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**COMMENT: “CLOSING PANDORA’S BOX:” SPECULATIVE
INVOICING AND OPPORTUNISM IN FILE SHARING**

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INTRODUCTION

When public access to the world-wide web expanded and advanced in 1994,¹ copyright protection and consumer access to unauthorized files began on their inevitable collision course. This widespread consumer access eventually provided both an opportunity and a substantial risk for content owners. While early web developers may have longingly envisioned a potentially world-wide file sharing community, no one could have foreseen the impact that downloading and file sharing would have on the music and film industries' classical business models and the market substitutes this virtual environment would provide. Online access to unauthorized files has redefined multiple generations' definitions of permissible access and has recharacterized the debate surrounding copyright violations and the exclusive rights the law permits.² Further, the explosion of file sharing sites has culminated in increased national awareness of copyright laws,³ on the one hand, and a quagmire of legal difficulties and policy decisions on the other.⁴ These legal difficulties have arisen prominently in the battles that have ensued between content owners and the file sharing community.

While some file sharing may have existed prior to Napster's

¹ Daniel Nations, *Key Events in Internet History*, ABOUT.COM, <http://webtrends.about.com/od/history/a/history1.htm> (last visited Feb. 11, 2012). However, the first Internet Service Provider enabled the public dial-up access to the Internet as early as 1990. Robert H'obbes' Zakon, *Hobbes' Internet Timeline*, ZAKON.ORG (last updated Dec. 30, 2011), <http://zakon.org/robert/internet/timeline/>.

² See O. Freestone & V.-W. Mitchell, *Generation Y Attitudes Towards E-ethics and Internet-related Misbehaviours*, 54 J. BUS. ETHICS 121, 126 (2004) ("In particular, Generation Y consumers seem more permissive of software piracy and . . . they feel that they are doing no direct harm to sellers as they cannot see the direct economic consequences of their actions, and that they are the victim of inflated software, music or movie prices, blaming the industry for keeping prices artificially high.").

³ See FED. TRADE COMM'N, STAFF REPORT, PEER-TO-PEER FILE SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 12 (June 2005), available at <http://www.ftc.gov/reports/p2p05/050623p2prpt.pdf> ("On the whole . . . FTC staff concludes that consumer awareness of certain risks appears to have increased . . . [O]ne panelist stated that there has been 'significant growth' in consumer awareness regarding potential liability for copyright infringement for using P2P networks.").

⁴ 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, 727 (2005) ("Peer-to-peer technology blindsided the recording industry in 1999, and . . . [t]he battle has been fought mainly in the courts, not in legislative and administrative agencies . . . [T]he choices facing the music industry have still been the same: (a) surrender, (b) seek to enforce copyright norms against the technology and its business models, and/or (c) seek to enforce copyright norms against individual consumers—the individual P2P users offering and downloading music files.").

creation in 1999, the development of this notorious site marked a seminal event in file sharing history and gave the public its first dominant file sharing model for free distribution of unauthorized files.⁵ Following Napster's demise, technology continued to advance, with copyright violations skyrocketing and enforcement regimes struggling to keep pace.⁶ Naturally, the music industry and a prominent lobbying group, the Recording Industry Association of America ("RIAA"), searched to find a way to close Pandora's Box. This search was pursued by targeting file sharing websites such as Napster, Aimster, and Grokster, and, in tandem, suing individual end users.⁷ While the content industry has been arguably successful on both of these fronts,⁸ resolution of the larger problem has not been realized, Pandora's evils are out of the box, and all similar efforts are beginning to look like a seemingly futile attempt to prevent online file sharing.⁹

This struggle against consumers has culminated in the use of speculative invoicing, or 'pay up or else' schemes, which pit content owners against end users in pre-litigation disputes. Though these schemes create new opportunities for extra-judicial resolution of disputes, they also create significant opportunities for abuse. These processes are currently being utilized on a grand scale by groups referred to as "copyright trolls" ("troll").¹⁰ Unlike the prototypical

⁵ *Napster Inc.*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Napster-Inc-Company-History.html> (last visited Sept. 25, 2011) (prior to the creation of Napster, some sites offered music but were not logistically desirable).

