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Of Pornography Pirates and Privateers: Applying FDCPA Principles to Copyright Trolling Litigation

Henry D. Alderfer

NOTES

OF PORNOGRAPHY PIRATES AND PRIVATEERS: APPLYING FDCPA PRINCIPLES TO COPYRIGHT TROLLING LITIGATION

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INTRODUCTION

> Plaintiffs have outmaneuvered the legal system. They've discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video. Then they offer to settle—for a sum calculated to be just below the cost of a bare-bones defense. For these individuals, *resistance is futile*; most reluctantly pay rather than have their names associated with illegally downloading porn. So now, copyright laws originally designed to compensate starving artists allow, starving attorneys in this electronic-media era to plunder the citizenry.[1]

So began U.S. District Judge Otis D. Wright's scornful order issuing sanctions against attorney John Steele and his cohorts at Prenda Law. Under Steele's direction, a group of attorneys crafted a "cloak of shell companies and fraud"[2] to perpetrate a sprawling copyright infringement litigation scheme.[3] Judge Wright's order, replete with timely Star Trek references,[4] encapsulates the vexing legal, moral, and ethical problems associated with a legal phenomenon

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1. Ingenuity 13 LLC v. John Doe, No. 2:12-CV-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013) (emphasis added).

2. *Id.* at *1.

3. *See id.* at *2-3 (describing how Prenda Law carried out its copyright-enforcement operation); *see also* Joe Mullin, *Prenda Law's "Hacking" Suit that Named ISPs Ends in Total Loss*, ARS TECHNICA (Oct. 31, 2013, 3:05 PM), http://arstechnica.com/tech-policy/2013/10/prenda-laws-hacking-suit-against-isps-ends-in-total-loss/ [http://perma.cc/Z9C2-UVET] (describing how Prenda Law "raked in at least $1.9 million by sending thousands of letters alleging that Internet users had illegally downloaded pornographic films"). Prenda Law recently lost its appeal to the Seventh Circuit in spectacular fashion and now faces hefty sanctions. *See* Lightspeed Media Corp. v. Smith, 761 F.3d 699 (7th Cir. 2014); Joe Mullin, *Appeals Court: Shell Game Over, Prenda Law Must Pay Sanctions in Full*, ARS TECHNICA (Aug. 1, 2014, 3:16 PM), http://arstechnica.com/tech-policy/2014/08/appeals-court-shell-game-over-prenda-law-must-pay-sanctions-in-full/ [http://perma.cc/3WG8-6SD5] (reporting on Prenda Law's legal woes).

4. *See Ingenuity 13 LLC*, 2013 WL 1898633, at *5 ("Third, though Plaintiffs boldly probe the outskirts of law, the only enterprise they resemble is RICO. The federal agency eleven decks up is familiar with their prime directive and will gladly refit them for their next voyage."). For all intents and purposes, Judge Wright mortally wounded Prenda Law with his sanctions order. *See, e.g.*, Ken White, *All Across the Country, Prenda Law's Rubble Is Getting Bounced*, POPEHAT (Oct. 20, 2013), http://www.popehat.com/2013/10/20/all-across-the-country-prenda-laws-rubble-is-getting-bounced/ [http://perma.cc/DT9T-XTXT].

known as "copyright trolling."[5] Copyright holders and their attorneys who manipulate copyright law and the federal judiciary with the primary purpose of creating a revenue stream are said to be "copyright trolls."[6] According to the Norwegian fairy tale "Three Billy Goats Gruff," a troll was a creature that hid under a bridge and coerced payment from unsuspecting travelers.[7] Copyright trolls are not much different, except they usually come armed with a juris doctorate.[8]

Although not all copyright enforcement attorneys are as unscrupulous as John Steele and his companions,[9] copyright trolling—particularly in the context of pornography—is developing into a cottage industry.[10] A defendant in one of these cases is branded as a "pornography pirate."[11] He can either pay an expensive settlement to make the charges go away, or roll the dice and defend himself in federal court.[12] The attorneys who "plunder the citizenry"[13] by deriding their prey as "porn pirates" are, for all intents and purposes, no better than privateers of copyrighted pornography.[14]

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5. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 86 (2012) ("A copyright troll is a plaintiff who seeks damages for infringement upon a copyright it owns, not to be made whole, but rather as a primary or supplemental revenue stream.").

6. *See id.*; *see also infra* Part III.

7. *See* GLEN ROUNDS, THREE BILLY GOATS GRUFF (1993).

8. *See* Joff Wild, *The Real Inventors of the Term "Patent Troll" Revealed*, IAM MAG. (Aug. 22, 2008), http://www.iam-magazine.com/blog/detail.aspx?g=cff2afd3-c24e-42e5-aa68-a4b4e7524177 [http://perma.cc/Z4WG-VHUG] (describing the origins of the term "trolling" in the context of patent law).

9. *See, e.g.*, Patrick Collins, Inc. v. John Doe 1, 945 F. Supp. 2d 367, 373 (E.D.N.Y. 2013) (distinguishing *Ingenuity* on the basis that "there has been no extreme misconduct that would rise to the level other courts have witnessed").

10. *See* Ingenuity 13 LLC v. John Doe, No. 2:12-CV-8333-ODW (JCx), 2013 WL 1898633, at *4 (C.D. Cal. May 6, 2013) (describing copyright trolling as a cottage industry).

11. *See* Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made a "Few Million Dollars" Pursuing (Sometimes Innocent) "Porn Pirates,"* FORBES (Oct. 15, 2012, 2:09 PM), http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/#more-16339 [http://perma.cc/796V-DXAT]; Greg Sandoval, *ISP Won't Reveal Names of Alleged Porn Pirates*, CNET (Dec. 27, 2010), http://www.cnet.com/news/isp-wont-reveal-names-of-alleged-porn-pirates/ [http://perma.cc/7MJQ-K76Y].

12. *See, e.g.*, Letter from Prenda Law to John Doe (Apr. 23, 2012), *available at* http://perma.cc/JV4K-9V3S.

13. *Ingenuity 13 LLC*, 2013 WL 1898633, at *1.

14. *See generally* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 210-11 (2004) (discussing the

Many law review articles and notes have been written on copyright trolling.[15] Although most authors suggest altering joinder rules or eliminating copyright protection for pornography altogether, this Note argues that many of the problems associated with copyright trolling are analogous to abusive debt collection practices. By adapting the legislation enacted to address abusive debt collection, the Fair Debt Collection Practices Act (FDCPA), Congress can stop copyright trolling by forcing copyright trolls to abandon the demand-letter-factory business model, or risk facing defensive litigation brought by the very defendants they are targeting.

This Note takes the position that the actions of these copyright trolls are not only morally and ethically objectionable, but also pose a significant burden to the federal judicial system. Part I of this Note will provide an overview of digital piracy and copyright trolling. Part II of this Note will review the history and policy underlying copyright law and obscenity, and examine how different courts have decided whether obscene material is entitled to copyright protection. Part III of this Note will examine copyright trolling litigation as a business strategy, particularly for producers of pornography. Part IV of this Note will examine previously proposed solutions to copyright trolling litigation in the legal literature. Part IV will also propose that principles from the FDCPA can be readily applied to the Copyright Act to remedy many current problems associated with copyright trolling litigation by setting forth model statutory language. Part IV concludes that amending the Copyright Act to create legislation that provides (1) a defensive cause of action for copyright infringement defendants and (2) administrative enforcement will curtail copyright trolling suits while leaving legitimate copyright infringement actions intact.

I. PIRACY IN THE DIGITAL AGE

Over the last thirty years, the Internet has fundamentally transformed the landscape of copyright law.[16] Perhaps most notably, widespread access to the World Wide Web has led to an age of mass

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definition and historical context of the term "privateer").

15. *See infra* Part IV.

16. *See* Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 696-98 (2011) (discussing the internet and copyright enforcement).

copyright infringement.[17] Any ordinary American with a scintilla of Internet savvy can access and download hundreds of thousands of copyrighted digital works in a matter of seconds.[18] Although downloading digital material is not necessarily illegal per se,[19] more often than not Internet users engage in digital piracy by acquiring copyrighted material without the permission of the copyright owner.[20] Whether digital piracy is actually causing significant harm to the entertainment industry is a matter of debate.[21] Regardless, the entertainment industry evolved to cope with pervasive digital piracy.[22] Some players in the entertainment industry have adopted the classic "if you can't beat them, join them" approach.[23] For example, English rock band Radiohead released their popular 2007 album, *In Rainbows*, through the band's own website as a digital download for which customers could make whatever payment that

17. *See* Joseph D. Schleimer, *Protecting Copyrights at the "Backbone" Level of the Internet*, 15 UCLA ENT. L. REV. 139, 140 (2008) ("The potent combination of high speed Internet access, personal computers, and devices such as the iPod, has placed the technology of mass copyright infringement at the disposal of hundreds of millions of consumers."). *But see* Bridy, *supra* note 16, at 710-11 (challenging the notion of "mass infringement").

