁴ In essence, Righthaven's model was premised on buying one of the creator's several rights to exclude from the bundle of exclusive rights that copyright law grants every creator and enforcing it efficiently, albeit in dogmatic fashion.

Interestingly enough though, copyright law has long enabled behavior that is only today pejoratively described as "trolling." In enacting the Copyright Act of 1976,⁵ Congress abandoned the long-held idea that copyright's set of exclusive rights, whenever granted to a creator, was fundamentally indivisible. Under this old approach, copyright law was seen as granting authors a limited set of exclusive entitlements. In assigning these rights, authors could either assign them as a unified whole or not at all.⁶ Any attempt to assign anything less than the whole was treated by the law as a mere license, with the assignee / licensee then having no independent standing to commence an action for infringement.⁷ This made determining ownership of copyright a relatively simple matter and precluded parties from tailoring their contractual arrangements in excessively idiosyncratic terms. The Act of 1976, however, consciously abandoned this approach by allowing the bundle to be broken up into as many rights or mini-rights as the parties deemed necessary during an assignment.⁸ Additionally, and perhaps more importantly, it went one step further by creating an affirmative rule of standing, under which an exclusive licensee or assignee of any right or mini-right was deemed to be the owner of that right and given the ability to commence an action for copyright infringement as long as it related to any right covered by the contract.⁹ The Act thus came to recognize the idea of multiple ownership of a single work and allowed each owner to hold a narrowly defined and

4. For Righthaven's first lawsuit under its business model, see Complaint and Demand for Jury Trial, *Righthaven LLC v. Moneyreign, Inc.*, No. 2:10-CV-0350 (D. Nev. Mar. 13, 2010). For early coverage of its strategy, see David Kravets, *Newspaper Chain's New Business Plan: Copyright Suits*, WIRE (July 22, 2010, 3:29 PM), <http://www.wired.com/threatlevel/2010/07/copyright-trolling-for-dollars/>.

5. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.).

6. See 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 10.01[A] (rev. ed. 2012); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 564 (2010); Elliot Groffman, Comment, *Divisibility of Copyright: Its Application and Effect*, 19 SANTA CLARA L. REV. 171, 171 (1979).

7. 3 NIMMER & NIMMER, *supra* note 6, § 10.01[A], [C][1].

8. *Id.* § 10.02[A]; 17 U.S.C. § 201(d)(2) (2006).

9. 3 NIMMER & NIMMER, *supra* note 6, § 10.02[B][1].

limited set of rights.¹⁰

Analytically, this change seemed rather logical at the time. Since use and exclusion are taken to be the two primary and interdependent features of ownership, characterizing any party that holds both rights together as its owner now made perfect sense.¹¹ Yet, by allowing for the unrestricted fragmentation of copyright's bundle of exclusive rights and simultaneously endowing it with independent practical significance (standing), the Act allowed for a rather significant loophole on the enforcement front. In situations where a copyright holder might want to sell its enforcement rights (though not use rights) to another party, a practice otherwise forbidden under traditional contract and common law rules prohibiting the sale of legal claims,¹² the parties could now create an exclusive license (or assignment) that granted the licensee an artificially tailored use right, which would in turn indirectly enable the licensee to commence an action for infringement qua owner. Of course, this tailoring of the use right had to overlap with the scope of the enforcement sought. But in situations in which the target of the enforcement (the putative defendant) had already been identified either individually or by class, this posed no problem. The copyright holder could create an exclusive license that covered the precise activities, time frame, and geographic area of the defendant, and the licensee could enforce the copyright on its own, with claims for statutory and willful damages. Thus emerged the potential for copyright trolls.

It was precisely this loophole that Righthaven crafted its entire enterprise around, earning it the dubious distinction of becoming copyright law's first anointed "troll." In less than two years, Righthaven managed to bring more than 275 cases of copyright infringement against defendants, settling many of these cases or succeeding in obtaining statutory damages from courts.¹³ Its success in these actions in turn resulted in an outpouring of criticism from different corners.¹⁴

10. *Id.* § 12.02; 17 U.S.C. § 101 (defining "transfer of copyright ownership").

11. For an elaborate discussion of the use-exclusion connection in property law, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 68 (1997).

12. See Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 816 (1916); *infra* Part II. The prohibition is thought to emanate from the common law rules against champerty and maintenance. For a recent overview of the prohibition, see Maya Steinitz, *Whose Claim Is this Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1286–1301 (2011).

13. For a comprehensive list of these cases, see *Comprehensive List of Copyright Infringement Lawsuits Filed by Righthaven, LLC*, RIGHTHAVEN LAWSUITS, <http://www.righthavenlawsuits.com/lawsuits.html> (last visited Apr. 19, 2013) [hereinafter *Comprehensive List*].

14. See, e.g., Susan Beck, "Copyright Troll" Righthaven Passes Early Federal Court Test, AM. LAW. (Sept. 9, 2010), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202471807253>

On the face of things though, it is not readily apparent why a copyright owner's delegation of the enforcement of its exclusionary rights to another entity with special expertise in that task ought to be seen as problematic. The delegation solves what economists call the principal-agent problem by allowing for the perfect alignment of the agent's incentives with those of the principal, through the mechanism of divided ownership.¹⁵ Additionally, the law's historical reluctance to allow for the free alienability of legal claims to third parties that are better positioned to enforce them has long been thought to lack a suitably strong explanation.¹⁶ If a right is violated, and its enforcement is therefore the subject of a perfectly valid legal claim, why should it matter exactly who commences the legal action, as long as the original right-holder obtains some direct or indirect benefit from the enforcement? Scholars have continued to make this argument in response to the law's prohibition on the alienation of legal claims;¹⁷ and yet, when copyright law now seems to have indirectly allowed for just such alienation, it is seen as deeply problematic. Despite the voluminous media coverage that Righthaven's activities as a troll received, the precise legal, theoretical, or policy reasons for the purported illegitimacy of its business model have received surprisingly little attention. Indeed, much of the rhetoric surrounding Righthaven's actions as a troll seemed to stem from the perceived unfairness of today's copyright laws, around which its enforcement model was built.¹⁸

In this Article, I argue that the real reasons why allowing copyright owners to outsource and delegate the enforcement of their rights to third parties (trolls) such as Righthaven is troublesome originate in its disruption

&slreturn=20130313204837; Jay Fitzgerald, *Legal Shark Sues Boston Bloggers*, BOS. HERALD, Aug. 8, 2010, http://www.bostonherald.com/business/general/view/20100808legal_shark_sues_boston_bloggers_las_vegas_paper_sells_news_content_to_lawyer; Joe Mullin, *Is This the Birth of the Copyright Troll?*, LAW.COM (Aug. 16, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202466627090&Is_This_the_Birth_of_the_Copyright_Troll; Debra Cassens Weiss, *'Attack Dog' Group Buys Newspaper Copyrights, Sues 86 Websites*, AM. BAR. ASS'N J. (Aug. 4, 2010, 6:34 AM), http://www.abajournal.com/mobile/article/attack_dog_group_buys_newspaper_copyrights_sues_86_websites.

15. For a general overview of the agency cost problem, see JEAN-JACQUES LAFFONT & DAVID MARTIMORT, *THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL* 2–3 (2002).

16. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 703–57 (2005) (“[A]s traditionally formulated, the apparently most formidable objections to claim sales are not powerful.”); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 120–22 (2011) (“U.S. courts have never been shy about admitting that the earliest justifications for limitations on assignment and champerty has almost no relevance to contemporary life.”).

17. Sebok, *supra* note 16, at 132–33.

18. See, e.g., Beck, *supra* note 14; Fitzgerald, *supra* note 14; Mullin, *supra* note 14; Weiss, *supra* note 14.

of an enforcement equilibrium that is integral to the functioning of copyright as an institution. While structured along the lines of a property right, copyright law embodies a deep instrumentalism—relating to the encouragement of creativity—that is manifested both in the working of its individual doctrines as well as in the way in which these doctrines interact with each other as an ensemble. Copyright law however consciously chooses to realize this instrumental goal through the vehicle of private enforcement, which explains why it is structured as a regime of private law.¹⁹ And as with most regimes of private enforcement, realization of the institution’s social goals depends on their alignment with the enforcement incentives of private actors. Nonetheless, as has been shown to be true in innumerable contexts, the enforcement incentives of private actors invariably come to be influenced by various costs and considerations external to the formal rules of the legal regime.²⁰ The result is often a systematic underenforcement of otherwise actionable claims. So it is with copyright too, where this manifests itself in the creation of a balance between actionable claims of infringement that are actually enforced and actionable claims that are instead tolerated and treated as de facto noninfringing claims.²¹

Copyright claims, much like other private law claims in the areas of tort, property, and contract, are thus systematically underenforced.²² It is

19. See generally Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012) (describing the private law origins and structure of copyright law).

20. See, e.g., Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 371 (1986) (“Recent work has analyzed the serious deficiencies of this system of private enforcement that arise because the costs of operating the legal system create a divergence between actual private incentives to sue and those that would lead to socially optimal results.”); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577–79 (1997) [hereinafter Shavell, *Fundamental Divergence*] (basing the argument on the assumption that costs of litigation will affect private incentives to file suit); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333–34 (1982) [hereinafter Shavell, *The Social Versus the Private Incentive*] (stating that the argument can be made that multiple social efforts reflect the “problems of otherwise insufficient private motives to bring suit”).

21. Tim Wu has used the phrase “tolerated use” to describe a set of uses (of copyrighted works) that are “technically infringing” but “nonetheless tolerated.” Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 617 (2008). With a few modifications, see *infra* Part III.B, “actionable but tolerated” uses correspond roughly to Wu’s idea of uses that are tolerated by “policies of selective enforcement,” see Wu, *supra*, at 622.

22. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1102–03, 1158–59 (1996) (noting that tort law has high transaction costs and low claim rates); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1287 (1992) (“At nearly every stage, the tort litigation system operates to diminish the likelihood that injurers will have to compensate their victims.”).

this equilibrium of underenforcement that the advent of the copyright troll threatens to disrupt. Being a complete outsider to the market for creative works—in that it is not a producer, distributor, consumer, or indeed user of such works—the troll operates on a fundamentally different calculus of when to enforce the copyright claim from that of the original copyright owners. In essence then, the troll’s actions convert copyright law’s previously actionable but tolerated claims into actionable and enforced ones, disrupting the implicit equilibrium.

The problem with the troll however is more than just that it is overenforcing copyright. If this were the case, there would indeed be little reason to distinguish the troll from any other overzealous copyright owner. The unique problem presented by the troll originates in its incentive structure. The traditional copyright owner’s decision whether to enforce an actionable claim or not is thought to derive primarily (though not exclusively) from copyright law’s fundamental purpose as an inducement for creativity. Commencing an action for infringement is presumed to be a viable option principally when the harm from such infringement interferes in some way with (or is likely to interfere with) the market for creative works.²³ A copyright owner’s decision to sue a copier thus represents the belief that the copying in question is harming the owner’s ability to exploit the market for the copyrighted work. The incentive to enforce a copyright claim is ordinarily thought to track—either directly or indirectly—the very purpose for which the copyright system exists, namely, its creation of a market-based inducement for creativity. What makes the troll’s disruption of the underenforcement equilibrium problematic then is the fact that its reasons for doing so bear no relationship whatsoever to the market for creative works and derive instead from other unique efficiencies that it is positioned to capitalize on. Its incentives to sue for copyright infringement emanate from motivations that diverge rather fundamentally from the social reasons for the very existence of the copyright system.

This is where things cease being straightforward. Copyright law’s underenforcement equilibrium is maintained entirely through the conscious inaction of copyright owners, with absolutely no support from copyright’s formal rules and processes. In other words, it is almost never directly enforced by courts, but is instead dependent entirely on potential plaintiffs’ behavior for its realization. “Actionable but tolerated” claims also fall well outside the purview of the fair use doctrine, which by its very nature

23. Cf. Shavell, *The Social Versus the Private Incentive*, *supra* note 20, at 337–38 (arguing that a suit is socially desirable if social costs warrant the suit in that particular situation, not just when private costs warrant the suit).

extends to claims that copyright law recognizes as intrinsically nonactionable to begin with.²⁴ As a result, courts struggle to rein in copyright trolls and invariably resort to rules and principles that are at best indirect ways of addressing the problem. Given that copyright trolls have in theory violated none of the law's formal rules and principles, copyright law has thus far failed to articulate a coherent basis on which to curb their activities. In the process, the argument against copyright trolls starts becoming somewhat murky, since it remains unsupported by legal doctrine and instead originates in the overall functioning of the copyright system. It is this sense of unease that the rhetoric about copyright trolls continues to mask.

This Article sets out the analytical and normative contours of behavior that is pejoratively described as “copyright trolling,” examines the strategies that courts have used to curb it, and unbundles the real problems underlying such behavior. In so doing, it shows why discussions of copyright trolling reveal a sense of unease in their identification of the root of the problem and solutions to it.

Part II starts with an overview of copyright trolling, using the Righthaven episode as its paradigm. It sets out the idea of the “copyright troll,” shows how copyright law's principle of “infinite divisibility” facilitated the creation of copyright trolls such as Righthaven, describes Righthaven's precise business model and enforcement strategy, and concludes by examining how courts eventually reined in Righthaven's actions.

Part III unpacks the practice of copyright trolling to show how it remains problematic as a matter of copyright theory and policy. This part argues that copyright law embodies an equilibrium of underenforcement, which emanates from its reliance on private enforcement to realize its instrumental goals. It is this equilibrium that the troll's behavior disrupts both quantitatively and qualitatively. Since this equilibrium is maintained entirely through private (in)action, the troll's behavior remains perfectly compatible with existing copyright law, thereby making the case against it especially hard for both courts and litigants.

Part IV moves to the prescriptive and suggests that the only way to completely disallow copyright trolling will require the formalization of a rule that examines the incentives and motives of a claimant seeking statutory damages in a copyright infringement action. It concludes by

24. 17 U.S.C. § 107 (2006) (describing an act of fair use as copying that “is not an infringement of copyright”).

suggesting an approach that courts might consider to this end.

II. THE COPYRIGHT TROLL

A copyright troll refers to an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest. Much like a patent troll, a copyright troll is generally a nonperforming entity, in the sense that it is not a creator, distributor, or indeed user of creative expression.²⁵ It operates by obtaining an assignment—for valuable consideration—of one or more legal rights in another’s creative work, which it then uses to threaten and bring actions for infringement against others. Focused almost entirely on the legal enforcement of these rights, it relies either on the threat of litigation to force a large monetary settlement or instead proceeds to litigate its rights with the sole objective of obtaining damages from a defendant. Having no interest in the use or exploitation of the work and dependent entirely on settlements and damages for its revenue, a copyright troll is almost never satisfied with an order merely enjoining the defendant’s infringing activities.

Englishman Harry Wall is often described as the world’s first copyright troll.²⁶ The U.K. Dramatic Copyright Act of 1833 had created a system of statutory penalties for the infringement of protected works.²⁷ Wall developed a business in which he would obtain a power of attorney from composers with the sole objective of enforcing their rights, and would thereafter go around cities extracting hefty licensing fees and settlements from individuals who performed these compositions, threatening them with litigation and statutory penalties if they refused to pay up.²⁸ A critic of Wall described him as “not car[ing] anything for the work or anything else,” but the “money” involved.²⁹ This description of the copyright troll is as true today as it was of Wall in the 1800s. The only difference is of course that modern copyright trolls’ strategies are far more nuanced and sophisticated.

This part unpacks the working of copyright trolls as they operate today

25. See Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 INTELL. PROP. L. BULL. 1, 1 (2005) (“[Patent trolls] obtain patents, not to make, use, or sell new products and technologies, but solely to force third parties to purchase licenses.”).

26. Isabella Alexander, *Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words’: The Birth of the Performing Right in Britain*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 321, 339 (Ronan Deazley et al. eds., 2010).