⁶ This proposition is evidenced in the *Napster*, *Aimster*, *Grokster*, and *Limewire* decisions, explained *infra* Part II.

⁷ Hughes, *supra* note 4, at 728.

⁸ See *infra* Part II.

⁹ See *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. 10 (Sept. 2008), <https://www.eff.org/files/eff-riaa-whitepaper.pdf> ("While it is hard to precisely measure the use of P2P and the amount of illegal file sharing in the U.S., one thing is clear: after more than 30,000 RIAA lawsuits, tens of millions of U.S. music fans continue to use P2P networks and other new technologies to share music.").

¹⁰ Similar to the patent regime, the term 'troll' has both a positive and negative connotation. They are generally not content creators, but are merely hired guns or third-party assignees, and they seek to benefit by acquisition or exploitation of the rights creators hold. However, trolls serve in a positive light to provide enforcement in an area seemingly rife with derision. The term troll is used in this article for ease of reference and commonality with the existing literature. See Joe Mullin, *Is This the Birth of the Copyright Troll?*, CORPORATE COUNSEL (ONLINE) (Aug. 13, 2010), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202466627090>. The two paradigmatic examples of these entities are Righthaven, which focuses on newspaper articles and blogs, and the U.S. Copyright Group ("USCG"), which targets movie downloading. See also Ryan Kearney, *D.C.'s U.S. Copyright Group continued . . .*

‘content owners versus file sharer’ battle that has heretofore been pursued, this model brings a new third party to the bargaining table.

The typical example of this pre-trial procedure begins when a troll contracts with a copyright holder to either gain assignment of a copyright, or take an enforcement case on a contingency basis.¹¹ Next, the troll sends a cease-and-desist letter, coupled with a settlement offer, to individual downloaders after subpoenaing their personal information from the end users’ respective Internet service providers (“ISPs”). The letter will give the individual a limited time frame in which to settle, provide penalty for delay, and threatens suit if the individual chooses not to settle. As most individual consumers are legally unsophisticated, this model promotes a quick settlement, and none of these cases seem to ever result in actual litigation on the merits. With a threat of potential statutory damages of \$150,000, the cost of going to trial being presumably around \$65,000, and a standing settlement offer of \$3,500, any rational actor would settle; thus, a lucrative business model is alive and thriving.¹² Despite this legally utopian cash cow and its apparent permissibility within the constraints of the law, many burgeoning legal claims and authors argue that these trolls have become greedy, using demand letters indiscriminately, and in some cases, illegally. Consumer lawsuits have begun to arise, claiming incorrect analysis of the law in the cease-and-desist letters, unreasonable demands, coercion, and intimidation.

Globally, this Article provides a comprehensive overview of the

Takes Aim at 6,500 More BitTorrent Users, TBD ARTS (Feb. 9, 2011, 12:18 PM), <http://www.tbd.com/blogs/tbd-arts/2011/02/d-c-s-u-s-copyright-group-takes-aim-at-6-500-more-bittorrent-users-8324.html>; *see generally* WELCOME TO RIGHTHAVEN LAWSUITS, <http://www.righthavenlawsuits.com> (last visited May 20, 2011) (giving a pro-consumer account of the business).

¹¹ This process is discussed fully below, *infra* Part III.