18. *See, e.g.*, John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543.

19. For instance, Apple's iTunes Store allows Internet users to legally acquire copyrighted material. As of February 6, 2013, Apple's iTunes Store has sold over 25 billion songs. *See iTunes Store Sets New Record with 25 Billion Songs Sold*, APPLE (Feb. 6, 2013), http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html [http://perma.cc/NP75-6ZE4].

20. *See, e.g.*, Jennifer Martinez, *One-Fourth of Web Traffic is Pirated*, POLITICO (Jan. 31, 2011), http://www.politico.com/news/stories/0111/48494.html [http://perma.cc/YMC3-6C35].

21. *Compare* STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, POL'Y REP. 189, THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY (2007), *available at* http://perma.cc/NF55-QCW2 (estimating annual economic loss to U.S. economy to be approximately 12.5 billion dollars), *with* Luis Aguiar & Bertin Martens, *Digital Music Consumption on the Internet: Evidence from Clickstream Data* 2 (Joint Research Ctr., Working Paper No. 2013/04, 2013), *available at* http://perma.cc/5PU3-YZT8 (finding "no evidence of digital music sales displacement" due to illegal consumption).

22. The effect of digital piracy on the record industry was eloquently captured by the 2010 American drama film *The Social Network*. In the film, Sean Parker (an entrepreneur) brags about the success of Napster. Eduardo Saverin (a co-founder of Facebook) dismisses Parker's braggadocio by pointing out that Napster ultimately paid out an exorbitant settlement to the record industry. Parker responds simply by asking, "Want to buy a Tower Records store?" THE SOCIAL NETWORK (Sony Pictures 2010).

23. For an interesting discussion on the matter, see Jake Rossen, *How Hollywood Can Capitalize on Piracy*, MIT TECH. REV., Oct. 17, 2013, at 95, *available at* http://perma.cc/9WCF-GPKA.

they deemed appropriate, including paying nothing at all.[24] However, many others in the entertainment industry have resorted to litigation.[25] Although there are a few prominent examples of sizeable judgments against defendants in copyright infringement cases,[26] using mass litigation to fight digital piracy has proven to be an imperfect strategy.[27]

A. The Napster and RIAA Litigation

In June 1999, Shawn Fanning launched the first mainstream peer-to-peer (P2P) music file-sharing service: Napster.[28] Within nine months, over 20 million people downloaded Fanning's program.[29] Although Napster revolutionized music distribution,[30] it did so at the expense of artists and record labels whose copyrighted music was impermissibly shared via Napster.[31] A few months later, an assemblage of record labels sued Napster for contributory and vicarious copyright infringement.[32] Metallica, a heavy-metal rock band,

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24. Josh Tyrangiel, *Radiohead Says: Pay What You Want*, TIME (Oct. 1, 2007), http://content.time.com/time/arts/article/0,8599,1666973,00.html [http://perma.cc/97CY-5CDG]. Fans purchased over 3 million copies of *In Rainbows*, over 1.75 million of which were physical compact discs. *See* Paul Thompson, *Radiohead's* In Rainbows *Successes Revealed*, PITCHFORK (Oct. 15, 2008), http://pitchfork.com/news/33749-radioheads-in-rainbows-successes-revealed/ [http://perma.cc/Z44S-G4BB].

25. *See* Gregory S. Mortenson, Comment, *BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem*, 43 SETON HALL L. REV. 1105, 1108-09 (2013).

26. Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 910 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1584 (2013) (awarding statutory damages of $220,000 for pirating twenty-four songs via a file-sharing service).

27. *See* Mortenson, *supra* note 25, at 1107 & nn.19-23.

28. *See, e.g.*, Darren Waters, *Napster: 10 Years of Change*, BBC NEWS (June 8, 2009, 12:23 PM), http://news.bbc.co.uk/2/hi/technology/8089221.stm [http://perma.cc/95RS-BATT].

29. *See* Tom Lamont, *Napster: The Day the Music Was Set Free*, THE OBSERVER (Feb. 23, 2013), http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing [http://perma.cc/Q5CL-MPP8].

30. *See id.*

31. *See id.*; *see also* Amy Doan, *Metallica Sues Napster*, FORBES (Apr. 14, 2000, 2:30 PM), http://www.forbes.com/2000/04/14/mu4.html [http://perma.cc/4TRY-GMH9] (describing the legal dispute between heavy-metal band Metallica and Napster); *Dr. Dre Raps Napster*, WIRED (Apr. 18, 2000), http://archive.wired.com/techbiz/media/news/2000/04/35749 [http://perma.cc/QJF5-SKTA] (describing a similar legal dispute between rap artist Dr. Dre and Napster).

32. *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part* 239 F.3d 1004 (9th Cir. 2001).

filed suit shortly thereafter for similar claims against Napster.[33] The ensuing litigation ultimately resulted in Napster's bankruptcy.[34]

In the years following Napster's demise, the Recording Industry Association of America (RIAA), a trade group for the music industry,[35] launched a series of lawsuits with the intent to curb digital piracy.[36] For years, the RIAA made headlines litigating copyright infringement suits against individuals caught illegally downloading copyrighted music.[37] In the end, the RIAA gave up their crusade against copyright infringement.[38]

The pornography industry is much like the music industry in that both sell copyrighted material, much of which is distributed electronically.[39] And like the music industry before them, some players in the adult entertainment industry are readily filing suits against citizens they believe to have infringed upon their copyrighted pornographic works.[40] Their tactics, however, are very different.

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33. *See* Metallica v. Napster, Inc., No. C 00-4068 MHP, 2001 WL 777005, at *1 (N.D. Cal. Mar. 5, 2001), *aff'd sub nom*, A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

34. Benny Evangelista, *Napster Files for Bankruptcy*, SFGATE (June 4, 2002, 4:00 AM), http://www.sfgate.com/business/article/Napster-files-for-bankruptcy-2813933.php [http://perma.cc/586Q-244V].

35. *See Who We Are*, RIAA, http://www.riaa.com/aboutus.php [http://perma.cc/E8RB-JWGZ] (last visited Sept. 27, 2014).

36. *See generally How Not to Get Sued for File Sharing*, ELEC. FRONTIER FOUND. (July 1, 2006), https://www.eff.org/wp/how-not-get-sued-file-sharing [http://perma.cc/3VU8-6ZBZ]; *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), http://riaa.com/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1 [http://perma.cc/TUD2-3NEK] (describing the aims of RIAA's campaign).

37. *See, e.g.*, Troy Carpenter, *RIAA Continues Litigation Campaign with 517 Suits*, BILLBOARDBIZ (May 24, 2004, 12:00 AM), http://www.billboard.com/biz/articles/news/1436936/riaa-continues-litigation-campaign-with-517-suits [http://perma.cc/MQ93-JLHM].

38. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1 (reporting on various industry experts' opinions on why the RIAA abandoned the campaign); *see also* Jon Healey, *The RIAA Turns Off its Lawsuit Machine*, L.A. TIMES (Dec. 19, 2008, 3:37 PM), http://latimesblogs.latimes.com/technology/2008/12/riaa-lawsuits.html [http://perma.cc/HL78-U747] (opining on the suspension of the RIAA litigation campaign).

39. *See generally* Ben Beaumont-Thomas, *Sasha Grey: Music Is Just Like the Porn Industry*, THE GUARDIAN (Oct. 25, 2012), http://www.theguardian.com/music/2012/oct/25/sasha-grey-music-porn-industry [http://perma.cc/F9QR-NRKF] (explaining the similarities between the adult entertainment industry and the music industry).

40. *See infra* Part III.

B. Copyright Trolling in the Pornography Industry

As of March 2012, copyright trolls had targeted over 200,000 anonymous defendants for illegally downloading copyrighted pornography.[41] These copyright trolling suits can be complex, with one notable suit having nearly 6,000 people joined as co-defendants.[42] However, the copyright holders bringing these suits rarely litigate the matter beyond the initial pleading stages of litigation.[43] Rather, these plaintiffs seek, and are usually granted, early discovery requests providing access to the defendants' identities via their Internet service providers (ISPs).[44]

The problem with copyright trolling is that it is not illegal per se, yet it imposes significant costs not only on defendants, but also on the federal judiciary, which is inundated with these claims. As one judge noted, "Courts have been troubled by what amounts to be a new business model employed by production companies 'misusing the subpoena powers of the court, seeking the identities of the Doe defendants solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims.'"[45]

The strategy behind this "demand-letter factory" business model is simple: it is easier and faster to collect settlement payments from a large pool of defendants,[46] as opposed to targeting a few defendants with protracted RIAA-style litigation.[47] This "demand-letter factory" strategy has proven lucrative for both pornography pro-

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41. *See* Amy Rosen, *The Big Lawsuits Keep on Coming: An Analysis of Extortive Pornographic "Trolling Lawsuits" and Preventive Approaches*, 95 J. PAT. & TRADEMARK OFF. SOC'Y 165, 193-94 (2013); John Doe, *Sued for Downloading Porn? One Victim's Answer*, CT WATCHDOG (Mar. 10, 2012, 7:50 PM), http://ctwatchdog.com/finance/sued-for-downloading-porn-one-victims-answer [http://perma.cc/Y6YE-DFFV].