27. The Dramatic Copyright Act, 1833, 3 & 4 Will. 4, c. 15 (U.K.).

28. Alexander, *supra* note 26, at 339–40.

29. *Id.* at 339; Statement of Thomas Chappell Before the Royal Commission on Copyright of 1878, in ROYAL COMMISSION ON COPYRIGHT: MINUTES OF EVIDENCE 106–09 (1878).

under the Copyright Act of 1976. Using the example of Righthaven, it illustrates how trolls capitalize on the relaxed rules of assignment, standing, and damages under copyright law, and then describes how courts have had challenges dealing with them under existing law.

A. MOTIVATING THE COPYRIGHT TROLL

Each element of the copyright troll's strategy inevitably involves exploiting a loophole or feature of the law to its advantage. While each of these loopholes may seem minor independently, when taken as a whole, they collectively make for a robust business model. This section examines the three main features of the Copyright Act of 1976, which when put together, actively facilitate the emergence of copyright trolls. Indeed, in some ways it is surprising that it took trolls a good three decades to fully exploit these features and develop their business models.

1. Independent Standing to Sue

Under the Copyright Act of 1909, only the proprietor of a copyright could bring an action for infringement, and only an author or the author's assignee was deemed a proprietor.³⁰ A licensee, even if exclusive, could bring an action only by joining the proprietor as a party to the action—either voluntarily or involuntarily.³¹ This created an obvious problem for potential trolls, since it necessitated either the copyright proprietor cooperating with the troll (in a voluntary joinder) or the troll running the risk of antagonizing the proprietor (in an involuntary joinder), which could jeopardize its entire business. This limitation on standing thus created an obvious obstacle to the emergence of trolls, and courts for their part, enforced this limit in legitimately rigid fashion.³²

30. *Manning v. Miller Music Corp.*, 174 F. Supp. 192, 194 (S.D.N.Y. 1959); *Borden v. Gen. Motors Corp.*, 28 F. Supp. 330, 334 (S.D.N.Y. 1939); 3 NIMMER & NIMMER, *supra* note 6, § 12.02[A].

31. *Followay Prods., Inc. v. Maurer*, 603 F.2d 72, 74 (9th Cir. 1979); 3 NIMMER & NIMMER, *supra* note 6, § 12.02[A].

32. *See, e.g., Buck v. Elm Lodge, Inc.*, 83 F.2d 201, 202 (2d Cir. 1936) (“In the case at bar, the society, as exclusive licensee of the right to perform the copyrighted work publicly for profit, could not sue for infringement without joining the owner of the copyright.”); *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9, 11–12 (2d Cir. 1922) (reversing injunction placed on infringing film on the grounds that the plaintiff “own[ed] less than the whole” copyright); *Ed Brawley, Inc. v. Gaffney*, 399 F. Supp. 115, 116 (N.D. Cal. 1975) (“It has been held repeatedly and consistently that a nonexclusive licensee may not bring an action on a copyright infringement unless the licensor, the proprietor, of the copyright is joined as a plaintiff.”); *Field v. True Comics, Inc.*, 89 F. Supp. 611, 613 (S.D.N.Y. 1950) (“A person to whom has been transferred only a limited right is a mere licensee of the particular right, and, as such, is not empowered to sue alone for violation of the copyright.”); *Local Trademarks, Inc. v. Powers*, 56 F. Supp. 751, 752 (E.D. Pa. 1944) (granting motion to dismiss on grounds that the plaintiff was a mere

The Act of 1976, however, altered this drastically, primarily in order to give effect to its principle of unlimited divisibility, discussed below. Under the new rules too, only the owner of a right granted by copyright was permitted to bring an action for infringement.³³ However, the definition of an owner was altered to recognize exclusive licensees as copyright owners as well.³⁴ Nonexclusive licensees were still prohibited from bringing actions.³⁵ For trolls, this now meant that they would have to do no more than obtain an exclusive license from a creator-owner to be entitled to commence an action. They no longer had to make the licensor a party to the action; indeed, under the new rules, the licensor (of an exclusive license) was actively precluded from bringing an action.

On the face of things, the inclusion of exclusive licensees into the category of owners made perfect sense. By itself, it continued to emphasize the idea that exclusivity by its very nature implied the existence of no more than one owner. It thus merely moved the ability to commence an action from licensor to licensee in an exclusive transaction. The most pernicious effects of this rule were however felt only when exercised in conjunction with the Act's allowance for the disaggregation of copyright's bundle of rights.

2. Copyright's Disaggregative Bundle of Rights

The troll's strongest impetus for its business model came from the Act's new rules on the divisibility of copyright's exclusive rights. Whereas the Act of 1909 had allowed copyright owners to either assign their rights in the work in their entirety, or run the risk of assignments being treated as mere licenses³⁶—the 1976 Act now allowed for “[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the

licensee of copyright and not an assignee); *Eliot v. Geare-Marston, Inc.*, 30 F. Supp. 301, 306–07 (E.D. Pa. 1939) (detailing how one plaintiff was unable to recover damages because that plaintiff did not own the full copyright and thus had no standing); *Douglas v. Cunningham*, 33 U.S.P.Q. (BNA) 470 (D. Mass. 1933) (granting motion to dismiss copyright infringement claim because the plaintiff was not the owner of the entire copyright).

33. 3 NIMMER & NIMMER, *supra* note 6, § 12.02[B].

34. 17 U.S.C. § 101 (2006) (defining “transfer of copyright ownership”).

35. See *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 (2d Cir. 1982); 3 NIMMER & NIMMER, *supra* note 6, § 12.02[B] (“Thus, a nonexclusive licensee has no more standing to sue at present than was the case under the 1909 Act.”).

36. 3 NIMMER & NIMMER, *supra* note 6, § 10.01[A] (noting how the rule rendered it “impossible to ‘assign’ anything less than the totality of rights commanded by copyright”). For cases treating a partial assignment as a license, see *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002); *P.C. Films Corp. v. MGM/UA Home Video Inc.*, 138 F.3d 453, 456 (2d Cir. 1998); *Hirshon v. United Artists Corp.*, 243 F.2d 640, 643 (D.C. Cir. 1957); and *Goldwyn Pictures Corp.*, 282 F. at 10.

rights” to be “transferred” and “owned separately.”³⁷ The owner of a particular right was entitled to all the protections and remedies of the law as it related to that right.³⁸

Together with the new rules on standing, this changed things quite significantly. First, it permitted the owner of an individual right to commence an action for infringement of that particular right. And by treating an exclusive licensee of a right as its owner, in effect it now allowed the exclusive licensee of a specific right to bring an action for infringement of that right.³⁹ Second, and perhaps most importantly, the Act expressly permitted both natural and artificial divisions of the bundle. Not only could copyright’s set of six enumerated rights be partitioned during a transfer, but parties were now free to create artificial subdivisions of them as well. These subdivisions could be temporal, geographic, or relate to particular markets for the work (for example, hardback editions rather than paperback).⁴⁰ In each instance, the ownership interest extended only to the narrow subdivision specified in the grant, but that subdivision itself could be tailored in as many idiosyncratic ways as possible.⁴¹

In essence then, copyright’s model of rights came to resemble what property scholars have for long described as the “bundle of rights” picture of property, under which property is thought to consist in an infinite set of rights and privileges that relate to a particular resource.⁴² The exact content of this bundle is impossible to ascertain in advance, but its depletion and disaggregation can be determined analytically *ex post*. The content of the bundle is thus only ever ascertained when it is broken down into its constituent elements, and hence the term “disaggregative” to describe it.⁴³

Notwithstanding the Act’s allowance for the infinite divisibility of the bundle, it continued to emphasize an important restriction on this principle. The divisibility could extend only to the rights specifically enumerated in

37. 17 U.S.C. § 201(d)(2).

38. *Id.*

39. See 3 NIMMER & NIMMER, *supra* note 6, § 12.02[B][1].

40. *Id.* § 10.02[A] (discussing various temporal, geographic, and subject-matter divisions).

41. 17 U.S.C. § 501(b) (noting how the interest extends only to the “particular right” owned); H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674 (“Each of the five enumerated rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately.”).

42. For an authoritative study of the bundle of rights conception and its stranglehold on property thinking, see generally J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

43. *Id.* at 734 (noting how under the disaggregative version, each “possible use” is itself treated as a property right) (internal quotation marks omitted).

the Act's grant.⁴⁴ Thus, the mere "right to sue" or the "right to enforce" the copyright could not on its own, be the subject of a transfer or assignment. *Silvers v. Sony Pictures Entertainment, Inc.* is the leading case on this point.⁴⁵ There, the plaintiff was the screenwriter for a television movie, copyright in which was owned (through the work-for-hire doctrine) by the producers.⁴⁶ On discovering that the defendant's work was substantially similar to hers, the plaintiff obtained an assignment from the producers to commence an action against the defendant. The transfer assigned to her "all right, title and interest in and to any claims and causes of action against" the defendants, as it related to the works in question.⁴⁷ Hearing the appeal en banc, the Ninth Circuit concluded that the list of copyright's exclusive rights contained in the Act was "exhaustive," as a result of which the "bare assignment" of the right to commence an action for enforcement of copyright could not be validly assigned.⁴⁸ The mere right to sue, in other words, could not be validly assigned or licensed.

In light of the Act's allowance for the infinite divisibility of its enumerated rights however, this restriction on the alienability of the right to sue is largely without teeth. Parties need merely create an artificially constructed assignment that relates to a narrow part of the right being infringed by the defendant, thereby effectively conferring on the assignee the right to bring an action against the defendant. In *Silvers*, the plaintiff would have thus needed to do no more than obtain a temporally circumscribed assignment of the right to make a cinematographic adaptation of the screenplay along the lines of the defendant's movie. Given the court's insistence on complying with the formal language and structure of the statute, this is likely to have passed muster with no problems.⁴⁹ Infinite divisibility—along multiple dimensions—thus enables parties to create an artificial assignment that has the purpose and effect of doing no more than transferring the mere right to commence an action for infringement, a feature just waiting to be exploited by copyright trolls.

3. Statutory Damages

While the law's relaxed rules on standing and divisibility certainly

44. See 3 NIMMER & NIMMER, *supra* note 6, § 12.02[B].

45. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005).

46. *Id.* at 883.

47. *Id.*

48. *Id.* at 886–87, 890.

49. The court placed extensive emphasis on the structure and language of the statute, and the legislative history accompanying its enactment. See *id.* at 883–87.

facilitate the troll's existence, the real inducement for its actions come from the Act's rules on statutory damages, which render its business model not just viable, but also potentially lucrative. The Copyright Act allows the copyright owner in an infringement action to elect to receive "statutory damages" instead of actual damages.⁵⁰ While actual damages are usually calculated on the basis of lost profits, statutory damages enable the court to award the owner a fixed amount, per work infringed, as it "considers just."⁵¹ The statute further stipulates that this amount is to be between \$750 and \$30,000 per work, circumscribing a court's discretion by fixing both upper and lower limits for these damages.⁵² In addition, the Act also empowers courts to raise the award to as much as \$150,000 per work when a plaintiff succeeds in establishing that the infringement was committed willfully.⁵³ Courts have in turn interpreted the requirement of willfulness somewhat loosely, effectively converting the range of awards from \$750 to \$150,000 per work infringed.⁵⁴

Actual damages—compensatory in nature—make little sense for a copyright troll. Having no presence in the actual market for expression, whether as creator or distributor, it suffers no actual harm and loses no profits as such from the infringement. Yet, by allowing a copyright owner to elect to receive statutory damages that are in turn determined independent of any harm, while simultaneously curbing a court's ability to lower the award below \$750 per work, the Act effectively assures the troll of a meaningful recovery once an infringement is established. In addition to incentivizing the troll, the existence of such minimum mandatory statutory damages also induces potential defendants to settle their claims with the troll in advance of a court's actual decision. Indeed, relying on statutorily prescribed damages was integral even to Harry Wall, the world's first copyright troll.⁵⁵

When originally introduced (in 1909), the idea behind statutory damages was to enable courts to award damages in situations where it was exceedingly difficult or impossible to determine actual damages or lost profits.⁵⁶ In situations where either actual damages or lost profits could

50. 17 U.S.C. § 504(c)(1) (2006); 4 NIMMER & NIMMER, *supra* note 6, § 14.04[A].

51. 17 U.S.C. § 504(c)(1).

52. *Id.*

53. *Id.* § 504(c)(2).

54. See 4 NIMMER & NIMMER, *supra* note 6, § 14.04[B][3][a]; Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

55. Alexander, *supra* note 26, at 339.

56. Samuelson & Wheatland, *supra* note 54, at 449.

indeed be proven, but were alleged to be inadequate (or in the nature of a loss rather than a profit to the defendant), courts often refused to award statutory damages.⁵⁷ In contrast, under the 1976 Act, courts almost never question a plaintiff's preference for statutory damages over actual damages and indeed often disregard the complete absence of any actual harm during the computation—which obviously favors trolls.⁵⁸

* * *

In summary then, these three features of the Copyright Act of 1976, when combined together, create the ideal legal environment for the emergence of copyright trolls. Having existed since 1976, it is indeed somewhat surprising that it took nearly three decades for the first troll to emerge. And unsurprisingly, when it did, courts and defendants had few mechanisms with which to curb its activities.

B. THE CLAIM AGGREGATOR MODEL OF TROLLING: RIGHTHAVEN

It was not until a few years ago that entities began to recognize the existence of a potentially lucrative business model hidden within the contours of the Copyright Act. While the label of “copyright troll” has come to be commonly attached to just about any entity that enforces copyrights,⁵⁹ it is crucial to bear in mind that a troll—as understood here—is one whose entire business revolves around the acquisition and enforcement of copyright in works created by others. A plaintiff-focused group of lawyers, for instance, might actively solicit copyright owners and assist them with the enforcement of their rights without actually acquiring any rights themselves in those works.⁶⁰ While it may be rhetorically powerful to characterize these entities as trolls, the description is analytically faulty since these entities never enter the copyright system except in their capacities as lawyers. Never directly acquiring any claims,

57. *Washingtonian Pub. Co. v. Pearson*, 140 F.2d 465, 466 (D.C. Cir. 1944) (“Certainty that profits and damages are nil is not equivalent to difficulty in proving them.”); *F. A. Mills, Inc., v. Standard Music Roll Co.*, 223 F. 849, 852 (D.N.J. 1915) (refusing to award statutory damages when the defendant made no profits from the infringement). Nimmer characterizes these cases as situations where “no injury” was established. 4 NIMMER & NIMMER, *supra* note 6, § 14.04[F][1][a].

58. 4 NIMMER & NIMMER, *supra* note 6, § 14.04[A].

59. *See, e.g., Copyright Trolls*, ELECTRONIC FRONTIER FOUND., <http://www EFF.ORG/ISSUES/copyright-trolls> (last visited Feb. 18, 2013) (describing various copyright enforcement initiatives as “trolls”).

60. The United States Copyright Group (“USCG”) is a prime example of this. The USCG operates as a group of lawyers who approach various content owners offering to enforce their copyrights against online distributors for them. *Id.* Unlike trolls, USCG does nothing to acquire any ownership interest in the copyrights they actually enforce.

their participation in the copyright system is entirely indirect, that is, through the copyright owners whose claims they help enforce. The troll, by contrast, in acquiring claims from others, is endowed with a crucial level of autonomy in its decisionmaking. In other words, as owner of the acquired claim, the troll decides on its own—based on its own set of incentives—which particular claims to enforce and against whom to so enforce them. Its enforcement calculus is thus effectively its own, which is not the case with entities merely assisting copyright owners with enforcement. Nonetheless, some of the concerns with copyright trolls do carry over to these entities as well.