¹² *See* Jeffrey Edward Barnes, *Attorney’s Fee Awards in Federal Copyright Litigation After Fogerty v. Fantasy: Defendants are Winning Fees More Often, but the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L. REV. 1381, 1392 (2000); *See, e.g.*, Jefferson Graham, ‘Amnesty’ for Song Swappers?, USA TODAY Sept. 8, 2003, at 1D, *available at* 2003 WLNR 6115403; Jonathan Mattise, *Villanova Warns Students: Stop Illegal Downloads*, PHILA. INQUIRER, Apr. 26, 2008, at B04, *available at* http://articles.philly.com/2008-04-26/news/25252882_1_illegal-downloads-villanova-university-students-riaa (indicating the average cost of settling a copyright infringement lawsuit for college students averages about \$5,000); Mullin, *supra* note 10 (In referring to Righthaven’s founder, Steve Gibson: “Of the suits he’s already filed, Gibson says about 30 percent have settled. While the settlements are all confidential, Las Vegas Sun reporter Steve Green reported this week that the settlement amounts range from \$2,185 to \$5,000. None of the settlements have included a transfer of the defendant’s domain name to Righthaven, a demand made in each of the initial Righthaven complaints.”).

process of speculative invoicing and the major players currently operating in the field. Specifically, this Article argues that the existing legal structure has created opportunities for abuse that—if these new legal claims have merit—some trolls have been unable to resist, and that these abuses far exceed the schemes’ potential as a viable solution to the file sharing problem. Part I provides a brief history of file sharing generally, and explains peer-to-peer file sharing as it exists. Part II provides a background of the judicial history of secondary liability, as applied initially to VCRs and then eventually to websites. Part II further describes the suits against individual downloaders, and concludes with the paradigmatic example of Joel Tenenbaum. On a granular level, Part III explains the business model of speculative invoicing, and elucidates its prevalence in multiple areas of copyright protection, thus exposing the problem and setting the stage for the legal issues and proposed solutions in Part IV, which consists of two different potential amendments to the Copyright Act that would reduce the abuse of these models, while maintaining an avenue for the pursuit of valid claims. The first proposed Amendment creates a threshold level of due diligence regarding potential fair uses prior to sending a demand letter, which is extrapolated from other judicial decisions. The second proposed Amendment provides for substantial penalties in the event of knowing or negligent misrepresentation in a demand letter or the use of misleading coercion in the use of pre-trial settlement demands. The sum total of these Amendments would serve to maintain a private enforcement regime, which is necessary in light of governmental lethargy in this arena, while simultaneously preventing the abuse that inevitably has occurred. However, recognizing that the Amendment remedy is merely a short-term solution, Part V questions the compatibility of the speculative invoicing model with copyright law’s underlying goals and purposes, and makes some arguments in favor of systemic reform of copyright law more generally.

I. A BRIEF PRIMER ON FILE SHARING TECHNOLOGY

File sharing in its present form began as a twinkle in the eye of Shawn Fanning in 1998.¹³ Fanning’s model consisted of a centralized server that acted as a real time index of all the sites available at any given moment.¹⁴ This model revolutionized file sharing, and allowed a downloader to log on to one central site and find a list of all

¹³ See, e.g., FUNDING UNIVERSE, *supra* note 5.

¹⁴ See Sarah Riedel, *A Brief History of Filesharing: From Napster to Legal Music Downloads*, YAHOO! VOICES (Feb. 24, 2006), <http://voices.yahoo.com/article/20644/16990>.

currently available songs or files for downloading.¹⁵ The success of this model depended entirely on its individual users, who made their own files available to other users. Thus, while one user was downloading a file, all of the user's music files were open and available to all others connected to the server for download as well. Each user would download from another user, and not surprisingly, the term peer-to-peer ("P2P") arose to denominate this model.¹⁶ This downloading model was wildly successful,¹⁷ but it had its limitations. If a user wanted to download a song, it was necessary for another user in possession of the song to be online simultaneously; hence, slower download times and unpredictable access plagued users. Further, this centralized model was an easy target for content owners, who could point to the central server as a conspicuous facilitator of copyright violations.¹⁸

This problem of centralization was cured by the creation of BitTorrent technology ("BT"). A BT P2P network is "a communication structure in which individuals interact directly . . . which requires a dedicated server to record user information and accumulate pieces of shared data."¹⁹ A BT P2P network is a mutation of the Napster model, and allows downloads at much faster speeds in a safer environment than the previous methods. Decentralized BT has usurped the centralized server model and is currently the most prevalent form of peer-to-peer network today.²⁰ In a BT network, a user converts a file, (usually music or a film) and uploads it to a server or hosting site with the torrent file extension.²¹ This file contains