42. *See* W. Coast Prods., Inc. v. Does 1-5829, 275 F.R.D. 9, 11 (D.D.C. 2011).

43. *See* Rosen, *supra* note 41, at 166.

44. *See, e.g.*, Combat Zone, Inc. v. Does 1-84, No. 12-30085-MAP, 2013 WL 1092132, at *2 (D. Mass. Feb. 20, 2013), *report and recommendation adopted*, No. 12-CV-30085-MAP, 2013 WL 1092458 (D. Mass. Mar. 14, 2013) (finding that a copyright troll requested early discovery for the sole purpose of identifying all Doe defendants by subpoenaing the Defendants' respective Internet Service Providers).

45. Killer Joe Nevada, LLC v. Does 1-12, No. 1:13-CV-1038, 2013 WL 3458197, at *3 (N.D. Ohio July 9, 2013) (quoting Third Degree Films v. Does 1-47, 286 F.R.D. 188, 190 (D. Mass. 2012)).

46. *See* Mortenson, *supra* note 25, at 1106-08.

47. *See id.* at 1109 & nn.32-33.

ducers and their attorneys.[48] These copyright trolls have disrupted the "under-enforcement equilibrium" that has historically existed in copyright law.[49] Furthermore, because copyright trolls have not *technically* broken any laws, there is no "coherent basis on which to curb their activities."[50] To find meaningful success will require solving a jigsaw puzzle of interweaving and conflicting legal doctrines.

II. THE TWISTED RELATIONSHIP BETWEEN PORNOGRAPHY, OBSCENITY, AND COPYRIGHT

Understanding how pornography copyright trolling is possible requires an examination of the tenuous relationship between the laws of obscenity and copyright. Because the legal standing of pornography in the context of copyright law is rather muddled and complicated, a concise review of copyright law, and its historical application to pornography, is appropriate.

A. Copyright at a Glance

The Copyright and Patent Clause of the Constitution gives Congress the power "[t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[51] It is from this constitutional source that the domain of copyright law flows.[52] The Copyright and Patent Clause is notable for being the only clause in the original Constitution that sets forth a justification for its allocation of power—namely, to promote the progress of science and useful arts.[53] Copyright law is designed both to incentivize

48. *See* Hill, *supra* note 11; *see also* Jane Wakefield, *Law Stops 'Chasing Illegal File-Sharers,'* BBC NEWS (Jan. 25, 2011), http://www.bbc.co.uk/news/technology-12253746 [http://perma.cc/X3E2-HWWR] (describing how a British copyright enforcement firm took a 65 percent share of proceeds earned from settlement letters and litigation).

49. Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 730-31 (2013).

50. *Id.* at 731.

51. U.S. CONST. art. I, § 8, cl. 8.

52. *See* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 2 (2002) ("The United States patent and copyright law derives from congressional authority embodied in the Clause.").

53. 1 HOWARD A. ABRAMS, THE LAW OF COPYRIGHT § 1:3 (2013) ("This undoubtedly laudable public purpose thus becomes a value whose consideration is constitutionally

the creation of new intellectual property, and to protect intellectual property rights owners' financial interests in their works.[54] Modern copyright law is formally codified in the U.S. Copyright Act of 1976,[55] which lists the kinds of works that qualify for copyright protection.[56] The Copyright Act also sets forth the various remedies available[57] to copyright holders should their exclusive rights[58] be violated.[59] Motion pictures, even those of a pornographic nature, are protected by the Act.[60]

When a work is eligible for copyright protection, the owner of the copyright enjoys "exclusive rights"[61] to reproduce the copyrighted work, prepare derivative works, and distribute copies of the copyrighted work.[62] These rights, however, are limited by competing public policy interests such as the Fair Use Doctrine.[63]

Copyright infringement occurs when a nonowner violates any of the copyright owner's exclusive rights.[64] But in order to have a civil cause of action against the violator,[65] the copyright owner must register the copyright with the U.S. Copyright Office.[66] Copyright protection begins at creation and endures for the lifetime of the author, plus 70 years after the author's death.[67] In effect, if infringement is discovered, the copyright owner can register the work ex post and subsequently bring suit.[68] However, only an owner of the copyright—either in part or in full—is permitted to bring suit.[69]

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suggested, if not mandated, in any analysis of copyright issues.").

54. *See* Mortenson, *supra* note 25, at 1106 (citing Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009)).

55. 17 U.S.C. §§ 101-1332 (2012).

56. *Id.* § 102.

57. *Id.* §§ 501-513.

58. *Id.* § 106.

59. *Id.* § 501.

60. *See infra* Part II.B.

61. 17 U.S.C. § 106.

62. *See id.*

63. *See id.* § 107. *See generally* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1533-37 (2004).

64. *See* 17 U.S.C. § 501.

65. Although government may bring a criminal case against infringers who meet certain statutory triggers, *see id.* § 506, this Note focuses on civil actions.

66. *Id.* §§ 408, 501.

67. *Id.* § 302(a).

68. *Id.* §§ 411, 501(b); *see* Rosen, *supra* note 41, at 167.

69. 17 U.S.C. § 501.

Although the ownership of a copyright is initially vested in the author or authors of the work,[70] the copyright can be transferred in whole or in part "by any means of conveyance or by operation of law."[71]

The owner of a copyright to a pornographic motion picture can bring a copyright infringement action if the motion picture is digitally distributed or copied without the owner's consent.[72] However, there has been some dispute as to whether an *obscene* pornographic film is entitled to copyright protection at all.[73] If not, no cause of action for copyright infringement would be available.

B. Obscenity: A Bar to Copyright Protection?

It is unclear whether obscene material is entitled to copyright protection.[74] The most prominent discussion on the matter originates from the 1979 case *Mitchell Brothers Film Group v. Cinema Adult Theater*.[75] In *Cinema Adult Theater*, the Fifth Circuit held that obscenity was not a defense to copyright infringement.[76] The court found that Congress had not chosen to refuse copyrights on obscene material,[77] and thus asserting that a work was obscene did

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70. *Id.* § 201(a).

71. *Id.* § 201(d)(1); *see also* Mortenson, *supra* note 25, at 1111-12 & n.47.

72. *See infra* Part III.A.

73. *See infra* Part II.B.

74. The definition of obscenity is, to put it delicately, a tricky subject. For a general discussion on the ever-shifting legal standards pertaining to obscenity, see generally OBSCENITY AND PORNOGRAPHY DECISIONS OF THE UNITED STATES SUPREME COURT, at i (Maureen Harrison & Steve Gilbert eds., 2000). The current legal standard is the three-prong *Miller* Test. Miller v. California, 413 U.S. 15, 24 (1973); *see, e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 575 (2002). First, the finder of fact must decide whether "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest." *Miller*, 413 U.S. at 24. Second, the finder of fact must decide whether the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Id.* Third, the finder of fact must decide whether the work, taken as a whole, "lacks serious literary, artistic, political, or scientific value." *Id.* Accordingly, the obscenity analysis is entirely fact-specific. *See* Jartech, Inc. v. Clancy, 666 F.2d 403, 407-08 (9th Cir. 1982).

75. *See* 604 F.2d 852, 863 (5th Cir. 1979).

76. *Id.*

77. *Id.*; *see also Jartech*, 666 F.2d at 406 ("Acceptance of an obscenity defense would fragment copyright enforcement, protecting registered materials in a certain community, while, in effect, authorizing pirating in another locale.").

not constitute "an appropriate defense in an infringement action."[78] Under the Fifth Circuit's reasoning, it is perfectly reasonable that a copyright troll would be able to enforce their copyright regardless of whether the pornography is legally obscene.

Nearly twenty years later, Judge Martin of the Southern District of New York declined to follow the Fifth Circuit's reasoning, holding that obscenity was a defense to copyright infringement.[79] In *Devil Films, Inc. v. Nectar Video*, Judge Martin denied the plaintiff's request for an order of seizure and a preliminary injunction against the defendant's unlicensed copies of the plaintiff's copyrighted pornographic films.[80] Judge Martin reasoned that the obscene nature of the films barred the plaintiff from equitable relief.[81] Accordingly, it seems that a copyright troll would face much more difficulty enforcing a copyright to a pornographic movie in Manhattan than in Texas.