Commencing its operations in early 2010, Righthaven was perhaps the first entity to capitalize on copyright law's lax rules on standing, assignment, and damages. This section begins by describing Righthaven's business model and revenue-earning strategy, then looks at how courts and defendants addressed the question of fair use when dealing with Righthaven, and finally examines the strategy that courts and defendants eventually used to curb Righthaven's activities.

1. Copyright Revenues in Four Simple Steps

Describing itself as committed to “advancing the interests of copyright law,” Righthaven's business model was premised on finding copyright owners who in principle wanted their rights enforced, but lacked the time, expertise, or willingness to do so themselves, or indeed the resources to hire outside lawyers for this task each time.⁶¹ Righthaven presented these owners with a third, more economically viable option: the transfer of a limited ownership interest in the content to Righthaven in order to enable it to enforce these rights against third parties using its own resources and expertise.

Locating a Creator: The first step of its strategy involved locating a copyright owner willing to enter into a strategic partnership with it. Stephens Media LLC (“Stephens Media”), the owner of over seventy large newspapers across nine states, soon became its first partner.⁶² Both parties

61. See Dan Frosch, *Enforcing Copyrights, for a Profit*, N.Y. TIMES, May 3, 2011, at B1 (quoting Steve Gibson, CEO of Righthaven LLC, and discussing how some newspapers have formed business relationships with Righthaven after “grappl[ing] with how to protect their online content”), available at http://www.nytimes.com/2011/05/03/business/media/03righthaven.html?pagewanted=1&_r=1.

62. David Kravets, *Righthaven Expands Troll Operation with Newspaper Giant*, WIRED (Dec. 7, 2010, 4:36 PM), <http://www.wired.com/threatlevel/2010/12/righthaven-expands-trolling/>; Kravets, *supra* note 4.

entered into a “Strategic Alliance Agreement,” under which Stephens Media agreed to assign its rights in works that were copied by potential defendants to Righthaven for enforcement in court, and both parties also agreed to share the proceeds of any enforcement on a proportional basis.⁶³ This agreement also made explicit the artificial nature of the future assignments providing in no uncertain terms that Righthaven had no right or entitlement to exploit works or participate in their exploitation other than the right to recover any proceeds in an infringement action.⁶⁴

Finding a Copier: Having found a willing copyright owner, step two began with Righthaven policing the Internet and other publication media for unauthorized uses of Stephens Media’s works. Once it located an unauthorized use of a work—usually in the nature of a blog reproduction of text or photographs from a newspaper owned by Stephens Media—Righthaven would then obtain an assignment of the specific work (or part of it) being reproduced from Stephens Media.⁶⁵ In addition to covering only the work being copied, the assignment was also invariably retrospective in operation, allowing Righthaven to seek redress for “past, present, and future” infringements of the work.⁶⁶

Commencing the Action: In step three, Righthaven would bring an action for copyright infringement against the identified user of the work in federal court. Since most of its actions involved online reproductions that could be accessed anywhere, it chose the federal district courts of Nevada and Colorado for its actions.⁶⁷ Typically, a copyright owner places at least some (even if not a large) value on getting the defendant to stop its infringing activities and to this end ordinarily sends the defendant a “cease-and-desist” letter that first threatens legal action before actually bringing it. To Righthaven, a troll, curbing the defendant’s actions through such threats mattered very little. It therefore, in all but a very few of its cases, proceeded to commence an action against a defendant with absolutely no

63. Declaration of Laurence F. Pulgram in Support of Defendants’ Supplemental Memorandum Addressing Recently Produced Evidence Relating to Pending Motions, Exhibit A at 3–4, *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011) (No. 2:10-cv-01356-RLH (GWF)), available at <http://www.scribd.com/doc/53175589/Strategic-Alliance-Agreement-Between-Righthaven-and-Stephens-Media>.

64. *Id.* at 4.

65. See, e.g., Plaintiff’s Opposition to Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Lack of Personal Jurisdiction, Exhibit 1 at 2, *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, No. 10-cv-00636-RLH-RJJ (D. Nev. dismissed Nov. 1, 2010), available at <http://www.scribd.com/doc/36862835/Righthaven-Copyright-Assignment>.

66. *Id.*

67. For a complete listing of its lawsuits, see *Comprehensive List*, *supra* note 13.

forewarning.⁶⁸ And unlike the typical copyright owner, its primary focus in these actions was on obtaining an award of statutory damages, going as high as \$150,000 per work when the infringement was alleged to be willful.

Settling the Claim: In a large number of cases brought by Righthaven, the defendant simply chose not to litigate the claim, but to instead settle with Righthaven for a figure significantly lower than the maximum statutory damages it might have been required to pay if the matter had actually proceeded to trial.⁶⁹ These settlements have averaged around \$3500 per defendant.⁷⁰ Righthaven's collection strategy thus involved playing into potential defendants' litigation and risk aversion. The collection strategy offered defendants the chance to settle for a lower (but nonnegligible) amount instead of having to risk a higher award and incur additional transaction costs in court. While the settlements may not have been independently lucrative, cumulatively they amounted to a lot given that Righthaven commenced over 275 cases of infringement.⁷¹

2. The Irrelevance of Fair Use in Theory

Righthaven's principal targets were individuals and groups that had posted copyrighted content on their websites or blogs without authorization. Very often, this involved more than just posting excerpts from the original articles and frequently entailed the verbatim reproduction of articles in their entirety. At first blush, it might seem like the fair use doctrine—copyright law's primary safety valve—might have rendered these actions noninfringing. In reality however, the fair use doctrine was of little help to these defendants.

Only ever rarely do courts find a defendant's verbatim reproduction of a copyrighted work in its entirety to be a fair use. Merely because the use is for an informational purpose as opposed to a commercial purpose ordinarily does not render it a fair use under existing copyright law. Righthaven's strategy relied entirely on this position and was well supported by prior cases in which bloggers had been found liable for posting content to their websites despite the noncommercial and

68. *E.g.*, Kravets, *supra* note 4 (discussing how Righthaven brought an infringement suit prior to sending the defendant a takedown notice).

69. *Id.*

70. See Steve Green, *Righthaven Settles \$150,000 Copyright Suit for \$1,000*, VEGAS INC. (July 1, 2011, 1:55 AM), <http://www.vegasinc.com/news/2011/jul/01/righthaven-settles-150000-copyright-suit-1000/> (discussing three of Righthaven's publicly reported settlement figures).

71. See *Comprehensive List*, *supra* note 13.

informational nature of their activities.⁷² Even though courts have observed that there may be instances where the reproduction of a work in its entirety can amount to a fair use, they have generally been reluctant to declare instances of simple verbatim reproduction as fair use.⁷³ In hardly any case in which a defendant has reproduced a creative work in its entirety and without any significant transformation to it (for example, by way of commentary or criticism being added, or by giving the work a new purpose), has a court found the copying to be fair use.⁷⁴ Thus, existing fair use jurisprudence seemed to favor Righthaven.

Nonetheless, when they realized their inability to curb Righthaven under other principles, a few courts—desperate for a solution and finding none (see below)—began to interpret fair use in extremely liberal terms. These courts effectively exempted conduct that would have been considered infringement in relation to any other plaintiff.⁷⁵ Relying on dicta that verbatim copying too could be fair use under circumstances, these courts placed significant weight on the noncommercial nature of the defendants' activities⁷⁶ and the lack of potential market harm to the owner as part of the fair use analysis.⁷⁷ While this approach was limited to a few courts, it nonetheless made other copyright owners—that is, true creators and distributors—concerned about the expansive precedent being set.⁷⁸ This approach to the fair use doctrine ultimately failed to gain significant popularity given that courts and defendants in due course found another way to restrict Righthaven.

Lastly, something must be said for the fair use doctrine's inherent ambiguity and Righthaven's reliance on this uncertainty to take advantage of potential defendants' risk aversion. Structured as a common law-type four-factor inquiry, the fair use doctrine has long been criticized for

72. See, e.g., *L.A. Times v. Free Republic*, No. CV 98-7840 MMM (AJWx), 2000 U.S. Dist. LEXIS 5669, at *6, *50–51, *75–76 (C.D. Cal. Mar. 31, 2000).

73. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:143 (2012).

74. See *id.*

75. E.g., *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1147–51 (D. Nev. 2011); *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 U.S. Dist. LEXIS 111576, at *4–6 (D. Nev. Oct. 18, 2010); *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 U.S. Dist. LEXIS 105307, at *6–10 (D. Nev. Sept. 17, 2010) (finding a sufficient meritorious fair use defense to set aside a default).

76. E.g., *Klerks*, 2010 U.S. Dist. LEXIS 105307, at *7–8.

77. E.g., *Realty One Grp., Inc.*, 2010 U.S. Dist. LEXIS 111576, at *5–6.

78. See David Kravets, *Righthaven Loss: Judge Rules Reposting Entire Article Is Fair Use*, WIRE (June 20, 2011, 4:54 PM), <http://www.wired.com/threatlevel/2011/06/fair-use-defense/> (noting how Righthaven plans to appeal the decision and that it is “not often that republishing an entire work without permission is deemed fair use”).

offering potential defendants very little guidance in terms of their liability for copyright infringement.⁷⁹ This uncertainty is thought to result in a heightened amount of risk aversion among copiers, who prefer to either license, settle, or worse still, refrain from using altogether the protected work in order to avoid time- and cost-intensive litigation.⁸⁰ While neither the uncertainty nor the risk aversion is in any sense Righthaven's creation, its strategy nonetheless drew obvious support from both features. The fair use doctrine, in short, was both useless to Righthaven's defendants and structurally facilitative of Righthaven's strategy.

3. Reining in the Troll

While Righthaven enjoyed a good deal of success in its early actions, with time courts began to grow wary of its business model and litigation strategy, especially in light of the extensive criticism it began receiving. It was not until recently, however, that courts found a way by which to fault Righthaven for its model. During the course of its most recent suits against online copiers, it was discovered that the agreement between Righthaven and Stephens Media contained language that seemed to convey to Righthaven no more than the mere right to sue, which as discussed earlier, would have been ineffective at enabling Righthaven to bring its actions.⁸¹

In *Righthaven LLC v. Democratic Underground LLC*,⁸² a district court in Nevada concluded that any actual assignment of copyright that Righthaven received from Stephens Media had to be understood and interpreted in light of the parties' "Strategic Alliance Agreement" that they had entered into at the very beginning.⁸³ The agreement provided in explicit terms that despite any assignment to Righthaven, Stephens Media was to retain the "exclusive license" to exploit the works in all forms, and that Righthaven was to have no rights other than the rights to recover from infringers.⁸⁴ Relying on *Silvers*, the district court concluded that in light of this agreement, Righthaven's eventual assignment left it with "nothing more than a fabrication."⁸⁵ Describing Righthaven's claims to the contrary

79. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1495–1502 (2007).

80. Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284–91 (2008); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887–906 (2007).

81. See *supra* text accompanying notes 45–48.

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

83. *Id.* at 972–73.

84. *Id.* at 972.

85. *Id.* at 973 ("In reality, Righthaven actually left the transaction with nothing more than a

as “disingenuous” and potentially “deceitful,” the court dismissed Righthaven’s suit, finding that it had no standing whatsoever to sue for copyright infringement.⁸⁶ On learning about the strategic agreement, several other courts also either dismissed or stayed most of Righthaven’s remaining suits, in rather quick succession.⁸⁷

While the court may have been right in its interpretation of the agreement, its solution was entirely temporary. All that Righthaven needed to do to fix it and obtain legitimate standing for the future, was to modify the strategic agreement to convert the exclusive license retained by its client into a nonexclusive one and obtain exploitation rights to the work as well. In other words, the court had found a procedural flaw in Righthaven’s exploitation of a substantive loophole in the law. The former could be fixed, but not the second. Surely enough, Righthaven and Stephens Media modified their agreement along precisely these lines, thereby effectively remedying the lack of standing for future cases.⁸⁸ In cases in which Righthaven had filed its complaint prior to the amendment however, courts refused to use the amendment to interpret the original agreement and continued to dismiss such cases for lack of standing.⁸⁹

Recognizing the futility of curbing Righthaven’s practices exclusively through copyright law, its opponents began looking elsewhere. Shortly after the dismissals, a group known as the Citizens Against Litigation Abuse (“CALA”) filed a petition in the Supreme Court of South Carolina arguing that Righthaven’s business model amounted to an “unauthorized practice of law,” since Righthaven was not, strictly speaking, a “law

fabrication since a copyright owner cannot assign a bare right to sue after *Silvers*.”).

86. *Id.* at 973, 976.

87. Righthaven LLC v. Barham, No. 2:10-cv-02150-RLH-PAL, 2011 U.S. Dist. LEXIS 66720, at *3–4 (D. Nev. June 22, 2011); Righthaven, LLC v. DiBiase, No. 2:10-cv-01343-RLH-PAL, 2011 U.S. Dist. LEXIS 67181, at *3–4 (D. Nev. June 22, 2011); Righthaven, LLC v. Hoehn, 792 F. Supp. 2d 1138, 1147. On appeal in two of these cases, the Ninth Circuit affirmed and validated the lower courts’ interpretation of the Strategic Alliance Agreement, and concluded that Righthaven lacked standing to commence an action for copyright infringement. Righthaven LLC v. Hoehn (*Hoehn II*), 716 F.3d 1166, 1169–72 (9th Cir. 2013).

88. David Kravets, *Righthaven Says It Owns News Articles It’s Suing Over—for Real This Time*, WIREd (June 24, 2011, 2:52 PM), <http://www.wired.com/threatlevel/2011/06/righthaven-survival-bid/> (describing the amendment to the agreement).

89. See, e.g., Righthaven, LLC v. Mostofi, No. 2:10-CV-1066-KJD-GWF, 2011 U.S. Dist. LEXIS 75810, at *9–10, *13 (D. Nev. July 13, 2011) (“Here, Plaintiff and Stephens Media attempt to impermissibly amend the facts to manufacture standing. Therefore, 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.”); *Hoehn*, 792 F. Supp. 2d at 1147 (“Even assuming that the [amendment] can change the jurisdictional facts as they existed at the time of the filing of the suit, it still does not correct the deficiencies with respect to lack of standing.”). The Ninth Circuit affirmed the lower courts’ refusal to interpret the original agreement in light of the amendment. *Hoehn II*, 716 F.3d at 1171–72.

firm.”⁹⁰ In essence, the petition alleged that Righthaven was engaged in champerty and maintenance, practices long forbidden by the common law, in an effort to avoid third party encouragement for litigation.⁹¹ What is most intriguing about the petition, however, is that the core of the argument faulted Righthaven for its unethical as opposed to unlawful conduct. Describing it as “overreaching,” “bullying,” and “viciously attack[ing]” defendants, the petition seemed more intent on characterizing Righthaven’s actions as amounting to an unfair and unethical business model, rather than as a direct violation of any legal rule.⁹²

In due course however, Righthaven’s model began to fall apart. Shortly after courts began finding that it lacked standing to sue, Righthaven stopped commencing new cases and began laying off employees.⁹³ In cases in which the court concluded that it had lacked standing to bring its suits all along and had thereby misled the court, Righthaven was fined and sanctioned for its actions, and ordered to pay its opponents’ full costs and reasonable attorney’s fees.⁹⁴ When Righthaven failed to comply, the court ordered its assets to be seized and auctioned.⁹⁵ Righthaven’s assets and domain name were then placed in receivership—and Righthaven effectively went under.⁹⁶

What Righthaven’s short-lived adventures reveal more than anything is the somewhat shaky legal foundation on which the case against copyright trolling—Righthaven’s principal activity—was built. In the end, Righthaven’s lack of standing hinged on an inadequacy in its agreement with Stephens Media, rather than a clear principle, theory, or doctrine. Arguments altogether missed the fact that Righthaven’s actions were

90. Petition for Original Jurisdiction at 4, *Citizens Against Litig. Abuse, Inc. v. Righthaven LLC*, (S.C. June 29, 2011), available at http://bloglawblog.com/docs/CALA_v_Righthaven_Supreme_Court_Petition.pdf; Steve Green, *Two Groups Ask High Court to Shut Down Righthaven in South Carolina*, VEGAS INC. (June 27, 2011, 4:20 PM), <http://www.vegasinc.com/news/2011/jun/27/two-groups-ask-high-court-shut-down-righthaven-sou/>.