¹⁵ *Id.*

¹⁶ See, e.g., *A Survey of Open Peer-to-Peer Technologies and their Applicability to Implementing an Organizational Information Repository*, ADEPTECH SYSTEMS, INC., <http://www.adeptech.com/p2p> (last visited Aug. 20, 2011) ("'[P]eer-to-peer' is used in the network architecture sense, i.e. to indicate a distributed system in which data is exchanged between two or more equal, autonomous, general-purpose entities; as opposed to a client-server model, in which roles are rigidly fixed and specialized.")

¹⁷ Riedel, *supra* note 14 (stating that at Napster's peak, it traded 2.79 billion songs *per month*).

¹⁸ *Id.*

¹⁹ PIOTR STRYSZOWSKI & DANNY SCORPECCI, *PIRACY OF DIGITAL CONTENT* 28 (OECD Publishing 2009); see BRIAN'S BITTORRENT FAQ & GUIDE, <http://web.archive.org/web/20110227050653/http://btfaq.com/serve/cache/1.html>.

²⁰ See generally Okechukwu Benjamin Vincents, *When Rights Clash Online: The Tracking of P2P Copyright Infringements v. The EC Personal Data Directive*, 16 INT'L J. L. & INFO. TECH. 270 (2008) (providing a detailed history of the growth and technology behind P2P networks and BitTorrent).

²¹ See Bram Cohen, *The BitTorrent Protocol Specification*, BITTORRENT.ORG (June 24, 2009), http://www.bittorrent.org/beps/bep_0003.html ("To start serving, a host goes through the following steps: 1. Start running a tracker. . . . 2. Start

continued . . .

“information about the file, its length, name, and hashing information, and the url of the tracker.”²² This file does not contain the actual copyrighted material, however; the file acts as a road map that connects the uploader to the downloader for transfer of information.²³ Thus, each user shares their files with other users, without the use of a central server. This makes tracking the users and proving infringement much more difficult.

BT models are also infinitely faster than the previous direct P2P downloading model, due to the ‘swarm.’²⁴ Encoding and decoding software used by the respective parties breaks the file into many small pieces, which are downloaded (leeches) and uploaded (seeded) simultaneously by each party using the file.²⁵ While downloading the file, all portions of a file, as they are completed, automatically seed for other users creating a swarm of users downloading and seeding from one another.²⁶ As opposed to Napster, where one user downloads one file from one other specific user, a torrent file can potentially have thousands of users seeding and leeching a file at the same time, allowing for much faster downloads for each end user. These P2P networks have grown in popularity due to the anonymity of the transfer and the speed at which transfers occur. Some estimates have concluded that P2P sites (due to the large size of files transferred) constitute 39% – 49%, or even as high as 83% of all Internet traffic in North America.²⁷ While BT continues to thrive, it has recently come

running an ordinary web server, such as apache, or have one already. 3. Associate the extension .torrent with mimetype application/x-bittorrent on their web server (or have done so already). 4. Generate a metainfo (.torrent) file using the complete file to be served and the URL of the tracker. 5. Put the metainfo file on the web server. 6. Link to the metainfo (.torrent) file from some other web page. 7. Start a downloader which already has the completed file (the ‘origin’).”

²² See Bram Cohen, *Incentives Build Robustness in BitTorrent*, BITTORRENT.ORG, May 22, 2003, at 2, <http://www.bittorrent.org/bittorrentecon.pdf>.

²³ *Id.*

²⁴ Vincents, *supra* note 20, at 275.

²⁵ *Id.* at 274.