Federal law contains no outright prohibition on obscenity; it leaves this decision to the states.[82] Some federal statutes prohibit obscenity in areas of federal jurisdiction.[83] Precedent—particularly the *Miller* test—defines obscenity for the purpose of federal law in the context of these statutes.[84] However, the Supreme Court has not decided whether an obscene pornographic work is entitled to copyright protection.[85] Different circuits may thus have different

78. *Cinema Adult Theater*, 604 F.2d at 863. The court never reached the issue of whether the pornographic film in question was actually obscene. *Id.* at 854.

79. Devils Films, Inc. v. Nectar Video, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998). *But see* Nova Prods., Inc. v. Kisma Video, Inc., No. 02 CIV. 3850 (HB), 2004 WL 2754685, at *3 (S.D.N.Y. Dec. 1, 2004) ("In its well-reasoned and scholarly opinion, the Fifth Circuit reviewed the history of the copyright legislation and found that all-inclusive language of the Copyright Act of 1909, 17 U.S.C. § 34 (1970) (repealed), which encompassed 'all the writings of an author,' did not bespeak of an obscenity exception to copyright protection.").

80. 29 F. Supp. 2d at 175.

81. *Id.* at 177.

82. HENRY COHEN, CONG. RESEARCH SERV., CRS-95-804, OBSCENITY AND INDECENCY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES 11 (2009).

83. For a review of relevant federal obscenity statutes, see Sen. Orrin G. Hatch, *Fighting the Pornification of America by Enforcing Obscenity Laws*, 23 STAN. L. & POL'Y REV. 1, 15 (2012). *See also Nectar Video*, 29 F. Supp. 2d at 175.

84. *See* Hamling v. United States, 418 U.S. 87, 105 (1974); Hatch, *supra* note 83, at 15 ("We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity.... These standards are applicable to federal legislation." (quoting United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 129-30 (1973))); *see also supra* note 74.

85. *See* Ann Bartow, *Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography*, 39 U. BALT. L.F. 75, 82-83 (2008); Rosen, *supra* note 41, at 168.

standards, as demonstrated by the holdings in *Adult Cinema Theater* and *Nectar Video*.[86] Although much debate has taken place regarding how the courts and the government should interpret and enforce obscenity laws,[87] there is no controlling authority on whether pornography—obscene or not—is copyrightable.[88] As a result, copyright holders of pornographic films actively enforce their copyrights by vigorously pursuing those whom they catch infringing upon their works.[89] The copyright trolls take advantage of the law, the judiciary, and the salacious nature of their copyrighted works to cow potential defendants into settling out of court.[90] This Note now turns to how copyright trolls operate, the problems they create, and what can be done to remedy this situation.

III. COPYRIGHT TROLLING AS A BUSINESS STRATEGY

A copyright troll is an attorney or a firm that specializes in copyright enforcement litigation.[91] A copyright troll invariably seeks damages for copyright infringement.[92] However, the copyright troll's quest for damages comes not from a desire "to be made whole, but rather as a primary or supplemental revenue stream."[93] As will be discussed later, these attorneys rely on collecting settlement payments from hundreds of alleged copyright infringers, most of whom find out they have been sued not through service of process,

86. *See supra* notes 75-81 and accompanying text.

87. *Compare* Hatch, *supra* note 83, at 15-17 ("[E]ffective enforcement [of obscenity laws] requires not only prosecuting more cases, but prosecuting the right cases in the right way."), *with* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 702 (2007) ("[P]rosecutors abandoned obscenity law because it presented a mix of vexing institutional and doctrinal problems.").

88. *See supra* notes 82-87 and accompanying text.

89. *See infra* Part III.

90. *See infra* Part III.

91. *See* Mortenson, *supra* note 25, at 1111 & n.40. For a discussion of major players in the "copyright trolling" world, *see generally* Luke S. Curran, *Copyright Trolls, Defining the Line Between Legal Ransom Letters and Defending Digital Rights: Turning Piracy into a Business Model or Protecting Creative from Internet Lawlessness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 170, 176-79 (2013) (discussing Righthaven LLC and Prenda Law, both companies labeled as copyright trolls).

92. *See* Mortenson, *supra* note 25, at 1111 n.40.

93. DeBriyn, *supra* note 5, at 86.

but through a demand letter.[94] These fishing expeditions have proven to be a lucrative revenue stream for attorneys and copyright owners, with at least one attorney admitting he generated multi-million dollar revenues from such suits.[95] Copyright trolls usually retain a percentage of the recovered settlement payments and judgments as their fees, but those who own retain the entirety of the recovered settlement payments.[96]

The demand letters that copyright trolls send threaten legal action should the defendant choose not to settle the dispute out of court.[97] Many of these alleged infringers settle their claims upon receipt of the settlement letter, even though they may be innocent.[98] The alleged infringers may be unable to afford adequate defense counsel,[99] which can cost tens of thousands of dollars more than the settlement offer.[100] They may also settle out of fear of the massive statutory and compensatory damages available to plaintiffs under the Copyright Act.[101] Or they may simply settle for fear of being publicly associated with a lawsuit, especially one involving the taboo of pornography.[102] Whatever the case, these demand letters have proven to be successful enough to sustain an entire industry of copyright trolls. Although copyright trolling suits are a legal action, the methodology behind them is purely business.

A. The Copyright Trolling Suit Procedure

Copyright trolling litigation operates very much like a business. Because the legal procedures used by various copyright trolls are

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94. *See* Hard Drive Prods., Inc. v. Does 1-90, No. C 11-03825 HRL, 2012 WL 1094653, at *3 (N.D. Cal. Mar. 30, 2012) (noting in a copyright trolling infringement suit that neither the plaintiff nor any other plaintiff in similar suits have ever served a single defendant in a copyright trolling litigation suit).

95. *See* Hill, *supra* note 11.

96. *See id.* Whether this profit scheme presents an ethical conflict is outside the scope of this Note.

97. *See* Mortenson, *supra* note 25, at 1111.

98. *See id.*

99. *See, e.g.*, Ingenuity 13 LLC v. John Doe, No. 2:12-CV-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013).

100. *See* Mortenson, *supra* note 25, at 1111.

101. *See* 17 U.S.C. § 504 (2012).

102. *See, e.g.*, *In re* BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80, 90 (E.D.N.Y. 2012).

virtually identical,[103] explanations of how these schemes operate are rather simple. This Note is not revealing any industry secrets. Almost every complaint filed by copyright trolls discusses in detail how they managed to wrangle up their defendants.[104] Many opinions and orders have been written as well on how these suits come into being, and almost all of them evidence that the following procedure is being used without significant variation.[105]

1. The Initial Steps

The first step for a pornography copyright troll is to either find a client who is willing and able to partake in a copyright troll litigation scheme,[106] or acquire rights to the copyrighted pornography.[107] The adult entertainment industry is particularly keen on using copyright trolling litigation.[108] The pragmatic explanation behind the pornography industry's usage of copyright trolling litigation is that while no one particularly enjoys being sued,[109] being sued for illegally downloading pornographic movies with lewd titles[110] is startling, and more often than not, embarrassing for alleged copyright infringers.[111] The demand letters and pleadings filed by copyright trolls usually list the titles of pornographic works allegedly infringed upon,[112] which puts pressure on the defendant to settle in order to avoid the social stigma of being publicly associated

103. *See* Mortenson, *supra* note 25, at 1111. The motivations for this legal strategy are unclear, although it could be possible that some jurisdictions are more "plaintiff-friendly" than others. It is also certainly possible that copyright trolls have learned that defendants in more socially conservative parts of the country would be more likely to settle these unsavory suits. Or it could be that there are more bona fide infringements in those regions, or that plaintiffs' counsel are geographically situated in those regions.

104. *See infra* Part III.A.1-2.

105. *See infra* Part III.A.

106. *See* Mortenson, *supra* note 25, at 1112 & n.47 (discussing "unbundling" in copyright law and assignment of parts of a copyright).

107. *See id.*

108. *Id.* at 1112.

109. *See* Malibu Media, LLC v. John Does 1-16, 902 F. Supp. 2d 690, 702 (E.D. Pa. 2012).

110. *In re* BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80, 82 (E.D.N.Y. 2012) (suing over a movie titled "Gang Bang Virgins").

111. *See* Mortenson, *supra* note 25, at 1112.

112. *See, e.g.*, Amended Complaint, Malibu Media, LLC v. Tashiro, No. 1:13-CV00205-WTL-MJD, 2013 WL 8291329, at Ex. A (S.D. Ind. Sept. 4, 2013).

with the aforementioned salaciously titled work.[113] Although some district judges have noted that embarrassment is not a defense to copyright infringement,[114] others have taken a stance against pornography copyright trolling.[115]

After acquiring the standing to initiate a suit, a copyright troll will identify potential defendants via their Internet protocol (IP) addresses,[116] which are usually obtained by hiring a third party that specializes in electronic sleuthing techniques.[117] The proprietary software used by these companies tracks and records IP addresses of Internet users suspected of infringing upon copyrighted works, along with the date and time of the alleged act of infringement.[118]

After identifying the anonymous infringers, the troll will file a complaint in federal court and seek joinder of the anonymous infringers-turned-defendants under Rule 20 of the Federal Rules of Civil Procedure.[119] Although joinder has the same inherent benefits in copyright trolling litigation as in any other form of litigation,[120] it is also economically advantageous for the plaintiffs to amass as many defendants as possible into one suit.[121] By joining numerous anonymous defendants together in a single suit, copyright trolls avoid incurring the $350 filing fee for each defendant.[122] If forced to sue each anonymous defendant separately, the filing fees alone could be in the multi-million dollar range.[123] There is no clear consensus in the federal judiciary as to whether joinder for these anonymous

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113. *See In re* BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. at *90; Mortenson, *supra* note 25, at 1112 & n.49.