91. Petition for Original Jurisdiction, *supra* note 90, at 9–21.

92. *Id.* at 25–28.

93. David Kravets, *Copyright Troll Righthaven Goes on Life Support*, WIRED (Sep. 7, 2011, 12:59 PM), <http://www.wired.com/threatlevel/2011/09/righthaven-on-life-support/>.

94. *Righthaven LLC v. DiBiase*, No. 2:10-cv-01343-RLH-PAL, 2011 U.S. Dist. LEXIS 124127, at *2–3 (D. Nev. Oct. 26, 2011); *Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265, 1273 (D. Colo. 2011).

95. Steve Green, *Marshals Ordered to Seize Righthaven Assets*, VEGAS INC. (Nov. 1, 2011, 7:54 PM), <http://www.vegasinc.com/news/2011/nov/01/marshals-ordered-seize-righthaven-assets/>.

96. Steve Green, *Can Righthaven Survive Latest Legal Blow*, LAS VEGAS SUN (Dec. 13, 2011, 2:00 AM), <http://www.lasvegassun.com/news/2011/dec/13/can-righthaven-survive-latest-legal-blow/>; Steve Green, *With Sale of Domain Name, Tables Are Turned on Righthaven*, VEGAS INC. (Jan. 6, 2012, 1:45 PM), <http://www.vegasinc.com/news/2012/jan/06/sale-domain-name-tables-are-turned-righthaven/>.

fundamentally problematic as a matter of copyright theory and policy.

III. THE PROBLEM WITH COPYRIGHT TROLLS

In the end, courts were able to rein in Righthaven's business model on the ground that it lacked standing since it had purportedly been given no more than the mere right to sue, which was insufficient to confer standing under the Ninth Circuit's ruling in *Silvers*.⁹⁷ District courts that invoked *Silvers* interpreted it as suggesting that an actionable claim for copyright infringement could not be alienated independent of some real right to use and exploit the work.⁹⁸ Using this reasoning, the troll was thus faulted for attempting to trade in an independent market for copyright claims. Besides being unduly formalistic and therefore likely short-lived, this approach to regulating copyright trolling remains extremely myopic, missing some of the obvious benefits in allowing copyright claims to be traded. Not only does it misidentify the problem with copyright trolling, which is likely to undermine its effectiveness, but it also turns a blind eye to some of the benefits of third-party involvement in litigation funding, a practice that has started to gain significant momentum in numerous other areas.⁹⁹

The problem with copyright trolls, however, has little to do with the free alienability of actionable copyright claims. It originates instead in ideas that are fundamental to the existence and justification of the copyright system. Copyright law contains an enforcement optimality / equilibrium that originates in its structure as a private law mechanism. This equilibrium is very closely connected to copyright law's fundamental social purpose—namely, the inducement of creativity. The troll's activities disrupt this equilibrium, but in so doing also run counter to copyright law's basic goal, which is why its actions are seen as deeply problematic.

Part III.A unbundles the connection between copyright law's overall purpose and its private enforcement mechanism. Part III.B argues that this connection produces a hidden enforcement equilibrium between different types of copyright claims. Parts III.C and III.D then describe the way in

97. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005).

98. See, e.g., *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972–73 (D. Nev. 2011).

99. For recent work documenting this trend, see Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 92–101 (2010), and Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–85 (2011). For coverage in the popular media, see Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES, Nov. 15, 2010, at B1, available at <http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all>. For recent work extending this analysis to copyright law, see Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. (forthcoming 2013).

which a troll's actions are disruptive of both the equilibrium and the goals of copyright law.

A. THE PRESUMPTIVE ALIGNMENT OF THE INCENTIVES TO CREATE AND LITIGATE

As a fundamentally utilitarian institution, copyright's basic purpose is thought to lie in providing creators with a market-based inducement to create.¹⁰⁰ Through its grant of a set of exclusive rights in a work of original expression, copyright law is thought to incentivize the very production of that expression.¹⁰¹ Justice Blackmun put it best when he unequivocally emphasized that “[c]opyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create.”¹⁰² Thus, the public welfare, manifested in the progress of the sciences and useful arts, is believed to be promoted by granting individual creators limited entitlements in their creations.¹⁰³ This idea, often referred to as copyright's incentives theory, is today taken to be the central dogma of U.S. copyright law. It routinely informs legislative activity in the area, and indeed motivates courts' analyses and interpretation of copyright doctrine.¹⁰⁴

Put in simple incentive-based cost-benefit terms, copyright's logic of incentives posits that creators are induced to produce creative expression because the benefits that they are likely to obtain from its grant of exclusive rights outweigh the costs incurred in the creative process.¹⁰⁵ As rational actors, creators are thus motivated to create by this cost-benefit calculus, thereby enhancing overall social welfare. If B_{\odot} represents the benefits likely to accrue to a creator from copyright (determined ex ante, at the time

100. Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 428 (2002); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996). *See also* Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 797 (2003) (hinting at the significance of incentives in copyright jurisprudence).

101. Balganes, *supra* note 100, at 1577; Liu, *supra* note 100, at 428; Sterk, *supra* note 100, at 1197.

102. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting).

103. U.S. CONST. art. I, § 8, cl. 8.

104. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

105. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 38–39 (2003) [hereinafter LANDES & POSNER, THE ECONOMIC STRUCTURE]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (“For a new work to be created, the expected return—typically, and we shall assume exclusively, from the sale of copies—must exceed the expected cost.”).

of creation), and C_C represents the costs involved in the creative process, the copyright system is premised on the idea that B_{\odot} must be greater than C_C to generate the incentive to create.

Beyond simply identifying the fact that copyright confers likely benefits on creators, the incentives theory pays little attention to the precise contours of those benefits and the ways in which their likelihood figures in creators' calculations—assuming, of course, that the basic idea underlying the incentives theory holds true.¹⁰⁶ Copyright certainly does not promise creators a viable market for their works. Works protected by copyright routinely fail in the marketplace, producing no tangible benefits to their creators. Yet, this is hardly copyright's fault. On the other hand, what copyright promises to creators is best described as an assurance of market preservation—that is, the assurance that it will protect the creator's market through its entitlement structure, regardless of how economically viable that market turns out to be. If market preservation forms the core of copyright's promise to creators, much of its incentive then originates in the precise mechanism of preservation that it offers. Copyright law's basic mechanism of market preservation remains its conferral of exclusive rights to copy the work, on creators. In granting creators exclusive rights in their works, it assures them that they alone will be able to exploit the market for copies of their works, however large or small that market may be. However, since expression is by its nature nonrivalrous, the functional significance of these exclusive rights emanates in large measure from the correlative duty that they impose on nonowners not to copy the work.¹⁰⁷ This point is best illustrated by a hypothetical.

Consider an open area scattered with edible apples on the ground. In order to induce individuals to make effective use of these apples (and clean up the ground), assume that the law now creates a rule under which a person who expends effort to pick up an apple obtains the exclusive right to the apple. In this situation, a person who picks up an apple from the ground comes to be in *de facto* exclusive possession of it. Even though the act of picking it up imposes a duty on others to stay away from that apple once picked up, the functional value / significance of the exclusive right does not depend entirely on the duty for its functioning. The holder of the apple can simply take a bite of the apple after picking it up without having to assert any rights over it. Copyright law works almost exactly like this regime,

106. *But see generally* Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (expressing skepticism about copyright's fundamental theory of incentives).

107. Balganes, *supra* note 19, at 1667–74.

except that the apple is replaced with a nonrival resource—namely, original expression. Once creators expend effort to produce original expression, they obtain an exclusive right to copy it. Since the expression is incapable of being possessed exclusively, the exclusive right is, however, only ever realized by disabling others from performing acts over which the owner is granted an exclusive right over, such as copying. This disabling dimension emanates from the duty that copyright law imposes on nonowners.¹⁰⁸

Copyright's incentive structure—its market-preserving exclusive-rights framework—is therefore heavily dependent on creating a correlative duty on others and then maintaining and enforcing breaches of this duty. Enforcing breaches of this duty, either directly through the law or in the shadow of the law, remains integral to the benefits of the exclusive rights that copyright law confers on creators. Yet, analyses of the benefits likely to flow from the copyright entitlement rarely ever look to the contingencies of enforcement, which obviously entails its own set of costs.¹⁰⁹ To put the point more sharply, if a creator were granted an exclusive rights entitlement, but nonetheless realized that the enforcement of that entitlement was likely to be cost prohibitive and unviable, it would feed directly into the entitlement's ability to induce creative expression.

Assume a movie studio (the creator), ABC Inc., is determining whether to create a movie. It recognizes that the cost of making a motion picture is \$2.5 million, but that it is likely to make at least \$4 million in revenues through theatres and other forms of distribution. Now assume that ABC Inc. also recognizes that rampant copying of the movie on the Internet and by competitors is likely to diminish its revenues from the movie to zero by interfering with the public's interest in going to movie theatres or in buying legal copies of the movie. The theory of incentives tells us that by promising creators like ABC Inc. that they have exclusive rights to make copies of their creation, copyright law enables them to exploit the full market potential of their works, effectively preserving their incentive to create. In our case, copyright therefore promises ABC Inc. that it will preserve its ability to earn revenue from its movie by rendering unauthorized copying actionable, and ABC Inc. estimates based on this promise that it can thereby obtain a net gain of \$1.5 million. Copyright certainty does not promise ABC Inc. that it will actually earn \$4 million, just that it will preserve ABC Inc.'s ability to do so by disabling unauthorized copying. Copyright is in effect preserving the entirety of ABC

108. *Id.*

109. See generally Kaplow, *supra* note 20 (identifying and discussing the different costs that private litigation entails, some of which are borne by the private actor, and others by society).

Inc.'s market, meaning that in this case B_{\odot} (\$4 million) $>$ C_C (\$2.5 million), motivating ABC Inc. to make the movie.

Now, ABC Inc. may also realize that copyright law's mechanism of preservation, its promise of exclusivity, is heavily dependent on ABC Inc.'s being able to enforce the exclusive rights that it grants creators. Here, if enforcing copyright law to make sure that its revenues stay at \$4 million (and preserve the market in its entirety) will likely take another \$1.5 million, ABC Inc. will have no incentive to create the movie, since it can calculate that its net gain will be zero. This suggests that the effective functioning of copyright as an incentive to create—in the standard incentives story—depends directly on the cost-effectiveness of enforcement. In other words, the costs (and benefits) of enforcing / litigating the claim are just as integral as the costs (and benefits) of creation to the copyright system's realization of its fundamental utilitarian goal.¹¹⁰

Two important qualifications are in order here. First, the argument above assumes that what are described as enforcement costs map onto litigation costs. One might argue that the exclusive rights could indeed be enforced independent of litigation—for example, through technological measures, cease-and-desist letters, and the like.¹¹¹ It bears emphasizing that while these mechanisms may not constitute forms of “litigation” strictly speaking, their effectiveness is always dependent on eventual recourse to litigation. In other words, enforcement by self-help is always parasitic on the threat of eventual litigation and happens in the shadow of the law.¹¹² As a result, ex ante calculations of enforcement must invariably consider the possibility of litigation. Second, copyright's benefits can certainly be seen

110. In some ways, it is surprising that the litigation and enforcement costs of the copyright system have not been taken to impact its ability to function as an incentive to create. The analogous point has for long shown to be true in relation to the deterrence function of tort law, namely that when litigation costs are excessive, a regime of liability is likely to underdeter, since the incentive to take adequate precautions is reduced. See Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 113–14 (1991); Keith N. Hylton, *The Influence of Litigation Costs on Deterrence Under Strict Liability and Under Negligence*, 10 INT'L REV. L. & ECON. 161, 161 (1990) (developing a model to show how strict liability and negligence rules lead to underdeterrence when litigation costs are taken into account); Thomas J. Miceli, *Deterrence, Litigation Costs, and the Statute of Limitations for Tort Suits*, 20 INT'L REV. L. & ECON. 383, 393 (2000) (developing Hylton's model further).

111. Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1092–94 (1998); Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393, 397–402 (1999).

112. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968, 997 (1979) (showing how interactions against the backdrop of a legal regime occur in “the shadow of the law”).

as entailing more than just the benefits of enforcing the entitlement. Since the entitlement is inherently marketable (that is, through licenses, transfers, and assignments), the very possibility of such contractual transfers might generate important benefits for the creator. The fact remains, however, that such purely contractual benefits are on their own likely to be fairly marginal when unbundled from the possibility of their enforcement. When contracting parties recognize that the possibility of the claim being enforced is cost prohibitive or unviable, the claim is likely to be valued at a much lower level, rendering its benefits to the transferor marginal.

Returning then to the main point, that copyright's incentive to create must factor in the incentive to litigate the copyright claim, allows us to now further specify the idea. Incentives to litigate a claim—for a rational private actor—can in similar terms be mapped onto the costs and benefits of a recovery. The benefits from litigation are thus the difference between the probabilistic expected recovery (or damages), and the costs of litigation, often represented by the formula¹¹³: $B_L = p(D) - C_L$, where B_L represents the benefit from litigation or the expected value from litigation, p the probability of succeeding in a recovery, D the damages that the recovery is likely to result in, and C_L the costs that the litigation entails. Only when this produces a positive yield for an actor, will it make sense to litigate.¹¹⁴

If copyright law's market-preserving benefits (previously B_{\odot}) consist in large part of the benefits from enforcing / litigating the copyright claim (B_L) and the marginal benefits that flow directly from the copyright entitlement (B_{Dir}), then the original calculus for the incentive to create ($B_{\odot} > C_C$) therefore becomes effectively: $[B_{Dir} + p(D)] > [C_C + C_L]$. In other words, for copyright to work as a rational inducement to create, the sum of the marginal nonenforcement benefits and the probabilistic recovery from enforcement must exceed the costs of creating the work and enforcing the claim.

Copyright's fundamental utilitarian goal of inducing creativity thus takes shape in significant part from the mechanism that the law sets up to enforce its grant of exclusivity to creators. The realization of this social goal is, as a result, contingent on the cost-effectiveness of the enforcement mechanism for creators. Altering the costs, benefits, and probabilities of recovery thus affects not just the incentive to litigate, but presumptively the very incentive to create. In this respect, copyright law tracks other areas of

113. SEAN FARHANG, THE LITIGATION STATE 22 (2010). See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 882 (1998).

114. FARHANG, *supra* note 113, at 22.

law in which Congress seeks to motivate private actors to bring claims, in the belief that by so doing, a broader social goal is likely to be realized.¹¹⁵ The reason this matters, we shall soon see, is because the copyright troll operates by driving a neat wedge between the two incentives, and in the process disrupts the continuity on which the regime is predicated.

B. SORTING COPYRIGHT CLAIMS—A HIDDEN EQUILIBRIUM

In addition to relying on private enforcement to achieve its social goal, copyright also depends entirely on its private-law apparatus to realize an additional institutional function—namely, that of differentiating between various types of copyright claims. This function is in many ways parasitic on its social goal, but is nonetheless important to the smooth functioning of the system. In delegating the decision whether to enforce a claim against a copier to the copyright owner (the right-holder), copyright law allows right-holders to decide precisely what kinds of claims they want to litigate and enforce. Yet, copyright's delegation of this decision is not unbridled, for the decision derives from the variables that impact the decision to litigate, which are in turn under the control of the state.¹¹⁶ Given the regime's purported realization of its social goal through litigation, this controlled delegation can be seen as emanating from the institution's basic premise on the alignment of the incentive to create with the incentive to litigate. This framework requires some unbundling.