²⁶ *Id.*

²⁷ STRYSZOWSKI & SCORPECCI, *supra* note 19, at 29; J.E. (Win) Basset, IV, *Unanswered Arrrrrguments After the Pirate Bay Trial: Dropping Sail in the Safe Harbors of the EU Electronic Commerce Directive*, 12 N.C. J. L & TECH. 67, 67 (2010); see THE PIRATE BAY, <http://thepiratebay.org/> (last visited Sept. 24, 2011). Arguably, the largest of the P2P BitTorrent sites, the Pirate Bay is a website which organizes and stores torrent files and facilitates their transfer. Organized by four Swedish nationals in 2003, The Pirate Bay (ironically named) was created in Sweden, and has become the poster child for the anti-copyright movement. See also Dirk Lasater, *The Pirate Bay as a Service Provider: Initial Interpretation of the E-Commerce Directive*, WAKE FOREST J. B. & INTELL. PROP. L. BLOG (Jan. 5, 2010), <http://ipjournal.law.wfu.edu/2010/01/the-pirate-bay-as-a-service-provider-initial->

continued . . .

under governmental attack,²⁸ and is the new target for enforcement among content owners, which is discussed below.

II. COPYRIGHT ENFORCEMENT THROUGH PRIVATE LITIGATION

Throughout the technological advances in BT technology, content owners have scrambled to create valid enforcement mechanisms within the confines of the law to mitigate the deluge of file sharing. In addition to lawsuits, content owners have promoted and lobbied for processes like graduated response²⁹ and have attempted to rely on governmental policing. This Part discusses the two most common classical models for enforcement, which provided precursors for the new speculative invoicing model. Subpart A chronicles the suits against websites which were based on theories of contributory infringement and vicarious liability—beginning with Napster, and proceeding through Grokster and Limewire. Subpart B complements this analysis by describing the lawsuits conducted against end users and the backlash of popular opinion which resulted in the eventual abandonment of individual suits by the RIAA, and the assumption of their use by the trolls discussed later in Part III.

A. Origins of Contributory Infringement and Vicarious Liability: Suits Against Distributors

“[W]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against

interpretation-of-the-e-commerce-directive/; see generally Miaoran Li, Comment, *The Pirate Party and the Pirate Bay: How the Pirate Bay Influence Sweden and International Copyright Relations*, 21 PACE INT'L. L. REV. 281 (2009) (explaining the tradition of Swedish copyright thought and the influence of the pirate party in parliament).

²⁸ The US Government, through the Department of Homeland Security, seized the domains of eighty-two file sharing BitTorrent sites in November of 2010 signaling its intent to regulate this type of file sharing model. See *U.S. Government Seizes BitTorrent Search Engine Domain and More*, TORRENT FREAK (Nov. 26, 2010), <http://www.torrentfreak.com/u-s-government-seizes-bittorrent-search-engine-domain-and-more-101126>.

²⁹ See Christopher M. Swartout, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 NW. J. INT'L L. & BUS. 499 (2011) (describing the nature of contemporary graduated response and arguing that graduated response provides a more appealing and finely tuned form of uniform copyright enforcement in light of the inconsistency in and failures of private enforcement); see generally Peter K. Yu, *The Graduated Response, in Copyright USA—A Collection: The Surging Influence of Copyright Law in American Life*, 62 FLA. L. REV. 1373, 1374 (2010) (providing an in-depth analysis of graduated response and its history and use in America).

all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.”³⁰

Contributory infringement as a theory was not expressly created in the Copyright Act.³¹ Originally analogized from patent law and equity, it provides that when a party induces infringement or creates a product that infringes, liability may be extended to the inducer or creator by virtue of his or her involvement.³² Vicarious liability, by comparison, is similar but analytically distinct.³³ An extension of *respondeat superior*, vicarious liability inures when a defendant has the right and ability to supervise the infringing activity coupled with the possession of a direct financial stake in the activities.³⁴ This Subpart discusses the judicial evolution of these theories of liability, beginning with VCRs, and shifting to the eventual grafting of this liability to websites, from Napster through Grokster.