114. *See, e.g.*, *Malibu Media*, 902 F. Supp. 2d at 702.

115. *See, e.g.*, Ingenuity 13 LLC v. John Doe, No. 2:12-CV-8333-ODW (JCx), 2013 WL 1898633, at *3-6 (C.D. Cal. May 6, 2013) (issuing sanctions to plaintiff's counsel and referring the matter to the Criminal Investigation Division of the Internal Revenue Service).

116. An IP address is a unique number that identifies each computer using the Internet. *IP Address*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/IP-address [http://perma.cc/35HG-YWVL] (last visited Sept. 27, 2014).

117. *See infra* Part III.A.2.

118. *See infra* Part III.A.2.

119. *See* Mortenson, *supra* note 25, at 1113 n.56.

120. *See, e.g.*, Malibu Media, LLC v. John Does 1-6, 291 F.R.D. 191, 199-206 (N.D. Ill. 2013) (discussing whether joinder of John Doe defendants is proper under Rule 20(b) of the Federal Rules of Civil Procedure); Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 344 (D.D.C. Mar. 22, 2011) (discussing benefits of joinder for numerous John Doe defendants).

121. *See* Mortenson, *supra* note 25, at 1113 & nn.57-58.

122. *See id.* at 1113 & n.57.

123. *See id.* at 1113 & n.58.

defendants is appropriate at the discovery stage.[124] Understandably, this lack of clarity has generated significant debate in legal literature.[125] However, assuming the court grants joinder, the copyright troll will then proceed to ferret out the true identities of the anonymous defendants.

2. Finding Anonymous Defendants via BitTorrent

Copyright trolls are able to locate anonymous defendants thanks in large part to the BitTorrent protocol.[126] The BitTorrent protocol is an Internet technology that makes downloading large files much faster than with traditional downloading technologies.[127] When a BitTorrent user downloads a file, such as a movie, BitTorrent allows the user not only to download the movie from the original source, but also from every other BitTorrent user that has downloaded a part of the file.[128] This network of downloaders is commonly referred to as a "swarm."[129] This network reduces the burden on the original source and increases downloading speeds for all of the users.[130] BitTorrent became immensely popular in the past decade, accounting for as much as 40 percent of the world's Internet traffic on a daily basis.[131]

BitTorrent operates somewhat like a jigsaw puzzle.[132] Each file is broken into many pieces, which are then individually transferred

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124. *See id.* at 1124 & nn.143-45.

125. *See infra* Part IV.

126. *See, e.g.*, Amended Complaint for Copyright Infringement and Demand for Jury Trial, Malibu Media, LLC v. Lutz, No. 2:12-CV-01147-JS-GRB, 2012 WL 6947150, at *3-4 (E.D.N.Y. Oct. 2, 2012).

127. *See Frequently Asked Questions*, BITTORRENT.COM, http://www.bittorrent.com/help/faq/concepts [http://perma.cc/EJ2H-PNBM] (last visited Sept. 28, 2014).

128. *See* Dylan Love, *Everything You Need To Know About BitTorrent, The Legal (And Illegal) Way To Download Anything You Want,* BUS. INSIDER (Apr. 23, 2012, 11:28 AM), http://www.businessinsider.com/what-is-bittorrent-2012-4 [http://perma.cc/JJ3F-TTH6].

129. *See, e.g.*, Amended Complaint, *Lutz*, 2012 WL 6947150, at *3 (discussing BitTorrent terminology and functionality).

130. *See* Costya Perepelitsa, *How Does BitTorrent Work In Layman's Terms?*, FORBES (July 24, 2013), http://www.forbes.com/sites/quora/2013/07/24/how-does-bittorrent-work-in-laymans-terms/2/ [http://perma.cc/XF5V-WKR3].

131. *See About BitTorrent*, BITTORRENT.COM, http://www.bittorrent.com/company/about [http://perma.cc/BW26-HHRM] (last visited July 9, 2014).

132. *See, e.g.*, Amended Complaint, Malibu Media, LLC v. Tashiro, No. 1:13-CV00205-WTL-MJD, 2013 WL 1898633, at *3-8 (S.D. Ind. Sept. 4, 2013).

via the swarm to the end user.[133] The BitTorrent software subsequently reassembles the puzzle pieces according to digital identifying codes called "hash values."[134] It is through these unique identifiers, and proprietary forensic software, that computer investigators hired by copyright trolls are able to identify potential defendants' IP addresses.[135] Although there are methods of avoiding detection,[136] copyright trolls still manage to target thousands of potential defendants suspected of infringing upon copyrighted pornographic works.[137]

3. Connecting the Dots with Subpoenas

Before a copyright troll can demand payment from the alleged copyright infringers, it must link the IP addresses acquired via BitTorrent surveillance to actual people.[138] The gatekeepers for this information are the defendants' Internet Service Providers (ISPs).[139] The ISPs' records provide the crucial link between the defendants' IP addresses and their personal information. From these records, the copyright troll can find the alleged infringers' real names, mailing addresses, and e-mail addresses.[140] However, due to compliance costs and privacy concerns for their customers,[141] ISPs

133. *See* Amended Complaint, *Lutz*, 2012 WL 6947150, at *3-4. *See generally* Perepelitsa, *supra* note 130.

134. *See* Amended Complaint, *Lutz*, 2012 WL 6947150, at *3-4. *See generally* Perepelitsa, *supra* note 130.

135. *See* Amended Complaint, *Lutz*, 2012 WL 6947150, at *3-4. As will be discussed later, technology experts have argued that this software is susceptible to recording false positives. *See* Mortenson, *supra* note 25, at 1129 n.164; *see also* Kevin Bauer et al., BitStalker: Accurately and Efficiently Monitoring BitTorrent Traffic (unpublished manuscript), *available at* http://perma.cc/H7E7-RLH9.

136. *See* Nick Vadala, *How to Work Around Comcast's File-Sharing Crackdown*, PHILADELPHIA.COM (June 1, 2012, 7:30 AM), http://www.phillymag.com/news/2012/06/01/bypass-riaa-mpaa-bittorrent-crackdown [http://perma.cc/BPR5-L2S9].

137. *See* Rosen, *supra* note 41, at 194.

138. *See* Mortenson, *supra* note 25, at 1113-14.

139. *See, e.g.*, Raw Films, Ltd. v. Does 1-11, No. 12CV368-WQH (NLS), 2012 WL 684763, at *2 (S.D. Cal. Mar. 2, 2012) ("Because the transactions in question occurred entirely online, the defendants have been elusive and the IP addresses and ISP are the only available identifying information. Without the requested discovery [compelling the ISP to identify the users behind the IP addresses], there are no other measures Plaintiff can take to identify the personal information for the Doe defendants.").

140. *See* Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 240 (S.D.N.Y. 2012).

141. *See* Mortenson, *supra* note 25, at 1114 & n.64.

rarely just hand over their customers' personal information. Instead, copyright trolls file *ex parte* motions in court for expedited discovery, which force ISPs to release the information.[142] Courts generally grant these *ex parte* motions, thus allowing the copyright trolling model to proceed.[143] However, a district court judge recently dismissed a copyright trolling suit on the basis that an IP address cannot identify a defendant.[144] Regardless, this holding seems to be the exception rather than the rule.[145]

4. Demand Letter Deluge

Once a copyright troll acquires the previously anonymous defendants' personal information, the copyright troll will send a flurry of demand letters with the intent of reaching as many out-of-trial settlements as possible.[146] These demand letters offer a quick resolution to the dispute for usually a few thousand dollars, and predict losses to the defendants' reputations, finances, and time, should they refuse the settlement offer.[147] If a John Doe agrees to the settlement offer, the copyright troll will move to voluntarily dismiss that particular defendant with prejudice from the pending suit.[148] Very few of these defendants go to trial because the plaintiffs rarely intend to reach a judgment on the merits.[149] Rather, the plaintiffs take advantage of the courts' subpoena powers to identify

142. *See, e.g.*, *Digital Sin, Inc.*, 279 F.R.D. at 240.