“Not all copying, however, is copyright infringement.”¹¹⁷ Perhaps more importantly though, not all copyright infringement is likely to result in liability. This is because the decision whether to enforce a claim (and impose liability on a defendant) is very often influenced by costs and variables that make it both impractical and inefficient for the copyright owner to commence an action.¹¹⁸ Putting these two concepts together, we see that potential copyright claims can thus be categorized, broadly speaking, into three basic categories.

Actionable and Enforced Claims (Type I). This category covers claims that constitute acts of infringement as a legal matter and which are in fact

115. *Id.* at 30–31.

116. Indeed, some argue that statutory regimes which delegate their enforcement to private actors do so for political reasons having to do with interbranch dynamics and the avoidance of gridlock. *See id.* at 31–37 (discussing political reasons for Congress using private actor enforcement in regards to the judicial and executive branches).

117. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

118. *See* Shavell, *The Social Versus the Private Incentive*, *supra* note 20, at 333, 337–38 (providing numerical hypotheticals where a private party may or may not bring suit based on costs).

enforced by the copyright owner because it makes economic sense to enforce them. Paradigmatic of this category are instances of competitive copying, where the copyright owner suffers direct, recurring harm.¹¹⁹ The action is commenced upon the recognition that the potential recovery is very likely to exceed the harm from allowing the copying to continue unabated.

Actionable but Tolerated Claims (Type II). This is the most important category for our purposes and covers claims that as a matter of law constitute infringement, but are nonetheless treated as nonactionable by copyright owners through their conscious inaction. Tim Wu calls uses that form the basis of these claims “tolerated uses” and posits that they come about when the copyright owner chooses not to enforce its rights for reasons of “simple laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement . . . actually benefits the owner.”¹²⁰ Examples include copying by fan fiction websites, or the private home copying of literary, musical, or audiovisual works by consumers.¹²¹

Nonactionable Claims (Type III). These are typically instances of copying that the law (as opposed to the individual copyright owner) treats as noninfringing to begin with. The most prominent claims in this category are instances of fair use, which the law treats as independently legitimate.¹²² Also included are instances of copying that do not meet the “substantial similarity” requirement,¹²³ and forms of copying under a statutory exemption¹²⁴ or implied license.¹²⁵ The key analytical point here is that these claims are rendered nonactionable as a matter of law. Private parties, in other words, have little say in expanding or contracting this category.¹²⁶

119. See, e.g., Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 45 (2010) (discussing the idea of defining copyright as a right to commercial exploitation); Lydia Pallas Loren, *The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 281–84 (2010) (discussing commercial harm).

120. Wu, *supra* note 21, at 619.

121. *Id.* (providing an example of a fan fiction site as a “tolerated use”). See also Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1895–1903 (2007) (discussing private home copying of protected works).

122. 17 U.S.C. § 107 (2006) (listing factors to be considered in determining fair use).

123. See Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 206 (2012) (describing substantial similarity and its role in copyright law).

124. See 17 U.S.C. §§ 108–112.

125. See generally, e.g., Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 281–87 (2009) (discussing the traditional use of implied licenses in copyright law).

126. Fair use thus operates as a mandatory, rather than default rule, and cannot be contracted away. See David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into*

What is crucial for our purposes, however, is the fact that copyright law—in its reliance on private enforcement—actively delegates to copyright owners the process of categorizing claims into the first two categories, that is Types I and II. As between Types I and II on the one hand, and Type III on the other, the law gives copyright owners no discretion whatsoever, and instead treats the classification as mandatory. Between Types I and II however, copyright law (that is, doctrine) says nothing at all. The decision is an entirely private one and resembles the gatekeeping function that ownership performs in property law.¹²⁷ Just as a property owner gets to decide who to treat as an uninvited but welcome guest and who to treat as a trespasser, copyright owners get to choose what kinds of uses (and hence claims) to treat as actionable and enforced, as opposed to actionable but tolerated.¹²⁸

This raises the obvious question then of identifying the criteria by which copyright owners separate these claims and how they make the decision to enforce some but not all. Here, we return back to the factors that influence the decision whether to litigate / enforce the claim to begin with. The decision to litigate is contingent upon the expected benefit from litigation exceeding its expected costs, or the costs of litigation when subtracted from the probabilistic recovery of damages producing a positive payout to the plaintiff: $p(D) > C_L$, since $B_L = p(D) - C_L$.¹²⁹ On the continuing assumption that the decision whether to commence an infringement action or not is a rational economic one, we may readily conclude that when $p(D) < C_L$, these claims fall into the category of actionable but tolerated.

What is important to recognize is that the variables in question, namely, the costs of litigation, the probability of success, and the damages recoverable are not necessarily individual to each plaintiff, but instead develop a level of uniformity over time. For instance, the litigation costs involve, among other things, the cost of finding a lawyer, paying the attorney's fees for representation, paying the court fees, the costs of negotiating a settlement, and the indirect costs that litigation entails (for example, involving reputation, goodwill, and the like). These are often independent of an individual plaintiff and also show a surprising level of consistency across diverse subject matter. As a result, sorting between

Expand, 87 CALIF. L. REV. 17, 68 (1999).

127. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 289 (2008).

128. *Id.* at 289–90.

129. FARHANG, *supra* note 113, at 22.

Type I and Type II claims begins to occur as a system-wide phenomenon, rather than an individual one. In other words, certain kinds of claims begin to fall into Type II rather than Type I because it makes little economic sense for a rational, individual utility-maximizing plaintiff to enforce them, regardless of the specifics of the plaintiff and defendant. An example best illustrates this point.

Jason is an amateur artist. Enamored by a movie poster for the movie *Avatar* that he comes across, he decides to paint an oil reproduction of the poster at home. He buys an authorized copy of the poster and produces three oil paintings that are each virtually identical to the original. He hangs each up in a different room of his house for his friends to admire when they visit him. As a purely doctrinal matter, Jason's actions do not fall under any of the copyright statute's exemptions from infringement, including the fair use doctrine; meaning it is in theory actionable.¹³⁰ Now assume that one day, a representative of the movie studio Lightstorm Entertainment—which owns the rights to the original poster—visits Jason. Will Lightstorm likely choose to enforce its claim against Jason?

Clearly not. As a rational actor, Lightstorm will realize that: (1) Jason's actions were not for profit and did not produce a negative market effect (harm) on the sale of its own poster; (2) a court / jury is likely to be sympathetic to Jason's "personal use" of the protected work (the probability of recovery, p , say hypothetically is thus closer to 0.4);¹³¹ (3) even if it succeeds, and elects to recover statutory damages (since there are no actual damages), its recovery (D) will likely be closer to the minimum \$750, since proving that Jason's actions were willful is extremely difficult;¹³² and (4) the costs of hiring a law firm, initiating the action, and going through the litigation will likely be (hypothetically) at least \$5,000 (C_L). Putting it all together, enforcing the claim will come at a net loss of \$4,700 ($5000 - (.4)750$), giving Lightstorm no incentive to enforce the claim. Over time though, the same type of calculation is likely to be applied by a majority of copyright owners to most types of personal home reproductions of protected works—making it highly unlikely that such claims will be enforced and effectively pushing such uses into the category of actionable but tolerated uses.

130. See Litman, *supra* note 121, at 1903 (describing such acts as infringing in the "nominal" sense).

131. *Id.* at 1878–79 (describing a personal use as one in which "even the most rapacious copyright owners have always agreed that some uses are lawful even though they are neither exempted or privileged in the copyright statute nor recognized as legal by any judicial decision").

132. See 17 U.S.C. § 504(c) (2006).

One might worry that if the costs of litigating / enforcing the claim in such Type II claims is prohibitive, it might affect Type I claims as well—effectively interfering with the incentive to litigate, which as we saw, feeds into the very incentive to create. This is where Congress and the federal courts have the power to step in and alter the calculus, as they deem necessary.¹³³ Through modifications in the law, they can alter the expected recovery (D), the probability of such recovery (p) and the costs of litigation, so as to ensure that at any point in time there remains a balance between Type I and Type II claims, making it viable for some copyright claims to be brought and enforced, in turn furthering copyright's purpose of motivating creativity. This point bears emphasis for it reveals two extremely important things about the enforcement of copyright claims: first, that the balance between Type I and Type II claims is realized through private copyright owners' calculations of when it makes economic sense to enforce; and second, that Congress and the courts are always in a position to influence this balance through changes in the law, if and when they find that the balance is impeding copyright's social purpose of inducing creativity.

Copyright law at all times contains a balance not just between Type I and Type III, or actionable and nonactionable claims, but also a balance between Type I and Type II, or actionable and enforced, and actionable but tolerated claims. As long as the expected benefits for potential Type I claims are significant enough, the incentive to create continues to be fuelled by copyright. When Congress and the courts have reason to suspect that the balance is problematic such that it is likely to impact the incentive to create, they alter the variables. A case in point is Congress's introduction of statutory damages into the Copyright Act in 1909, when it recognized that copyright owners were finding it "difficult to prove how much damage they had suffered."¹³⁴ Presumably then, Congress realized that this difficulty was expanding the scope of Type II claims—since it affected the variable $p(D)$ —and chose to fix it in an effort to push claims back into the category of actionable and enforced.

What this reveals is that copyright law as a structural matter, contains an underappreciated enforcement equilibrium, manifested in the ratio of Type I to Type II claims. This equilibrium is maintained entirely through the rational economic decisions of private copyright owners, with periodic support and tailoring from Congress and the federal judiciary. By ensuring

133. See FARHANG, *supra* note 113, at 24–28 (showing how Congress can do this in numerous domains).

134. Samuelson & Wheatland, *supra* note 54, at 446.

that the costs of bringing certain kinds of claims—measured in terms of primary litigation costs, and the secondary reputational, social, and long-term market consequences of such actions—exceeds any likely recovery, copyright law ensures that certain kinds of claims remain de facto lawful, even when legally actionable. Indeed, this balance is precisely why we have a host of “gray area” uses that while infringing in the nominal sense are nonetheless rampant.¹³⁵

As a species of transaction costs, litigation costs are routinely taken to be wasteful, and worthy of being minimized (if not eliminated).¹³⁶ Yet, much like positive transaction costs, which can produce certain beneficial outcomes contextually,¹³⁷ positive litigation costs are responsible for the Type I / Type II equilibrium, which injects added breathing space into any private enforcement regime. Positive litigation costs, in other words, perform an important “cautionary function,” by forcing plaintiffs to assess the costs and benefits of their actions before enforcing their claims.¹³⁸ This cautionary function in turn produces beneficial spillover effects to the rest of society, manifested in the maintenance of a large set of Type II claims.

What is perhaps most important to appreciate about this equilibrium, which may seem otherwise uncontroversial, is that it forms an essential boundary condition for copyright’s functioning as an incentive to create. In other words, it represents a calibration of the amount of incentive—in terms of the expected value from copyright—needed to stimulate creativity. This calibration, however, is done by copyright owners themselves in the aggregate. This is where the fact that the equilibrium originates entirely in the aggregated calculations of private copyright owners over time, while supported by alterations in the law as circumstances change, assumes significance. This certainly is not to suggest that the equilibrium never changes. Indeed, quite independent of legislative activity (which is in some sense responsive to the demands of private actors), private actors can themselves come to recognize that the balance of Type I to Type II claims is inappropriate (that is, inadequate) to serve as an inducement for creativity. When this occurs, copyright owners begin to alter their calculus,

135. Wu, *supra* note 21, at 633.

136. See, e.g., Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 410 (1999); Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1685 (1989).

137. For the leading account on the contextual benefits of positive transaction costs, see David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 85–103 (2005).

138. Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (describing how consideration in contract law acts as a “check against inconsiderate action”).

often ignoring the costs of enforcing previously tolerated claims and incurring short-term losses to instigate long term benefits. A prime example of this phenomenon is the recording industry's campaign against file sharing.¹³⁹

In 2003, as the practice of peer-to-peer file sharing started becoming common among college and high school students, recording studios began to worry that such digital downloads would diminish their revenues from regular sales.¹⁴⁰ Individual actions against downloaders had until then remained a paradigmatic Type II, or actionable but tolerated claim, since the recovery was costly and had little expected value.¹⁴¹ Nonetheless, recording studios under the rubric of the Recording Industry Association of America ("RIAA"), decided that there remained a hidden benefit to such otherwise economically inefficient lawsuits—namely, their deterrent effect on other potential downloaders.¹⁴² The recording studios thus made the calculation that even if bringing the individual lawsuits proved inefficient, it was likely to generate quantifiable long-term benefits that might render it worthwhile in due course. Between 2003 and 2008, the RIAA then commenced about 18,000 lawsuits against downloaders at a huge loss, but which they hoped would deter further downloading on peer-to-peer networks.¹⁴³ Evidence seems to suggest that this campaign had little to no deterrent effect on individual downloaders, with the RIAA eventually abandoning the campaign.¹⁴⁴ Nonetheless, the concerted action by the copyright owners did have the effect of altering the equilibrium of nonenforcement for peer-to-peer private copying, which had until then been tolerated. Scholars referred to this as a "historical shift" that occurred

139. For some literature documenting this, see 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, 744–50 (2005); Litman, *supra* note 121, at 1876–77; and Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 958 (2005).

140. See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/> (noting how the campaign began in September 2003).

141. Litman, *supra* note 121, at 1877.

142. *Id.*; Hughes, *supra* note 139, at 744.

143. Nate Anderson, *Has the RIAA Sued 18,000 People . . . or 35,000?*, ARS TECHNICA (July 8, 2009, 11:50 AM), <http://arstechnica.com/tech-policy/news/2009/07/has-the-riaa-sued-18000-people-or-35000.ars>; Kravets, *supra* note 140; Mike Masnick, *RIAA Spent \$17.6 Million in Lawsuits . . . to Get \$391,000 in Settlements?*, TECHDIRT (July 14, 2010, 9:44 AM), <http://www.techdirt.com/articles/20100713/17400810200.shtml>.

144. Mike Masnick, *Defining Success: Were the RIAA's Lawsuits a Success or Not?*, TECHDIRT (June 7, 2010, 11:15 AM), <http://www.techdirt.com/articles/20100606/2308559704.shtml> (arguing that the campaign was not a success). *But see* Litman, *supra* note 121, at 1877 (discussing the deterrent effects of infringement lawsuits against potential downloaders).

in copyright enforcement¹⁴⁵—brought about entirely through the action of owners. They had thus succeeded in altering the equilibrium, by moving such downloading from Type II to Type I, independent of its effect on deterrence and social norms among downloaders.¹⁴⁶ Individual home downloading is today viewed as likely to trigger an infringement action.

Despite the fact that the equilibrium of Type I and II claims plays an important role in constituting the incentive that copyright law creates, it has thus far received little attention in attempts to understand copyright's incentive framework. The “incentives-access” framework first developed by Arrow is thought to inform standard economic accounts of copyright law;¹⁴⁷ and yet, few recognize that actionable but tolerated claims play an important role in framing the boundary between incentives and access, which has traditionally been thought to derive entirely from copyright law's doctrinal filters between protectable and unprotectable material.¹⁴⁸ The typology and equilibrium described here reveal that the balance is maintained not just by protectability, but also by enforcement levels.

Note that thus far, we have avoided much discussion of nonactionable claims, of which fair use claims are the most common. The problem with fair use however is that given its uncertainty, its borders remain unclear.¹⁴⁹ As a result, while much of what is colloquially understood as fair use represents Type III, some of what is taken to be fair use is in reality Type II. Given that the decision whether something is in Type II or instead in Type I (and therefore enforced) is entirely a private decision delegated to copyright owners, potential defendants have little ability to contribute to the scope of Type II claims on their own. This is another way of saying that the balance between Type I and Type II claims is entirely a factor of costs and benefits specific to potential plaintiffs, which reveals its stability over time. Once again, Congress and the courts can of course, carve certain claims out of Type II and put them into Type III, and indeed they have done so in the past.

145. Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1127 (2005).

146. See Litman, *supra* note 121, at 1877 (describing possible effects on deterrence and personal uses).

147. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 617 (Universities-National Bureau ed., 1962) (setting up what would become the paradigm).

148. See, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 484–90 (1996) (discussing the balance between incentives and access).

149. See, e.g., Litman, *supra* note 121, at 1873–74 (discussing some of the unclear applications of fair use).

C. THE EQUILIBRIUM AS A FOCAL POINT

The balance between Type I and Type II claims described above—the “equilibrium”—is more than just a descriptive reality of the copyright system. It is also of deep functional significance to the institution, which makes its erosion through artificial mechanisms troubling. The importance of balance in copyright law is hardly new and is well documented in the literature.¹⁵⁰ Given that copyright protection produces large costs over time, the importance of safety valves to minimize the system’s costs to society has for long been seen as essential to its functioning and legitimacy. Fair use, the idea-expression dichotomy, originality, and a host of other devices internal to copyright doctrine are thus seen as performing this balancing function.¹⁵¹

While the Type I / Type II equilibrium contributes in a similar vein to copyright’s basic ideal of balance, in turn central to the incentives-access tradeoff that economic accounts of copyright law rely on,¹⁵² there is also something fundamentally different (and important) about it. Since it originates in market-based calculations that copyright owners themselves are forced to make over a period of time, the balance partakes of a “spontaneous order,”¹⁵³ analogous to customary regimes in which participants have greater control over the content of the rules that govern them. The balance thus assumes a different kind of normativity from the

150. For recent work on this topic, see generally Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009) (discussing the importance of balance between users and authors in the Canadian copyright system), and Peter B. Maggs, *The Balance of Copyright in the United States of America*, 58 AM. J. COMP. L. 369 (2010) (describing the copyright balancing that has occurred in Congress and the courts).

151. See generally Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397 (2007) (“[T]he Supreme Court identified the common law doctrines of the idea/expression dichotomy and fair use as critical internal free speech safeguards that must be preserved if copyright is to be harmonized with the First Amendment.”); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007) (discussing the idea-expression dichotomy and the fair use doctrine as free-speech safeguards that “keep copyright law from extending too far and limiting the speech rights of others”).

152. See LANDES & POSNER, *THE ECONOMIC STRUCTURE*, *supra* note 105, at 21–24 (highlighting some of the costs and tradeoffs in intellectual property law).

153. Friedrich Hayek is credited with developing this idea. See 3 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* xii, 158 (1979) (describing it as synonymous with “self-generating order” or “self-organizing structures”); A. I. Ogus, *Law and Spontaneous Order: Hayek’s Contribution to Legal Theory*, 16 J.L. & SOC’Y 393, 394–98 (1989) (discussing spontaneous order as it exists in the market and in the law); Francesco Parisi, *Toward a Theory of Spontaneous Law*, 6 CONST. POL. ECON. 211, 211–13 (1995) (discussing the spontaneous emergence of law); Robert Sugden, *Spontaneous Order*, 3 J. ECON. PERSP. 85, 85 (1989) (providing an anecdote about a self-enforcing rule as an example of spontaneous order).

one ordinarily communicated and enforced by the rest of copyright law.¹⁵⁴

As a private law institution, copyright law is structured to speak through relational directives of rights and duties. Being an obligatory (as opposed to optional) regime, its private law architecture is composed of a set of “exclusive rights” that operate through their correlative duties “not to copy” and compels individuals to behave, or refrain from behaving in certain ways.¹⁵⁵ Copyright’s legal rules therefore communicate a formal legal normativity, largely analogous to other areas of law. By declaring certain actions to be within the exclusive providence of the copyright owner, the law directs others not to engage in those actions and subjects them to the possibility of legal liability if they choose not to comply.

The Type I / Type II equilibrium however is devoid of any formal normative significance. Being neither a direct nor delegated creation of the law, but rather a reality of the enforcement environment, its status is more *de facto* than *de jure*. This hardly suggests that it is not of great importance. To the contrary, it performs a crucial coordination function in the creative marketplace as a “focal point” for interactions between copyright owners, users, and copiers.

The typical interaction between a copyright owner and a private (noncommercial) copier in the marketplace can be understood as one of coordination, rather than pure conflict. A coordination situation (in Game Theory) is one where the interests of parties are aligned to some degree (even if not completely), and yet this fact alone does not ensure that they will act to further their aligned self-interest.¹⁵⁶ The literature is replete with examples of such coordination: cars on a street seeking to proceed in an orderly and efficient manner; rowers on both sides of a boat seeking to move the boat in the same direction; hunters trying to catch a common prey; and so on.¹⁵⁷ Users and copiers care deeply about many of the uses that fall into the category of “actionable but tolerated” (or “tolerated”), since they contribute to the effective consumption and use of creative works. Indeed, some scholars describe the allowance for such uses as an integral part of the free speech and liberty interests that users have, even if

154. For copyright’s traditional normativity, see Balganes, *supra* note 19, at 1677–82 (identifying the normative justifications for why copying is a wrong).

155. *Id.* at 1667–74.

156. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1655 (2000) (“In a coordination game, players have common interests, but this fact does not guarantee that the players will do the best they can for themselves.”).

157. *Id.* at 1655–58.

copyright law treats them as formally actionable.¹⁵⁸ Copyright owners also remain indifferent to such uses as we discussed, so long as they do not eat into their revenues (that is, as long as they remain within the zone of tolerance), for example, by turning commercial or competitive. In some instances, copyright owners might not just be indifferent to such uses, but might instead seek to encourage them—given their spillover effects on the primary market for the work in question (for example, fan fiction or sampling).¹⁵⁹ The two sides' interests are thus aligned, but absent some formal communication, there is no guarantee that they will coordinate—that is, copyright owners will refrain from enforcing their claims, and private users will use and consume the work within the zone of tolerance.¹⁶⁰

In such situations needing coordination, scholars have posited that very often “focal points” tend to spontaneously emerge, either through the interaction of parties over time or through a third party, which has the effect of making some information salient, thereby inducing the coordination that both parties desire.¹⁶¹ What is critical to appreciate though is that these focal points need not be endowed with any normative significance for them to work.¹⁶² All that they do is raise the salience of one option over others, causing parties to converge around that option.¹⁶³ The focal point thus generates credible expectations on each side as to the behavior of the other, which allow them to move forward collectively.¹⁶⁴ Since focal points do not work through their formal normativity, their origins matter very little. A focal point might thus originate in a third party (for example, a government) or indeed through the action of one side of the interaction over time. It is precisely in this manner that the equilibrium described before operates.

Over a period of time, when copyright owners decide not to enforce certain kinds of actionable claims (Type II claims), it has the effect of

158. See Litman, *supra* note 121, at 1918–19 (“A healthy copyright system requires an equilibrium between copyright owners’ rights to exploit works and individuals’ liberties to enjoy them.”).

159. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 445–46 (1984) (noting how some copyright owners “welcome the practice” of unauthorized copying in some contexts).

160. McAdams, *supra* note 156, at 1658 (discussing the importance of communication in facilitating coordination).

161. *Id.* at 1658–63.

162. *Id.* at 1666 (“But the moral authority to legitimacy of law is not necessary to create a focal point.”).

163. *Id.* at 1664–66.

164. Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 231 (2009).

communicating a signal to users and copiers. While it certainly does not carry any normative significance in the sense of binding the copyright owner, it nonetheless assumes a certain amount of salience that is sufficient to enable owners and users to coordinate their actions.¹⁶⁵ Copyright owners' behavior over time thus creates a self-fulfilling expectation that behavior of a certain kind will occur, even if it is not formally obligatory. It creates a credible expectation that certain kinds of unauthorized copying and use on the part of the public will likely not be enforced against them, even though such enforcement is permitted as a formal legal matter.

Indeed, the significance of such Type II uses, despite their nonobligatory status, was emphasized by the Supreme Court in *Sony Corp. of America, Inc. v. Universal City Studios, Inc.* otherwise known for its doctrine of substantial noninfringing uses in the area of contributory liability.¹⁶⁶ There, the Court noted how significant it was that several copyright owners readily testified (at trial) that they viewed certain kinds of copying as permissible.¹⁶⁷ It thus noted that one prominent copyright owner "had absolutely no objection to home taping for noncommercial use" and that numerous such owners had no objection to, and indeed "welcome[d]" such copying for various reasons.¹⁶⁸ Particularly telling is the Court's conclusion that "the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur" and that "[i]t is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights."¹⁶⁹ The Court repeatedly emphasized that it was using these findings not to accord the behavior normative significance—for example, as a collective implied license—but instead to conclude that such uses were de facto noninfringing because of the copyright owners' own inaction, which the users and copiers of the protected work could legitimately rely on.¹⁷⁰ In other words, the Court too seems to have thought the existence of Type II claims and the identification of the demarcating line between Type I and Type II to be both salient and behavior influencing as a focal point. Indeed, the Court's own recognition and validation of such uses can be seen as giving it additional prominence

165. For an attempt to convert the equilibrium into a normative commitment, see Wu, *supra* note 21, at 633–34 (advocating the creation of "copyright no action policies" by copyright owners that commits them to not enforcing actionable but tolerated uses).

166. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 444 (1984) (identifying evidence that home recordings of certain television broadcasts were authorized by the copyright holders, thus demonstrating "a significant potential for future authorized copying").

167. *Id.* at 444–46.

168. *Id.* at 445–46.

169. *Id.* at 446 n.28.

170. *Id.* at 446.

and salience to this end.

Nobel Laureate Thomas Schelling, who is commonly credited with developing the idea of focal points, observes that a “prime characteristic” of such focal points is that they introduce an element of “prominence or conspicuousness” into the situation—one that depends on “time and place and who the people are.”¹⁷¹ “[W]ho the parties are and what they know about each other” is thus an extremely important determinant for the emergence and continuing significance of such focal points.¹⁷² The credible expectation that a focal point creates is thus heavily dependent on one party being able to understand the reasoning and thinking that goes into the other’s decision, which is in turn dependent on the characteristics and incentives of both sides remaining relatively static over time, place, and context. In our situation, members of the public who seek to use copyrighted works must thus be able to understand how (and perhaps why) copyright owners will not enforce Type II claims, for the equilibrium to operate as a focal point and vice versa, which in turn necessitates a set of minimum shared characteristics on both sides. Indeed, it is precisely this element that the troll’s actions alter, in the process changing both the equilibrium and its ability to operate as a focal point for coordination between owners and copiers. The next section details this process.

D. THE COPYRIGHT TROLL, THE ENFORCEMENT EQUILIBRIUM, AND THE UNEASE

To this point, we have avoided any discussion of the copyright troll and its interaction with the enforcement equilibrium built into copyright law. It is precisely because of the existence of this equilibrium that the troll’s actions start to become problematic. Its unique set of market motivations and structural features turn the equilibrium—fragile, unstable, and dependent on private actors—on its head. In the process, it risks disrupting the connection between copyright enforcement and the institution’s fundamental purposes of inducing creativity through the market.

When the copyright troll steps into the shoes of the copyright owner by acquiring an actionable copyright claim, it brings several of its advantages to the enforcement game. The first is its expertise in enforcing copyright claims. The troll is usually comprised of individuals with experience enforcing and litigating copyright claims—that is, copyright

171. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–58 (1960).

172. *Id.* at 57.

lawyers. As a result, the transaction costs of initiating the claim decrease quite dramatically, eliminating the need for external counsel altogether. Second is its reliance on scale. To the copyright troll, the substance of an individual claim matters much less than its aggregate returns from the enforcement of multiple claims. This explains why it is able to settle each claim for amounts much lower than the damages it seeks. Yet, when aggregated together, the settlements prove to be beneficial. Third, the copyright troll focuses entirely on its short-term gains from enforcement. Not being a participant in the market for creative works, and therefore with no customer base as such, it has little to worry about in terms of the reputational consequences of going after defendants indiscriminately and of suing parties who to traditional copyright owners constitute their customers.¹⁷³

Going back then to the incentive to enforce a claim, represented by the idea of $B_L = p(D) - C_L$, what we begin to see is that the copyright troll is able to quite significantly lower its litigation costs (C_L) because of its cost efficiencies and expertise, and at the same time raise its probability of success (p), once again owing to its expertise and systematic enforcement, altering its expected payoff from the enforcement of the claim. Its expected benefits from litigating / enforcing the claim (B_L) are thus significantly higher than that of the original copyright owner, that is, the creator, as a result of these features. The reason this matters, however, is because it has the effect of altering the balance between Type I and Type II claims described earlier.¹⁷⁴ Recall that what held the balance between the two categories was the fact that at some point, for a large variety of claims $p(D) < C_L$, and as a result of which, those claims are not litigated / enforced.¹⁷⁵

This too, however, is hardly problematic, for as we noted earlier, the equilibrium is hardly immutable, and copyright owners do occasionally try to change the balance when they feel like the incentive provided by Type I claims is insufficient.¹⁷⁶ In this sense, the troll's actions are no different from an otherwise overzealous copyright owner, such as the RIAA, described earlier.¹⁷⁷ What differentiates the troll from the copyright owner, however, is that its reasons for not adhering to the balance are not germane

173. See Hughes, *supra* note 139, at 727–28 (2005) (explaining that “conventional wisdom” warned against suing one’s customers); Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM (Sept. 29, 2004), http://www.law.com/jsp/article.jsp?id=900005540575&Is_Suing_Your_Customers_a_Good_Idea (evaluating the success of lawsuits against peer-to-peer file sharing).

174. See *supra* Part III.B.

175. See *supra* text accompanying note 129.

176. See *supra* text accompanying note 139.

177. See *supra* text accompanying notes 140–46.

to copyright's fundamental purpose.

As noted earlier, the balance between Type I and Type II copyright claims can be seen as an essential boundary condition for the incentive to create that copyright law provides creators.¹⁷⁸ In other words, copyright owners treat some claims as Type II, the point at which the returns from enforcement are no longer deemed necessary for the inducement of creative expression. Over time, this might change through the actions of copyright owners, and when it does, the logic is normally that the marketplace for creative expression necessitates higher expected returns, pushing tolerated Type II claims into the category of enforced Type I claims in order to produce those returns. While the balance between Type I and II claims is changed through the concerted action of copyright owners in certain domains, the copyright system ordinarily views that change as unproblematic because it is taken to be a mere recalibration of the returns needed to induce creativity, which the law delegates to copyright owners themselves.¹⁷⁹ Thus, when recording companies (copyright owners) start enforcing infringement claims against noncommercial downloaders, the system is compelled to see it as unproblematic because it is thought to represent the fact that the copyright owners are merely reassessing an equilibrium that represents the returns needed to continue producing music. Given the connection between the incentives to create and enforce described earlier, an increase in the costs of creating new works (C_C) necessitates greater cumulative recovery ($p(D)$), which accounts for the change.¹⁸⁰ In short, since copyright's fundamental purpose is thought to lie in providing creators with an inducement to produce original expression through the market, alterations in the balance between Type I and Type II claims that derive from that purpose remain unproblematic.

The troll's attempt to change the balance, however, has very different origins. The troll's impetus for enforcing claims that would have otherwise been actionable but tolerated originates not in the increased costs of creating new works (C_C)—since it obviously plays no role in the creation of the work—but is instead a result of its ability to reduce its own litigation costs (C_L) and enhance its chances of recovery ($p(D)$), both of which raise its expected payoffs from enforcing / litigating a copyright claim. To the

178. See *supra* text accompanying note 133.

179. Cf. Hughes, *supra* note 139, at 737, 743 (observing how the U.S. market for music sales “contracted significantly” from 1998 to 2003, the period immediately prior to when the RIAA began to commence hundreds of user lawsuits).