1. Sony and the Betamax

The origins of file sharing and liability for those that act as conduits for or facilitators of infringement can be traced back to *Sony*, which tackled the second real medium available that allowed end users to make unauthorized copies of proprietary material.³⁵ Betamax was a creation of Sony, and was the first popularly used VCR.³⁶ Various television show copyright holders sued Sony on a theory of contributory infringement for its sale of VCRs to the consuming public.³⁷ They argued that VCR sales, with constructive knowledge of the fact that consumers *could* use the item to infringe their copyrights, constituted contributory infringement, and that the court should

³⁰ Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd., 545 U.S. 913, 929–31 (2005).

³¹ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35 (1984).

³² See 35 U.S.C. § 271 (2006); see also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.01[A] (2007).

³³ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001).

³⁴ See, e.g., *id.* at 1022–24.

³⁵ Technically the first medium was the Xerox copy machine, but the *Sony* case has been memorialized as the more influential judicial treatment of the issue. See generally *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1347 (Ct. Cl. 1973) (authorizing the photocopying of scientific articles).

³⁶ *Sony*, 464 U.S. at 420. While the court terms the Betamax a ‘VTR,’ the more commonly recognized term ‘VCR’ is used in this Article.

³⁷ *Id.*

expand *Kalem*³⁸ to include VCR sales.³⁹ The Court declined this advance, and held that despite the lack of a statutory provenance of contributory infringement, this does not end the inquiry: its “absence . . . does not preclude the imposition of liability . . . on certain parties who have not themselves engaged in the infringing activity.”⁴⁰

The Court analogized to patent law to invoke the staple article of commerce doctrine, which creates liability for anyone who creates an item knowing that it is made to infringe a patent, and which is not suitable for any substantial non-infringing use.⁴¹ Mere production in this instance results in contributory infringement.⁴² But the Court found that there were many non-infringing uses of the Betamax, not to mention fair uses, and distinguished cases like *Kalem* in which the contributory infringer was “in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.”⁴³ The Court explained that a finding of contributory infringement renders the item at issue within the purview of the monopoly granted to the patentee; thus a balance must be struck between protection of a patent and the right to engage in substantially unrelated commerce.⁴⁴ Time shifting—recording to watch later—was the predominant and ultimately determined fair use of VCRs by consumers, and Sony avoided liability due to this acknowledgment.⁴⁵ This apparent safe harbor for sale of a product that can be used for both infringing and non-infringing purposes seemed at this point to be a sufficient defense for file sharing websites; however, this was not to be the case.

2. *Napster*

The *Napster*⁴⁶ case could merit an extended discussion, however for the purposes of this Article, only a brief exposition of its impact is

³⁸ *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911). *Kalem* held that an unauthorized dramatization created and sold for public performance violated the exclusive right to distribute and that the producer was liable for the sale of the dramatization. “The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. . . . If the defendant did not contribute to the infringement, it is impossible to do so except by taking part in the final act.”

³⁹ *Sony*, 464 U.S. at 436.

⁴⁰ *Id.* at 435.

⁴¹ *Id.* at 439–41.

⁴² *Id.*

⁴³ *Id.* at 437 (indicating that vicarious liability is possible).

⁴⁴ *Id.* at 440–43.

⁴⁵ *Id.* at 455.

⁴⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

warranted.⁴⁷ Following the *Sony* rationale, *Napster* delimited contributory infringement and provided a sound analytical distinction between contributory infringement and vicarious liability.⁴⁸ *Napster* operated a centralized server that provided an updated list of available .mp3s for downloading between users.⁴⁹ This gave *Napster* direct control over what was listed, what was downloaded, and who participated.⁵⁰ In scrutinizing the District Court's opinion, the Ninth Circuit predicted that *Napster* would not likely prevail on its fair use and affirmative defenses, and proceeded to discuss *Napster*'s likelihood of liability under both contributory infringement and vicarious liability theories.⁵¹ As a threshold matter, the court stated that contributory infringement cannot be found without direct infringement by end users, and *Napster*'s end users concededly violated both the reproduction and the distribution rights of copyright holders.⁵²