143. *See, e.g.*, AF Holdings LLC v. Does 1-96, No. C-11-03335 JSC, 2011 WL 4502413, at *1 (N.D. Cal. Sept. 27, 2011) ("When a defendant's identify is not known at the time a complaint is filed, courts often grant plaintiffs early discovery to determine the doe defendants' identities.").

144. *See* Malibu Media, LLC v. John Doe, No. 1:14-CV-20213-UU (S.D. Fla. Mar. 20, 2014), *available at* http://perma.cc/J3BK-4RED. The court also dismissed the case on the ground that the copyright troll could not appropriately establish venue. *Id.*

145. *See supra* note 143 and accompanying text.

146. *See* Mortenson, *supra* note 25, at 1115.

147. For examples of typical settlement letters, including those sent by John Steele of Prenda Law, see *Settlement Letters, etc.*, DIETROLLDIE, http://dietrolldie.com/settlement-letters-other-troll-correspondence/ [http://perma.cc/7TY7-CB7Y] (last visited Sept. 27, 2014).

148. *See, e.g.*, Docket Report, W. Coast Prods., Inc. v. Does 1-5829, No. 1:11-CV-00057, 275 F.R.D. 9 (D.D.C. 2011) (go to http://westlawnext.com; then search for 275 F.R.D. 9; then click on the "Filings" tab).

149. *See* Mortenson, *supra* note 25, at 1115-16 & nn.72-74.

and coerce payment from their marks.[150] The sheer number of copyright trolling suits substantially burdens the judiciary and defendants. Although numerous arguments have been made on how to address the vexing problem of copyright trolling, this Note proposes to take a fresh look at an old statute: the FDCPA. By analyzing and adopting the principles set forth in the FDCPA, Congress can amend the Copyright Act to create a defensive cause of action for copyright trolling defendants. The new cause of action would significantly curb copyright trolling by forcing copyright trolls to abandon the "demand letter factory" model, thus eliminating copyright trolling's financial incentive.

IV. A FRESH TAKE ON COPYRIGHT TROLLING

Numerous law review articles and notes have posited various solutions to solving the problems associated with copyright troll litigation. Some of the various proposals include lowering the recoverable statutory damages under the U.S. Copyright Act,[151] implementing Federal Rule of Civil Procedure 11 sanctions for improper suits,[152] eliminating copyright protection for pornographic works,[153] disallowing joinder for John Doe defendants in copyright troll suits,[154] and creating a rule of standing for non-author plaintiffs.[155] Although these proposals have varying advantages, there are arguments against them as well.[156] However, by looking outside the realm of copyright law and into the realm of consumer protection law, a framework already exists for combating the same kind of abusive legal conduct carried on by copyright trolls: the FDCPA. By implementing a legal framework similar to the FDCPA, Congress can amend the Copyright Act to halt the

150. *See, e.g.*, Raw Films, Ltd. v. Does 1-32, No. 3:11CV532-JAG, 2011 WL 6182025, at *3 (E.D. Va. Oct. 5, 2011).

151. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 509-10 (2009). *But see* Curran, *supra* note 91, at 195.

152. *See* Mortenson, *supra* note 25, at 1134.

153. *See* Rosen, *supra* note 41, at 172-82 (discussing advantages and potential problems with stripping pornography of copyright protection).

154. *See, e.g.,* Patience Ren, *The Fate of BitTorrent John Does: A Civil Procedure Analysis of Copyright Litigation*, 64 HASTINGS L.J. 1343, 1376-79 (2013).

155. *See* Balganesh, *supra* note 49, at 773-78.

156. *See* sources cited *infra* notes 194-96 and accompanying text.

abusive behaviors of copyright trolls while leaving copyright protection intact for those willing to adhere to the original aims of copyright.

A. Purpose and Function of the FDCPA

Congress enacted the FDCPA in response to copious evidence of "the use of abusive, deceptive, and unfair debt collection practices" by debt collectors,[157] as well as inadequate protections for consumers at the state and federal level.[158] One Senate report noted that this abuse took many forms, including "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[159] The purpose of the FDCPA was to protect consumers from those unethical practices while leaving ethical debt collectors uninhibited.[160]

The FDCPA imposes civil liability on debt collectors for certain prohibited conduct.[161] That prohibited conduct includes, but is not limited to, false or misleading representations as to the collection of a debt,[162] as well as "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[163] Creditors, rather than third-party debt collectors, who originate or acquire a consumer debt prior to any default and act to collect the debt for themselves, are not required to abide by the restraints of the FDCPA.[164] Furthermore, federal courts have held the FDCPA is not intended to shield consumers from the attendant embarrassment and inconvenience of debt collection.[165]

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157. 15 U.S.C. § 1692 (2012); *see* 29 CAUSES OF ACTION 2D *Cause of Action for Violation of Fair Debt Collection Practices Act* 1 § 1 (2005).

158. 15 U.S.C. § 1692.

159. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

160. *Id.* at 1-2.

161. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1608 (2010).

162. 15 U.S.C. § 1692e.

163. *Id.* § 1692d.

164. *See, e.g.*, 104 AM. JUR. PROOF OF FACTS 3D *Proof Under the Fair Debt Collection Practices Act* 1 § 8 (2014).

165. *See* Dalton v. FMA Enters., Inc., 953 F. Supp. 1525, 1531 (M.D. Fla. 1997); Higgins v. Capitol Credit Servs., Inc., 762 F. Supp. 1128, 1135 (D. Del. 1991); Bieber v. Associated

The FDCPA provides for private actions, class actions, and administrative enforcement.[166] In private actions, individuals may collect any actual damages and "such additional damages as the court may allow, but not exceeding $1,000."[167] For class actions, recovery includes (1) "such amount for each named plaintiff as could be recovered [in an individual private action]"[168] and (2) "such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector."[169] FDCPA plaintiffs may also recover attorney's fees and the cost of the litigation should their action prove successful.[170] However, if a court finds that an FDCPA plaintiff brought such an action "in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."[171]

The Federal Trade Commission (FTC) is charged with administrative enforcement of the FDCPA.[172] The FTC has issued advisory opinions intended to clarify and exemplify provisions of the FDCPA.[173] All of the powers granted to the FTC under the Federal Trade Commission Act are available to enforce compliance with the FDCPA, including the power to enforce the FDCPA's provisions in the same manner as if the violation had been a violation of an FTC trade regulation.[174]

Collection Servs., Inc., 631 F. Supp. 1410, 1417 (D. Kan. 1986).

166. *See* 15 U.S.C. § 1692k.

167. *Id.* § 1692k(a)(1)-(2)(A).

168. *Id.* § 1692k(a)(2)(B).

169. *Id.*

170. *Id.* § 1692k(a)(3).

171. *Id.*

172. *Id.* § 1692*l*.

173. *See Advisory Opinions*, FED. TRADE COMM'N, http://www.ftc.gov/policy/advisory-opinions [http://perma.cc/S7F5-YHZY] (last visited July 9, 2014).

174. *See* 104 AM. JUR. PROOF OF FACTS, *supra* note 164, at § 3. In 2013, the FTC collected a $3.2 million civil penalty against Expert Global Solutions, the world's largest debt collection operation. *See* United States v. Expert Global Solutions, Inc., 3:13-CV-2611-M, 2013 WL 5870336 (N.D. Tex. July 16, 2013) (proposing a civil penalty and a permanent injunction against the offending conduct).

B. Unintended Litigation Under the FDCPA

Section 1692e(5) of Title 15 of the United States Code prohibits debt collectors from making "[t]he threat to take any action that cannot legally be taken or that *is not intended to be taken*."[175] Plainly stated, the FDCPA prohibits a debt collector from threatening to take legal action if the collector does not intend to take such action.[176] The most common collection tactic in this category is the false or implied threat of a lawsuit.[177] The accepted standard for determining if a debt collector violated the FDCPA is whether the "least sophisticated consumer" would believe the collectors intended to take legal action.[178] A debt collector would thus be liable under the FDCPA even if it did not intend to threaten legal action against a consumer, so long as the "least sophisticated consumer" would believe that was the debt collector's intent. However, this lenient standard does not apply to subsection (5). Rather, the subsection (5) standard is "whether or not the [debt collector] *intended* to take the action threatened."[179] As such, courts have held that subsection (5) merely requires proof of a fact that amounts to a per se violation of the statute.[180] The least sophisticated consumer standard is irrelevant in this context.[181]

Courts have held that form letters issued by debt collectors to consumers containing threats to take legal action, when no such intent existed, are inherently deceptive and thus violate the FDCPA.[182]

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175. 15 U.S.C. § 1692e(5) (emphasis added).

176. 2 DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER CREDIT AND THE LAW § 12:24 (2013).

177. *See id.*

178. *See, e.g.*, Zimmerman v. Portfolio Recovery Assocs., 276 F.R.D. 174, 177 (S.D.N.Y. 2011) ("The underlying purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law.") (citation omitted) (internal quotation marks omitted).

179. Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. 1985).