180. See *id.* at 744–46 (discussing how the recording industry's legal actions could be creating an optimal point).

extent that the balance between Type I and Type II claims is not just a contingent part of copyright's incentive structure, but is instead integral to its very functioning, the troll's disruption of the balance can be seen as emanating from reasons external to copyright's basic purpose of producing creative expression. It is precisely this aspect of copyright trolling that differentiates it from any other attempt to overenforce copyright claims. The real problem with the copyright troll thus lies in its disruption of the balance between actionable and enforced (Type I) and actionable but tolerated (Type II) claims for reasons that have nothing whatsoever to do with copyright's functioning as an incentive to create.¹⁸¹

The troll's actions produce obvious harm for defendants who, relying on the earlier equilibrium, perceived their actions to be actionable but tolerated. The troll however does more than just render the actions of a few defendants infringing and subject to liability. If allowed to continue unimpeded, the troll's actions would disrupt not just the equilibrium as it exists at any given point in time, but also the very process by which the equilibrium forms and functions as a mechanism of coordination. Therein lies the real danger that trolling poses for the effective functioning of the copyright system.

The equilibrium functions as a focal point because of its ability to generate credible expectations for both copyright owners and copiers as to the other's behavior. The identities of parties, as noted earlier, plays a major role in the development of such a focal point.¹⁸² When the copyright troll enters the enforcement game and begins to enforce its right indiscriminately, and by reference to its own set of motives and incentives (which are different from traditional creator-owners), it affects the ability of the equilibrium to function as a credible commitment from copyright owners across a variety of domains and contexts. Users and copiers of works whose actions would fit into the category of Type II claims now

181. A good analogy here is to the recent modifications to the copyright system that have in similar fashion been thought to alter copyright's balance. The retroactive term extension of twenty years brought about by the Copyright Term Extension Act ("CTEA") of 1998, Pub. L. No. 105-298, 112 Stat. 2827, was seen by numerous parties as fundamentally problematic not just because it altered the contours of the copyright system, which would have otherwise been fine given that copyright law has been amended by Congress on numerous occasions, but because the extension to the exclusive rights entitlement (by twenty years) was seen as bearing no connection at all to copyright's fundamental purpose. It was precisely because there was no evidence (or claim) that the extension was connected to copyright's inducement to create new expressive work, that many considered the CTEA deeply flawed. Indeed, this formed the very basis of the unsuccessful constitutional challenge to the CTEA. *See Eldred v. Ashcroft*, 537 U.S. 186, 210–12 (2003) ("[P]etitioners argue [the CTEA] does not stimulate the creation of new works but merely adds value to works already created.").

182. *See supra* Part III.C.

have to worry that the very identity and reasoning of copyright owners has changed, moving a greater number of Type II claims into Type I. Being devoid of formal normative significance—that is, in not binding the party generating the signal—the focal point begins to lose its salience as a mechanism of coordination. With this development, the possibility that Type II claims and the uses that they represent will disappear altogether begins to loom large.

This lack of formal normativity is, unfortunately, also the reason why the troll's behavior is hard to fault as a matter of copyright law. Strictly speaking, the troll has done nothing unlawful. Its actions are fully in compliance with copyright law's rules on transfers, standing, and recovery of damages.¹⁸³ Yet, its actions have the potential to disrupt an informal dynamic in copyright law that is just as integral to the institution as its formal framework of exclusive rights, privileges, and immunities. This, in turn, explains why the case against copyright trolls is rather difficult. Since its actions relate to an informal, uncodified part of the copyright system, reining it in as a matter of formal law presents a host of challenges. Any doctrinal tool employed to this end is likely to be either over- or underdeterminative.

Take for instance the two approaches that courts used to rein in Righthaven. Some courts expanded fair use to cover the defendant's actions of reproducing an article in its entirety.¹⁸⁴ In so doing, these courts effectively moved certain Type II claims into Type III simply in order to disallow a recovery and preclude the troll from moving the claims into Type I. Until this point, no court had ever concluded that such verbatim copying could amount to a fair use. Consequently, these decisions surprised both copiers and copyright owners, who quite legitimately viewed it as a doctrinal aberration motivated by the courts' purpose.¹⁸⁵ A few other courts, as noted before, invoked the *Silvers* rule to deny Righthaven formal

183. See *supra* Part II.B.

184. *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1151 (D. Nev. 2011).

185. See, e.g., Steve Green, *Book, Record Industries Attack Righthaven Fair Use Ruling*, VEGAS INC. (Dec. 5, 2011, 9:26 PM), <http://www.vegasinc.com/news/2011/dec/05/book-record-industries-attack-righthaven-fair-use/> (describing the amicus curiae brief of copyright owners opposing the Hoehn decision's expansion of fair use). For an exhaustive treatment of the interrelation between copyright trolling and fair use, see Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. (forthcoming 2014) (making the normative case for copyright trolls to establish the absence of fair use as a solution to the problem). It is worth noting that the district court's expansive interpretation of fair use was eventually vacated by the Ninth Circuit when it concluded that Righthaven's suit could be dismissed for lack of standing. *Righthaven LLC v. Hoehn (Hoehn II)*, 716 F.3d 1166, 1172–73 (9th Cir. 2013).

standing to sue for infringement.¹⁸⁶ Yet, as discussed, this approach can be overcome by a tightly worded artificial assignment. In short then, the absence of a viable doctrinal solution to the problem is a reflection of the reality that the problem with the copyright troll is (1) entirely one of copyright theory and policy that (2) is not formally embodied in copyright law. The challenge thus lies in formulating a legal response that can account for this reality, to which the next part turns.

IV. CURTAILING COPYRIGHT TROLLING DIRECTLY: “COMPENSABLE HARM”

Having identified the real problem with copyright trolls to lie in the fact that their reasons for enforcing copyright claims diverge rather significantly from the institution’s fundamental purpose, this part moves to the prescriptive and suggests mechanisms by which copyright trolls can be controlled. In specific, any solution to the problem of copyright trolling needs to focus directly on policing the entity’s motives and reasons for enforcing copyright claims, while at the same time ensuring that it does not (1) alter the contours of copyright’s traditional doctrines (such as fair use), or (2) preclude a secondary market for copyright claims from developing altogether. The approaches that courts currently adopt tend to do one or the other, making them unviable as long-term solutions to the problem.

This part argues that a direct, more tailored solution lies in a rule that introduces a heightened rule of standing for nonauthor plaintiffs, by ensuring that the basis of their legal claims, in theory, tracks those of actual authors-creators, who copyright law is primarily designed to serve. Such a rule would require (1) nonauthor plaintiffs (for example, trolls) who in infringement claims (2) elect for statutory damages (as opposed to actual damages or injunctive relief) to establish that the defendant’s actions would in principle have enabled a claim for “actual damages”¹⁸⁷ and / or attributable profits, the type of injury that copyright law’s statutory damages allowance was “intended to prevent.”¹⁸⁸ In other words, it would make the availability of statutory damages for nonauthor plaintiffs depend

186. *Hoehn*, 792 F. Supp. 2d at 1144–47; *Righthaven LLC v. Democratic Underground LLC*, 791 F. Supp. 2d 968, 973, 975 (D. Nev. 2011). *See also* *Righthaven, LLC v. Barham*, No. 2:10-cv-02150-RLH-PAL, 2011 U.S. Dist. LEXIS 66720, at *3–4 (D. Nev. June 22, 2011) (finding *Righthaven* lacked standing based on the same analysis used in *Democratic Underground* and *Hoehn*); *Righthaven, LLC v. DiBiase*, No. 2:10-cv-01343-RLH-PAL, 2011 U.S. Dist. LEXIS 67181, at *3–4 (D. Nev. June 22, 2011) (same).

187. 17 U.S.C. § 504(c) (2006).

188. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (applying antitrust law).

on their establishing the existence of some compensable harm.

A. A LIMITED ANALOGY TO THE ANTITRUST INJURY RULE

Scholars commonly make reference to antitrust law's "antitrust injury" rule to suggest that copyright law ought to incorporate an equivalent rule of standing to limit plaintiffs' claims to situations that relate to copyright's core objective of inducing creativity through the market.¹⁸⁹ While no doubt well intentioned, this argument is hard to square with copyright's basic structure as a strict-liability tort. My claim here is, by contrast, quite different. Subsequent interpretations (and applications) of the Supreme Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,¹⁹⁰ which is credited with formulating the antitrust injury rule, make the claim that the Court was attempting to lay down a formal rule of standing for all private plaintiffs in antitrust cases.¹⁹¹ Whether this is accurate or not, the Court's opinion in *Brunswick* also sheds important light on how a federal statute's remedial provisions ought to be understood and interpreted, when the statute specifically contemplates private actions and the realization of a public goal through such actions. This interpretive approach should inform how courts approach the question of when plaintiffs should be allowed to invoke copyright law's allowance for statutory damages.

Brunswick involved an action brought by a few individual bowling centers, complaining that the defendant's acquisition of a few other centers in the region was in violation of § 7 of the Clayton Act, which regulated anticompetitive mergers.¹⁹² The defendant was the largest owner-operator of bowling centers in the region. The action was brought under § 4 of the Act, which allowed a plaintiff to recover "threefold the damages" (treble damages) upon establishing that it had been "injured in its business or property by reason of anything forbidden in the antitrust laws."¹⁹³ Speaking for a unanimous Court, Justice Thurgood Marshall concluded that § 4

189. See, e.g., Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 979–80 (2010) (proposing a "serious harm requirement" in copyright cases); Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 933–34 (2007) (noting that, like antitrust law, copyright law "recognizes that some harms are not cognizable"); Shyamkrishna Balganesh, *Rethinking Copyright: Property Through the Lenses of Unjust Enrichment and Unfair Competition*, 156 U. PA. L. REV. PENNUMBRA 345, 346 (2008) (commenting on the analogy to the "antitrust injury rule").

190. *Brunswick*, 429 U.S. at 489.

191. 2A PHILLIP E. AREEDA et al., ANTITRUST LAW 73 (3d ed. 2007).

192. *Brunswick*, 429 U.S. at 479–80.

193. 15 U.S.C. § 15(a) (2006).

needed more than just any causal connection between the merger and the plaintiffs' injury, since mergers by their very nature cause some dislocation.¹⁹⁴ Instead, the plaintiffs needed to show "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."¹⁹⁵ In other words, the causation required to allow the claim had to originate in antitrust law's fundamental purpose of avoiding anticompetitive behavior and effects. Thus emerged antitrust law's "antitrust injury" rule, which has since become a formal doctrine of standing in antitrust law.

Many scholars have suggested that copyright law (and indeed perhaps all of intellectual property law) would stand to benefit from a similar injury requirement—and that courts should allow copyright claims only when plaintiffs succeed in showing harm to their incentives to create or distribute the work in question.¹⁹⁶ While this would certainly render nonactionable a large number of copyright claims that do not directly further social welfare by inducing creative expression, it is also likely to dramatically alter the analytical structure of copyright law.

Liability for copyright infringement has always been seen as strict in the sense that it requires neither a showing of fault nor proof of actual harm.¹⁹⁷ Making liability now depend on proof of injury is likely to alter the contours of liability not just as a procedural matter (that is, as to standing), but as a substantive one as well. As a private law regime, copyright law depends entirely on private enforcement via infringement suits for its functioning. Unlike antitrust law, in which private actions are one of several forms of enforcement,¹⁹⁸ the very existence and validity of a copyright claim is dependent on a copyright owner's ability to enforce it. In the antitrust context, when a private plaintiff's claim is dismissed under the antitrust injury rule, it never precludes various other forms of enforcement. As a purely analytical matter then, the underlying violation (of antitrust laws) is not automatically legitimized since public enforcement continues to remain viable. In copyright law, on the other hand, precluding an infringement claim when proof of harm is lacking would serve to validate the defendant's actions given the absence of alternative enforcement

194. *Brunswick*, 429 U.S. at 487.

195. *Id.* at 489.

196. *See, e.g.*, Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973, 1031 (2007) (supporting the Supreme Court's development of a harm-based approach); Stadler, *supra* note 189, at 933–34 (arguing for a stricter interpretation of "harm").

197. Balganesch, *supra* note 19, at 1682.

198. *See, e.g.*, 15 U.S.C. § 15a (suits by the United States); 15 U.S.C. § 15c (suits by State Attorneys General).

mechanisms.¹⁹⁹ To the extent that copyright law is meant to operate as an inducement to create, to the creator who understands that as a functional matter the very existence of the entitlement is heavily dependent on proof of harm, the rule is likely to impede the system's operation. A full-blown copyright injury rule—modeled on antitrust law's antitrust injury requirement—would operate as a substantive, rather than procedural bar. And certainly for our purposes, it is likely to do much more than just curtail trolling, since it would effectively alter all claims for copyright infringement.

A more modest use of the antitrust analogy, however, also derives from *Brunswick*. What analogies to Justice Marshall's opinion routinely ignore is the extent to which he focused on the remedial nature of the treble damages provision that was in question.²⁰⁰ In other words, the opinion was motivated in large part by the Clayton Act's purported fusion of compensatory and punitive (deterrent) objectives into the damages provision, which in turn necessitated a rule that would unbundle the two. Justice Marshall observed in *Brunswick*,

Section 4, in contrast [to Section 7], is in essence a remedial provision. It provides treble damages to “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.²⁰¹

Justice Marshall was clearly observing that the Act's damages provision served two separate functions: a compensatory one and a punitive one. Indeed, Congress's conflation of the two played an important role in the Court's analysis when it went on to further note,

The discussions of [the treble damages remedy] on the floor of the Senate indicate that it was conceived of primarily as a remedy for “[t]he people of the United States as individuals,” especially consumers. Treble damages were provided in part for punitive purposes, but also to make the remedy meaningful²⁰²

199. To put the point in terms of a distinction drawn earlier, it would effectively remove acts of copying that do not cause harm to the plaintiff out of the category of Type I claims, but its effect would not just be to move it into Type II, but rather Type III—that is, noninfringing claims.

200. *Brunswick*, 429 U.S. at 485.

201. *Id.* at 485–86 (citations omitted).

202. *Id.* at 486 n.10 (citations omitted).

The antitrust injury rule was thus motivated primarily by the concern that allowing a plaintiff to rely on a loose idea of causation, even if demanded by the punitive dimension of the remedy, would dilute the remedy of its compensatory significance. Despite later courts' extension of the logic to other antitrust remedies, the *Brunswick* Court saw its rule intricately tied to the treble damages recovery being invoked. It thus concluded that

for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market [but instead an] *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.²⁰³

Had the plaintiff been seeking just an injunction, one doubts that the Court would have insisted on the same rule, even though later courts have extended *Brunswick* in that direction.

Brunswick was thus in the end about standing for a damages recovery that combined compensatory and punitive purposes. It provides us with a narrower, and more direct framework with which to think about the primary motivation of the copyright troll, namely copyright's statutory damages provision.

B. A RULE OF STANDING FOR NONAUTHOR PLAINTIFFS SEEKING STATUTORY DAMAGES

Statutory damages were introduced into U.S. copyright law for the first time in 1909.²⁰⁴ The primary reason for their introduction was to aid courts and litigants in situations where it was difficult to prove and quantify actual damages and lost profits.²⁰⁵ In attempting to facilitate the recovery of actual damages through a fixed amount, their original purpose was thus compensatory in nature.²⁰⁶ While the 1909 Act's statutory damages provision authorized courts to make awards that they considered just, the law also set a range for such awards and provided suggested awards for common types of infringements.²⁰⁷ Perhaps most importantly though, the

203. *Id.* at 489.

204. *See* Samuelson & Wheatland, *supra* note 54, at 446–47 (describing the historical context of the 1909 Act).

205. *Id.* at 446 n.22 (detailing the legislative history of the 1909 Act's statutory damages provisions).

206. *See, e.g.,* Douglas v. Cunningham, 294 U.S. 207, 209 (1935) (discussing the compensatory purpose).