Thus, the court stated the rule for contributory infringement: "Traditionally, one who, with knowledge of the infringing activity induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer."⁵³ The court summarily held that *Napster* provided a material contribution to the infringing activity, satisfying the second prong.⁵⁴ As for the first prong, the court held that *Napster* possessed both constructive and actual knowledge of direct infringement, and the court refused to extend *Sony* to include active websites like *Napster*: "We are bound to follow *Sony* and will not impute the level of knowledge to *Napster* merely because peer-to-peer file sharing technology may be used to

⁴⁷ Many articles and even full volumes of law reviews have tackled the *Napster* case exclusively. Matthew Green, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799 (2002); Symposium, *Beyond Napster: Debating the Future of Copyright on the Internet*, 50 AM. U. L. REV. 355 (2000); Shawn D. Chapman, Special Feature, *The Napster Litigation – Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.*, 89 KY. L.J. 793 (2000–2001); see generally Damon Lussier, *Beyond Napster: Online Music Distribution and the Future of Copyright*, 10 U. BALT. INTELL. PROP. L.J. 25 (2001).

⁴⁸ *Napster*, 239 F.3d at 1023.

⁴⁹ *Id.* at 1012.

⁵⁰ *Id.* at 1011–13.

⁵¹ See *id.* at 1024–27.

⁵² *Id.* at 1013–14.

⁵³ *Id.* at 1019 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

⁵⁴ *Id.* at 1022.

infringe plaintiff's copyrights."⁵⁵ However, "[I]f a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement."⁵⁶ Thus, a website cannot come within the *Sony* safe harbor unless they have no actual knowledge of infringing activity and they take down infringing material pursuant to copyright holder requests.

Vicarious liability, by comparison, extends to situations where the accused "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."⁵⁷ Moreover, the *Sony* safe harbor does not extend to this theory, being strictly limited to contributory infringement.⁵⁸ The court held that Napster's potential increase in users would define Napster's future income, and thus a financial benefit inured.⁵⁹ The court also easily concluded that Napster had sufficient supervision and ability to block users and control the system to meet the second requirement.⁶⁰ Soon after *Napster*, the court elucidated in *Aimster* what is required to avoid vicarious liability, despite Napster's inability to do so: "[T]o escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability."⁶¹ Thus, a decentralized server could potentially fit within a safe harbor defense under *Napster*, and despite the following case, this is as of yet unresolved.

3. *Grokster*

Grokster, a more contemporaneous file sharing website, operated as a purely P2P network and bypassed the need for a centralized server system. Thus, a user request for a file would be routed directly to another user, without the need for any intermediary.⁶² This seemed to

⁵⁵ *Id.* at 1020–21.

⁵⁶ *Id.* at 1021 (construing *Religious Tech. Ctr. v. Netcom On-line Commc'n Svcs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995)).

⁵⁷ *Gershwin*, 443 F.2d at 1162.

⁵⁸ *Napster*, 239 F.3d at 1022.

⁵⁹ *Id.* at 1023.

⁶⁰ *Id.* at 1023–24.

⁶¹ *Id.*; accord *In re: Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (In denying the safe harbors of the DMCA for ISPs to *Aimster*, the Seventh Circuit explained that *Aimster* was "far from doing anything to discourage repeat infringers of the plaintiff's copyrights, *Aimster* invited them to do so, showed them how they could do so with ease using its system, and . . . disabled itself from doing anything to prevent infringement.").

⁶² *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 922 (2005).

fit within the *Sony* exception, and when the case came before the Ninth Circuit Court of Appeals, the court used the opportunity to hold that the *Sony* exception was indeed available on the Internet.⁶³ It held that since this software was capable of substantial non-infringing uses, and since Grokster had no actual knowledge of infringement (due to its decentralized architecture), it was not secondarily liable for the direct infringement of its users.⁶⁴ This was to become a fleeting victory for file sharing, as the celebration was abruptly halted. Later that year, the U.S. Supreme Court granted certiorari.⁶⁵

The Supreme Court began its discussion by providing an in-depth analysis of Grokster's architecture, and concluded that though no actual knowledge was proven, the express purpose behind the software was to promote, market, and distribute copyrighted files.⁶⁶ Nor did the Court find any evidence that take-down requests were honored, or that any procedures were in place to prevent copyrighted songs from being shared.⁶⁷ The Court weighed the competing interests, and eventually followed the rationale of the *Aimster* court, signaling what was soon to come:

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.⁶⁸

Thus, the right to maintain a potentially non-infringing website must yield to the prevention of rampant file sharing.