180. *Id.*

181. *See id.*

182. *See, e.g.*, United States v. ACB Sales & Serv., Inc., 590 F. Supp. 561, 566, 571-72 (D. Ariz. 1984). One form letter stated that it was giving the consumer forty-eight hours in which to act, and that the collector had authority "to proceed with any necessary lawful action," creating the clear (but false) impression that the collector would file a lawsuit if the debt was not paid within forty-eight hours. *Id.* Another form letter stated that lawsuits are filed "in an unspecified percentage of cases" and warned that legal costs to the consumer might exceed the amount of the debt. *Id.* (internal quotation marks omitted).

However, the determination of the debt collector's intent is generally a question of fact for the jury, rather than a question of law.[183] As a result, each case involving a debt collector's allegedly illegal threats is determined on a case-by-case basis.[184]

Subsection (5) is particularly important in the context of copyright troll litigation. As many district judges have found, some copyright trolls do not intend to litigate their infringement suits beyond the demand letter stage.[185] By adopting the statutory framework of the FDCPA, the Copyright Act can be amended to curtail the abusive actions of copyright trolls. By creating a statutory cause of action against copyright trolls who do not intend to litigate beyond the early discovery stage, copyright trolls will be dissuaded from relying on the courts as an inexpensive means of obtaining personal information from the John Does and coercing payment from them.[186] The financial costs associated with litigating a case to the point of reaching a judgment on the merits will force copyright trolls to decide whether pursuing litigation is economically feasible, or risk facing statutory and compensatory damages for using a "demand letter factory" business model. Under this proposal, John Steele could be held liable for damages should a court find that he does not intend to seriously litigate the copyright infringement actions backing the demand letters he distributes to hundreds of defendants. This risk will likely reduce the financial incentive behind copyright trolling, thus creating a rational economic solution to the copyright trolling dilemma.

C. Practicality of Amending the Copyright Act

The application of the FDCPA to copyright law is remarkably straightforward. The FDCPA itself was an amendment to the Consumer Credit Protection Act.[187] The conduct of copyright trolls is in many ways the same kind of abusive, harassing conduct that spurred the enactment of the FDCPA. Much like unscrupulous debt

183. *See Jeter*, 760 F.2d at 1176.

184. *See, e.g.*, *id.*

185. *See, e.g.*, Raw Films Ltd. v. Does 1-32, No. 3:11CV532-JAG, 2011 WL 6182025, at *3 (E.D.Va. Oct. 5, 2011).

186. *See, e.g.*, *id.*

187. *See* 15 U.S.C. §§ 1601, 1692 (2012).

collectors, copyright trolls are unconcerned with the public's opinion of them, and thus do not share creditors' motivation to avoid harmful or abusive conduct.[188] As such, copyright trolls are distinguishable from the creditor exemption under the FDCPA.[189] This new legislation, which could be titled the "Combating Abusive Copyright Infringement Litigation Act" (CACILA), would enable citizens to recover any actual damages resulting from copyright trolls violating the provisions of the act, statutory damages not exceeding $1,000 for individual actions, and court costs and attorneys' fees for successful actions.[190] These damages would create an economic disincentive for copyright trolls to continue their business model, while leaving copyright protection intact for those who seriously contemplate litigation.

D. CACILA: A Model Anti-Trolling Statute

Given the efficacy of the FDCPA, this Note's proposed anti-trolling statute, the CACILA, should contain the following provisions, all of which Congress incorporated into the FDCPA[191]:

> (1) Definitions
>
> (A) The term "copyright holder" means any individual, firm, labor organization, partnership, association, corporation, legal representative, trustee, trustee in Bankruptcy, or receiver that owns or represents a person owning a copyright.
>
> (B) The term "settlement agreement" means any legitimately contemplated or actual settlement agreement pertaining to a copyright infringement claim.

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188. *See* S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("Hearings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source of egregious collection practices. While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial. Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.").

189. *See id.*; 104 AM. JUR. PROOF OF FACTS, *supra* note 164, at § 1.

190. *See* 15 U.S.C. § 1692k (granting civil liability and damages for violations of the FDCPA).

191. The model statute is based on the FDCPA. The language is changed to apply to copyright trolls.

(C) The term "settlement payment" means any actual or legitimately contemplated debt resulting from a settlement agreement as defined by this subchapter.

(2) False or Misleading Representations

Any copyright holder may not use any false, deceptive, or misleading representation or means in connection with the enforcement of any such copyright. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(A) The false representation or implication that the copyright holder is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(B) The false representation of the character, amount, or legal status of any existing or contemplated copyright infringement claim; or

(C) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(D) The representation or implication that nonpayment of any settlement agreement pertaining to a copyright infringement claim will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the copyright holder intends to take such action.

(E) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(F) The false representation or implication that the consumer violated any civil or criminal statute in order to disgrace the consumer.

(G) Communicating or threatening to communicate to any person information pertaining to a copyright infringement suit which is known or which should be known to be false.

(H) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(I) The use of any false representation or deceptive means to collect or attempt to collect any settlement payment or to obtain information concerning a party to such a settlement agreement.

(J) The failure to disclose in the initial written communication with a person and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the copyright holder is attempting to collect a settlement payment and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a copyright holder, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(K) The false representation or implication that documents are legal process.

(L) The use of any business, company, or organization name other than the true name of the copyright holder's name, business, company, or organization.

(M) The false representation or implication that documents are not legal process forms or do not require action by a person in receipt of such documents.

(3) Civil Liability

(A) Amount of damages

Except as otherwise provided by this section, any copyright holder who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(i) any actual damage sustained by such person as a result of such failure;

(ii)(a) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or (b) in the case of a class action, (1) such amount for each named plaintiff as could be recovered under subparagraph (a), and (2) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(iii) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(B) Factors considered by the court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(i) in any individual action under subsection (A)(ii)(a) of this section, the frequency and persistence of noncompliance by the copyright holder, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(ii) in any class action under subsection (A)(ii)(b) of this section, the frequency and persistence of noncompliance by the copyright holder, the nature of such noncompliance, the resources of the copyright holder, the number of persons adversely affected, and the extent to which the copyright holder's noncompliance was intentional.

(C) Intent

A copyright holder may not be held liable in any action brought under this subchapter if the copyright holder shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(D) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(4) Administrative Enforcement[192]

(A) The United States Copyright Office shall be authorized to enforce compliance with this subchapter. If any copyright holder violates any rule under this subchapter respecting false or misleading representations, then the Office may commence a civil action against such copyright holder for relief under subsection (B) of this section in a United States district court or in any court of competent jurisdiction of a State.

192. If Congress chooses to provide for administrative enforcement of CACILA, it should do so in the same manner as the FDCPA. Specifically, the relevant agency should both: (1) issue advisory opinions in order to provide both guidance and notice to copyright holders on various compliance issues, and (2) have an adequately vigorous enforcement arm to both deter copyright trolling and mitigate the burden of private litigation. The model language in section 4 demonstrates how Congress could accomplish these goals through legislative enactment.

> (B) The court in an action under subsection (A) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to persons resulting from the rule violation or the false or misleading representation, as the case may be. Such relief may include, but shall not be limited to, the relief made available to private and class action plaintiffs in section (3)(A) of this subchapter.
>
> (C) Advisory opinions of the Office
>
> No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Office, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Although the FDCPA is far more intricate and complex than the foregoing model language, this Note's proposal covers the essential components of an effective anti-trolling statutory scheme by creating both (1) a private defensive cause of action, and (2) administrative power to enforce CACILA absent a defendant's willingness to bring a private cause of action. The following Section addresses potential counterarguments associated with this legislative reform.

E. Counterarguments Addressed

There are some drawbacks to this approach. Although the Copyright Act has been amended numerous times since its enactment in 1976,[193] drafting and implementing new legislation is easier said than done. Congressional gridlock in Washington presents a formidable roadblock to any new legislation, let alone an amendment to the Copyright Act.[194] Speaker of the House John Boehner joked that Congress currently could not vote to make Mother Teresa a saint.[195] Despite the practical problems associated with passing

193. *See generally* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:83-1:117 (2013).

194. *See* Frank Islam & Ed Crego, *Braking Bad: The Critical Need to End Congressional Gridlock*, HUFFINGTON POST (Oct. 28, 2013, 5:03 PM), http://www.huffingtonpost.com/frank-islam/braking-bad-the-critical-_b_4167947.html [http://perma.cc/8DW5-HTPF].

195. Russell Berman, *Boehner Jokes Congress Couldn't Vote to Make Mother Teresa a Saint*, THE HILL (Feb. 6, 2014), http://thehill.com/homenews/house/197644-boehner-jokes-

new legislation, amending the Copyright Act presents a universal solution to the burdensome litigation tactics employed by copyright trolls—particularly in the realm of pornography. Although severing joinder in these suits would create financial disincentives for copyright trolls, district judges have exercised discretion in deciding whether to actually do so.[196] Stripping pornography of copyright protection necessarily invites questions of constitutionality,[197] and reforming recoverable statutory damages for copyright infringement presents its own cadre of problems.[198] But by using the FDCPA as precedent, Congress can enact legislation to close the legal loophole currently being manipulated by copyright trolls.