207. 17 U.S.C. § 101(b) (1976).

statute specifically provided that statutory damages were “not [to] be regarded as a penalty,” thereby seemingly endowing them exclusively with a compensatory dimension.²⁰⁸ Thus, courts routinely refused statutory damages awards when plaintiffs could establish actual damages and lost profits.²⁰⁹

In revising the statute in 1976, Congress altered much of this. In addition to modifying the range for awards, the law eliminated suggested awards amounts and the explicit recognition that awards were not to be considered penalties.²¹⁰ In due course, courts came to interpret the new provision, § 504(c), as consciously embodying a punitive dimension in addition to a remedial or compensatory one.²¹¹ Yet, since statutory damages were intended as replacements for actual damages, they continued to serve their core compensatory purpose while accommodating a punitive one. In effect, the compensatory and punitive or deterrent dimensions came to be merged in practice, especially toward the higher end of the permitted range, that is, for willful infringements.²¹²

Much like antitrust law’s treble damages rule, copyright law’s statutory damages provision blends compensatory and punitive purposes into a single award. Especially since an election for such damages forms an alternative to actual damages or lost profits, the compensatory dimension of making the plaintiff whole in situations of injury continues to form at least part of the rationale for the provision. Given this reality, courts ought to scrutinize the election for statutory damages more closely, so as to ensure that the compensatory purpose is not lost altogether. Indeed, this is the modest lesson that can be taken away from *Brunswick*.

208. *Id.*

209. *See, e.g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (finding that statutory damages could not be awarded when damages and profits had been proven); *Ziegelheim v. Flohr*, 119 F. Supp. 324, 329 (E.D.N.Y. 1954) (finding that actual damages were easy to calculate and were “reasonable and just”).

210. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.).

211. *See, e.g.*, *On Davis v. Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2).”); *NFL v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (noting that statutory damages can be partially punitive); *U.S. Media Corp. v. Edde Entm’t Corp.*, No. 94 Civ. 4849 (MBM) (MHD), 1998 U.S. Dist. LEXIS 10985, at *60 (S.D.N.Y. July 17, 1998) (“[A statutory] award is designed to serve both compensatory and punitive purposes.”); *Samuelson & Wheatland*, *supra* note 54, at 460 n.89 (citing several other examples where courts have recognized this dual purpose).

212. *Samuelson & Wheatland*, *supra* note 54, at 460–61 (explaining that courts’ application of the 1976 Act “has devolved into a regime in which . . . willful infringement is commonly found in cases when infringement should properly be deemed ordinary”).

Section 504(a) of the copyright statute allows a plaintiff in an infringement suit to elect to receive statutory damages in lieu of actual damages or lost profits at any time before the final judgment is delivered.²¹³ In its compensatory dimension, the provision operates in largely evidentiary terms—either allowing the plaintiff to prove actual damages (and lost profits) or to avoid this burden by settling for an amount within a specified range. To ensure that the compensatory dimension is indeed at play—which Congress never sought to eliminate—courts should scrutinize a plaintiff’s election more closely to ensure the existence of actual damages or “any additional profits of the infringer” so as to trigger the very need for damages. In other words, since the statutory damages provision was intended to aid courts in their computation for compensatory damages, courts ought to satisfy themselves as to the need for such damages before proceeding to its computation within the prescribed range. In situations where the court finds no basis for compensation (no actual damage suffered), the need to invoke a computational aid ought to disappear, since the primary logic for damages as a category disappears and punitive damages are by and large impermissible without compensatory damages.²¹⁴

Indeed, the idea of scrutinizing the basis of and need for the plaintiff’s election has been suggested before. In arguing for reforming copyright law’s statutory damages provision, Pamela Samuelson and Tara Wheatland exhort courts to “[a]sk the parties to offer proof of damages and profits, or, in the alternative, to demonstrate why damages or profits are sufficiently difficult to prove.”²¹⁵ They continue on to note that Congress consciously chose to avoid requiring plaintiffs to offer such proof but seems to have contemplated an award of no more than the statutory minimum when the plaintiff fails to offer such proof of actual damages.²¹⁶ Accordingly, they would have courts award the prescribed minimum statutory damages when the plaintiff has lost no profits or suffered no actual damage.²¹⁷ The

213. 17 U.S.C. § 504(a) (2006).

214. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (explaining that in determining whether punitive damages are appropriate, courts should forgo mathematical calculations and instead examine (1) the degree of “reprehensibility or culpability,” (2) calculate “the relationship between the penalty and the harm to the victim,” and (3) compare the sanctions imposed in similar cases); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575–83 (1996) (same). *But see* *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 160 (5th Cir. 2008) (finding that punitive damages could be awarded without compensatory damages under the Civil Rights Act because of an explicit provision in the Act that enabled such awards).

215. Samuelson & Wheatland, *supra* note 54, at 502.

216. *Id.* at 502 n.313.

217. *Id.* at 501.

Samuelson-Wheatland proposal, while aimed at ensuring greater scrutiny of a plaintiff's election, does not quite convert the scrutiny into an actual prerequisite for recovery.

Interposing Justice Marshall's logic from *Brunswick* into this framework however moves us in the direction of a formal rule of standing. As noted previously, *Brunswick* can be seen to stand for the idea that in dealing with a mixed damages provision in a statute (that is, where both compensatory and punitive purposes are blended), the court should ensure that the compensatory purpose is being directly served—in a manner intended by the statutory framework—before allowing the award. In the copyright context, this should mean that when a court has reason to suspect that a plaintiff's election for statutory damages is not as a computational aid, but is instead a cloak for some recovery, it should deny the election of the statutory damages. Instead, the court should tie the recovery to any actual damages sustained, without which, the plaintiff should be unable to recover. In effect, this would work as an injury requirement for plaintiffs seeking to invoke the statutory damages remedy. At the same time, for plaintiffs that are initial owners of the copyright—such as authors / creators—this rule of standing might be relaxed for two interconnected reasons.

First, given copyright's purpose of creating an ex ante incentive to create original works of authorship, the very act of infringement—once identified—can be seen to operate as a valid basis for presuming potential market harm.²¹⁸ Since the insistence on a plaintiff's proving actual damages is meant to work as a proxy for injury, it ceases to remain necessary when such injury is known to exist in certain domains. Put in opposite terms, one could argue that the very availability of statutory damages operates as an ex ante incentive to create for authors, which in turn ought not to be disturbed.²¹⁹ Second, going back to the connection between the incentive to create and the incentive to enforce, requiring a

218. Indeed, the absence of market harm is often dispositive in fair use cases. Consequently, if a court were to find a defendant's copying to be infringement—and not fair use—it is reasonable to infer the existence of potential market harm. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985) (explaining that because infringement cases will rarely present clear evidence of actual damage, “once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred”).

219. Indeed this point is consistent with the Court's expansive interpretation of copyright law's structure as an incentive to create. *See Eldred v. Ashcroft*, 537 U.S. 186, 206 (2003) (upholding the constitutionality of the CTEA and arguing that Congress may have passed the CTEA in order to “provide greater incentive for American and other authors to create and disseminate their work”).

plaintiff to adduce evidence of actual harm as a precondition for recovery would undoubtedly raise the costs of litigation (C_L). Without a corresponding rise in benefits, it would undoubtedly modify the incentive calculus, altering the Type I / Type II claim equilibrium in one domain, which could in turn produce effects in others. In other words, by pushing some claims from Type I to Type II—which the rule could result in for creator-plaintiffs—it might conversely result in moving other types of claims from Type II to Type I to balance out the effects of the rule.

The rule of standing would thus operate only in relation to elections made by noninitial copyright owners, a class recognized by the copyright statute itself.²²⁰ Indeed the Copyright Act itself treats authors as a special class and vests them with additional protection, in the nature of inalienable termination rights in the interests of fairness.²²¹ There should thus be little reason in exempting author-plaintiffs from a formal rule of standing when they invoke the statutory damages provision. In short, the logic of *Brunswick* and the purpose behind copyright law's provision on statutory damages allow courts to impose on nonauthor plaintiffs in infringement suits who elect to recover statutory damages, the burden of showing the existence of some actual damages or lost profits before validating the election.

This rule raises the obvious next question of precisely what a nonauthor plaintiff will need to show to establish that some actual damages are, in principle, recoverable. As Nimmer notes, “Actual damages represent the extent to which infringement has injured or destroyed the market value of the copyrighted work at the time of infringement.”²²² At its simplest, the “basic rule for computing injury to the market value of a copyrighted work arising from infringement is to inquire what revenue would have accrued to plaintiff but for the infringement” and to place the burden on the plaintiff “of establishing with reasonable probability the existence of a causal connection between defendant's infringement and loss of anticipated revenue.”²²³ In situations in which lost revenue is hard to quantify and the defendant has no attributable profits to speak of, some courts look to the “value of use” in their assessment, that is, they equate actual injury with the likely cost of the infringing use to the defendant had permission been sought.²²⁴ Note that for our purposes, the quantification of these harms is

220. See 17 U.S.C. § 201(a) (2006).

221. *Id.* § 203.

222. 4 NIMMER & NIMMER, *supra* note 6, § 14.02[A].

223. *Id.* § 14.02[A][1].

224. *Id.* § 14.02[B].

irrelevant, since what matters is their very existence, and once shown to exist, the nonauthor plaintiff may conveniently elect for statutory damages.

Requiring nonauthor plaintiffs to establish some basis for actual damages before their election is validated would thus operate as a rule of substantive standing that comports with copyright's fundamental institutional purposes. It would operate as the perfect antidote against the copyright troll, by rendering its business model unviable—an issue to which we return.

C. DETERRING THE TROLL

A formal rule disallowing a nonauthor plaintiff from electing for statutory damages (under § 504(c)) without proof of compensable harm operates as a direct, targeted measure that is likely to impede copyright trolling. What is crucial to appreciate about this strategy though is that it operates by affecting the core motivation of the copyright troll, namely its reliance on copyright's statutory damages provision. Unlike a formalized denial of all standing to sue—such as the expanded *Silvers* rule—the version offered here does not formally prohibit trolling, but instead deters it. In other words, it focuses on eliminating the troll's basic incentive that drives its business model. Without the automatic availability of statutory damages, the troll will have absolutely no guarantee of legal recovery. Since the troll will in most cases be unable to establish any compensable harm as such, its ability to recover damages will be dramatically impeded. Knowing this to be the case, trolls are unlikely to pursue defendants that copyright owners are unlikely to have gone after themselves (for example, noncommercial defendants or those engaging in purely personal uses), thereby aligning the ability to obtain statutory damages with copyright's basic a priori incentive structure to litigate the claim.

None of this is to suggest that this strategy is foolproof. Copyright trolls might choose to take their chances and hope that defendants are risk averse enough to settle even without a valid claim for statutory damages. While this might have limited payoff in the short run, it is unlikely to be a viable model once a defendant emerges who is willing to test the troll's claim and have it adjudicated in a court.

The situation in which the compensable harm prerequisite is more likely to be insufficient involves defendants that have an interest in continuing their use of the work. In other words, when a defendant has something to lose from being enjoined from copying, a troll could in theory choose to seek a permanent injunction by way of remedy and use the threat

of such an injunction to obtain a hefty settlement from the defendant—which would operate as a licensing fee of sorts.²²⁵ This too is unlikely because the grant of injunctive relief is predicated on a plaintiff being able to show a likelihood of irreparable injury without such relief.²²⁶

The first requirement that courts of equity look to before granting injunctions is the requirement that the plaintiff establishes that an ordinary legal remedy—namely compensatory damages—will not adequately repair the harm. While the rule diminished in significance in the last century, the last few years have seen its revival following the Supreme Court’s decision in *eBay, Inc. v. MercExchange, L.L.C.*, which held that courts have to look to equity’s traditional requirements, including the irreparable-injury rule, before granting injunctive relief.²²⁷ While *eBay* dealt with permanent injunctions in patent cases, its logic and reasoning apply with equal force to copyright law and preliminary injunctions as well, and indeed later courts have extended it in that direction.²²⁸ In essence, the irreparable-injury rule prohibits courts from presuming that an injunction ought to follow merely because a plaintiff establishes ownership of copyright and an infringement. It needs to be additionally satisfied that damages are not sufficient.

One of the ways in which courts have historically satisfied the irreparable injury requirement is when damages are too difficult to measure accurately.²²⁹ Here, however, courts are required to invoke the logic of the compensable harm requirement suggested for statutory damages.²³⁰ Merely because damages cannot be adequately measured should not imply that courts do not satisfy themselves of the existence of compensable harm for such damages to begin with.²³¹ In other words, the gist of *eBay* is that a court cannot presume irreparable harm merely because a right is violated,

225. Injunctive relief while codified in Title 17 is largely equitable in its origins and availability. See 17 U.S.C. § 502(a); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (seeking injunctive relief under § 502(a)).

226. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–93 (2006) (stating in the context of a patent infringement the four factor test that includes irreparable injury and that “this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed”); *Abend*, 863 F.2d at 1479 (denying injunctive relief where the party failed to show irreparable injury).

227. *eBay*, 547 U.S. at 391.

228. *E.g.*, *Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010) (“We hold today that *eBay* applies with equal force (a) to preliminary injunctions (b) that are issued for alleged copyright infringement.”).

229. See *id.* at 81; Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 711–13 (1990).

230. See 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:74 (2012).

231. *Salinger*, 607 F.3d at 82 (“After *eBay*, however, courts must not simply presume irreparable harm . . . Rather, plaintiffs must show that, on the facts of their case, the failure to issue an injunction would actually cause irreparable harm.”).

but instead needs to be convinced that such harm does in fact exist or is very likely.²³² Consequently, the copyright troll is unlikely to succeed in merely replacing its quest for statutory damages with injunctive relief and going after defendants that intend to continue using the work. Courts are likely to insist on a showing of actual or potential harm—which the troll is unlikely to satisfy by merely pointing to presumptively lost licensing revenue.

V. CONCLUSION

Today, the copyright troll is a common bogeyman used to illustrate the innumerable problems that underlie our copyright system. In the process, discussions of copyright trolling all too readily ignore the mechanisms of copyright law that motivate trolling and the precise reasons why copyright trolling is fundamentally problematic. This in turn has courts and scholars developing antidotes to copyright trolling that are ineffective, short-lived, overexpansive, or which in their myopic focus on the consequences of trolling, end up foreclosing potentially important developments in the copyright system.

In this Article, I have argued that copyright trolling remains a deeply problematic activity, but for reasons that have little to do with fair use or the acquisition of copyright claims by third parties. Copyright law, as an inducement for creativity, is premised on the connection between the incentive to create and the incentive to enforce actionable claims. It contains an important balance between claims that are enforced and those that are tolerated despite their being actionable as such. Very importantly, this balance is realized by the private enforcement decisions of copyright owners over time. As an entity having no interest in the creation, distribution, or use of creative works, yet motivated to enforce copyright claims relating to such works in a dogmatic manner, the copyright troll disrupts this informal, unwritten, and fragile equilibrium. In the process, it detaches the enforcement side of copyright from its functioning as an inducement to create. What makes its actions additionally troublesome is the fact that in disrupting this informal equilibrium, its actions nonetheless comply perfectly with all of copyright law's formal rules. This is precisely what makes the case against copyright trolls complicated.

Despite having risen to prominence only recently, the conceptual and analytical tools that make trolling possible have been in existence since the

232. *Id.*

Copyright Act of 1976. The Righthaven episode brought home—to courts, lawyers, and the public—the speed and effectiveness with which copyright trolls could operate, and the powerlessness of courts to deal with the phenomenon. While Righthaven may have ended its operations, it is certainly only a matter of time before an entity learns from Righthaven’s mistakes and picks up where it left off. When that occurs, courts and policymakers will do well to fully appreciate what copyright trolling is and is not, and why it is that trolling is detrimental to the copyright system, before formulating a response to it. Failing such an approach, copyright trolls will have little reason to worry about their future.