In addition to enactment concerns, critics of this Note's proposal could also argue that public embarrassment or financial constraints would limit the willingness of potential plaintiffs to file suit under the proposed legislation. As previously discussed, a primary reason why so many copyright trolling defendants choose to settle, rather than litigate, is fear of being publicly branded as a pornography pirate.[199] Likewise one could plausibly argue that the same societal pressures would limit the defendants' willingness to bring suit under the proposed defensive cause of action. Moreover, critics could reasonably assert that many of these potential plaintiffs would lack the financial resources necessary to bring litigation.[200] However, like the FDCPA, the proposed legislation could mitigate these concerns by providing government enforcement powers.

The FTC may bring enforcement actions against a defendant accused of violating the FDCPA's debt collection provisions under its Federal Trade Commission Act powers.[201] This agency enforcement power exists alongside the private cause of action provided by the FDCPA. The FTC's enforcement power is substantial. For example, the FTC successfully collected a multi-million dollar settlement and

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congress-couldnt-vote-to-make-mother-theresa-a-saint [http://perma.cc/U7QQ-C5CB].

196. *See* Ren, *supra* note 154, at 1370-76 (discussing various courts' responses to joinder questions in these suits).

197. *See* Rosen, *supra* note 41, at 180.

198. *See id.* at 187-88. *But see* Samuelson & Wheatland, *supra* note 151, at 509-10 (discussing advantages of altering the Copyright Act's statutory damage regime).

199. *See supra* note 113 and accompanying text.

200. *See supra* notes 122-23 and accompanying text.

201. 15 U.S.C. §§ 45(m)(1)(a), 1692*l*(a) (2012).

obtained permanent injunctions against a third-party debt collector in 2013.[202]

Under this Note's proposed legislation, Congress could similarly assign enforcement powers to both private actors and a federal independent agency. For the purposes of this Note, the U.S. Copyright Office shall assume responsibility for enforcement of the proposed legislation. Although civil copyright infringement is currently limited to private actions,[203] Congress could legitimately grant the Copyright Office enforcement powers under the Copyright Clause,[204] or alternatively create a separate enforcement division at the FTC under its expansive Commerce Clause powers.[205] In either case, agency enforcement of the proposed legislation would effectively mitigate the previously expressed financial and societal concerns related to private actions.

Another possible concern in creating a defensive cause of action against copyright trolls is that the possibility of retaliatory litigation would "chill" plaintiffs from legitimately prosecuting their copyrights. However, by seriously pursuing litigation—rather than sending out demand letters without any intent to go to trial—legitimate copyright infringement plaintiffs will easily avoid violating the provisions of the act. Furthermore, the cause of action would be subject to the same standards as other pleadings, meaning that an attorney bringing a defensive cause of action would be subject to Rule 11 sanctions should the complaint be found to be without merit.[206] It seems reasonable that the only "chilled" plaintiffs would be copyright trolls.

Critics could also point out that the underlying aims of consumer protection law and copyright law are fundamentally different, which could lead to a "translation" issue in applying FDCPA principles to an anti-trolling statutory amendment. As previously discussed, the

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202. *See* United States v. Expert Global Solutions, Inc., 3:13-CV-2611-M, 2013 WL 5870336 (N.D. Tex. July 16, 2013).

203. 17 U.S.C. § 501 (2012). However, the government may bring a *criminal* copyright infringement case against persons who violate § 506. *See also* 120 AM. JUR. PROOF OF FACTS 3D 181 (2011) (providing useful commentary on criminal copyright infringement proceedings).

204. *See* U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 101-1332.

205. For detailed discussion of the interplay between Congress's Commerce Clause powers and copyright regulation, see generally Kevin J. Hickey, *The Copyright/Commerce Clause Collision: A Subject Matter Approach*, 82 U. CIN. L. REV. 1 (2013).

206. *See* FED. R. CIV. P. 11.

underlying constitutional goal of copyright law is to promote the progress of science and useful arts.[207] Stated otherwise, copyright law was crafted to incentivize the creation of knowledge.[208] In the context of pornographic copyright trolling, copyright law is not advancing the progress of science or the useful arts. Rather, it is providing a legal loophole for copyright trolls to take advantage of an antiquated legal doctrine to create a cottage industry built on a foundation of fear, shame, and smut.

Admittedly, Congress did not pass the FDCPA to promote the progress of science and useful arts.[209] But Congress's four reasons for passing the FDCPA[210] all apply to copyright trolling. First, Congress found that abusive debt collection practices caused personal bankruptcies, marital instability, unemployment, and invasions of privacy.[211] Pornographic copyright trolling assuredly has at least some of the same adverse social and economic effects. Second, Congress noted that existing laws inadequately protected consumers.[212] As previously discussed, the current framework for copyright law fails to protect citizens from abusive copyright trolling litigation. Third, Congress recognized the existence of alternative, non-abusive methods of debt collection.[213] Copyright holders may similarly protect their exclusive rights in a non-abusive manner. Fourth, Congress found that abusive debt collection practices directly and indirectly affected interstate commerce,[214] thus giving Congress the constitutional "hook" to pass the FDCPA. Because Congress may regulate copyright law under its power to promote the progress of science and the useful arts, this "hook" is not necessary.[215] Even if it were, it is reasonable to infer that copyright trolling directly and indirectly affects interstate commerce.

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207. *See supra* notes 51-54 and accompanying text.

208. *See supra* note 54 and accompanying text.

209. The goal of the FDCPA was "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e) (2012).

210. *Id.* § 1692(a)-(d).

211. *Id.* § 1692(a).

212. *Id.* § 1692(b).

213. *Id.* § 1692(c).

214. *Id.* § 1692(d).

215. *See supra* notes 51-54 and accompanying text.

Congress clearly has the power to amend the Copyright Act to combat copyright trolling.

Analogous to the FDCPA, the proposed amendment comports with the underlying aim of promoting the progress of science and the useful arts because the amended law would continue to protect copyright owners who refrain from partaking in abusive copyright trolling litigation. The amended law merely accounts for an important competing policy interest of protecting citizens from abusive copyright trolling practices. As previously discussed, the Copyright Act is amenable to evolving to account for such competing policy interests. Copyright law was never intended to facilitate a litigious business model for pornographers. Accordingly, Congress can and should amend the Copyright Act to dismantle the copyright trolling industry once and for all.

CONCLUSION

John Steele and other copyright trolls have outmaneuvered the federal court system, demonstrating fundamental shortcomings in the final frontier of American copyright enforcement law. Although much discussion has already been devoted to developing solutions for the copyright trolling litigation problem, many of these proposals come with fatal flaws that prevent meaningful implementation. Moreover, they ignore the motivation behind copyright trolling litigation: creating an auxiliary revenue stream for copyright holders. This subverts the basic premise of copyright law, namely, to promote the progress of science and useful arts.

This Note has argued that amending the Copyright Act to incorporate policies and principles found in the FDCPA can effectively combat copyright trolling. Although consumer credit protection and copyright are two distinct areas of law, many of the same problems posed by unscrupulous debt collectors, subsequently remedied by the FDCPA, are readily identifiable in copyright trolling litigation. The statutory framework of the FDCPA does not prohibit debt collection entirely, nor does it create a cause of action for embarrassment or shame associated with debt collection. Rather, it prohibits a set of abusive and harassing behaviors carried out by debt collectors. Much in the same way, the Copyright Act can be amended to prohibit copyright trolls from implying an intention to

take legal action when no such intention exists. Creating a cause of action for statutory and compensatory damages for citizens harmed by copyright trolls under this new legislation would make this demand-letter-factory business model financially risky and unfeasible, thereby drastically reducing the number of copyright trolling litigation suits filed in federal court.

Although drafting and enacting new legislation is a lengthy and complex process, particularly in today's political climate, amending the Copyright Act to allow for this proposed statutory cause of action would avoid many of the hurdles present in other proposed solutions. As long as the business model behind copyright trolling litigation continues to prove successful, copyright trolls will take up arms. Creating a statutory cause of action to allow John Does to push back against coercive demand letters would force copyright trolls to play their hand or fold. This cause of action would not only provide a remedy for thousands of citizens embattled by John Steele and his counterparts, but would also destroy the financial incentive driving copyright trolling litigation in the first place.

Henry D. Alderfer[*]

* J.D. Candidate 2015, William & Mary Law School; B.S. 2012, Indiana University Bloomington. I am grateful to the editors and staff of the *William & Mary Law Review* for their exemplary editing and candid advice, Judge William T. Lawrence and his chambers staff—particularly Lisa Theilmeyer—for the inspiration to write on the subject matter, and my family and friends for their unconditional support. All errors, of course, are my own.