The Court disregarded MGM's proposed vicarious liability theory, and found that a nuanced inducement theory was both preferable and sufficient.⁶⁹ The Court held that: "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."⁷⁰ Therefore, even with decentralized architecture and no actual

⁶³ *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162 (9th Cir. 2004).

⁶⁴ *Id.* at 1163

⁶⁵ *MGM Studios, Inc. v. Grokster, Ltd.*, 543 U.S. 1032, 1032 (2004).

⁶⁶ *Grokster*, 545 U.S. at 926.

⁶⁷ *Id.*

⁶⁸ *Id.* at 929–30 (construing *In re: Aimster Copyright Litig.*, 334 F.3d 643, 645–46 (7th Cir. 2003)).

⁶⁹ *Id.* at 930 n.9.

⁷⁰ *Id.* at 936–37.

knowledge of infringement, if a court can find that the website expressed intent to promote infringement and did so, liability will attach.⁷¹ Despite the Plaintiffs' success in *Grokster*, content owners soon realized that suits against websites were long, tedious, expensive, and unpredictable, amounting to pyrrhic victories.⁷² Further, file sharing spread swiftly while these litigations ensued, leaving the file sharing landscape realistically unimpeded, and altered only in model.⁷³ Therefore, in tandem with the suits against providers, the content industry adopted a different business model, one that celebrated justice and maximum profitability: suing consumers.

B. Suits Against Individual File Sharers

While suing one's own customers may seem counter-intuitive, there are many examples of the success of this enforcement model.⁷⁴ These lawsuits began in 2003, and swelled through the end of 2008.⁷⁵ These individual suits almost never reached trial, with many settling in pre-litigation negotiation—this strategy is the crux of this Article and its legal framework is discussed in detail below in Part III. Prior to an explanation of the strategy, a history of the suits is useful, and this Subpart focuses on the background of the RIAA litigation as an example of the suits between 2003 and 2008, to provide context for the litigation strategies currently used.⁷⁶ While more than 30,000

⁷¹ *Id.* at 937.

⁷² However, this hasn't completely prevented suits. Limewire, another decentralized file sharing website, recently settled with major recording companies for \$105 million on May 13, 2011. See Debra Cassens Weiss, *Limewire Settles Infringement Claims for \$105M; Recording Companies Initially Wanted \$75T*, A.B.A. J. (May 13, 2011 8:45 AM), http://www.abajournal.com/news/article/limewire_settles_infringement_claims_for_105m_recording_companies_initially/.

⁷³ See ELEC. FRONTIER FOUND., *supra* note 9, at 10 (“[A]fter more than 30,000 RIAA lawsuits, tens of millions of U.S. music fans continue to use P2P networks and other new technologies to share music.”); see also Christian E. Mammen, *File Sharing is Dead! Long Live File Sharing! Recent Developments in the Law of Secondary Liability for Copyright Infringement*, 33 HASTINGS COMM. & ENT. L.J. 443, 457–459 (2011) (for an analysis of the most current state of suits against websites, including Limewire, Rapidshare, and YouTube).

⁷⁴ See generally Hughes, *supra* note 4 (arguing that not only is suing end users the most profitable way to achieve enforcement, despite the backlash in public opinion, but also arguing that the users on the margins should be the main targets).

⁷⁵ See ELEC. FRONTIER FOUND., *supra* note 9, at 2. The EFF indicates that the recording industry has sued or threatened to sue at least 30,000 individuals as of 2008.

⁷⁶ In 2008, the recording industry announced that it would cease suing individuals. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, available at <http://online.wsj.com/article/SB122966038836021137.html>.

individuals settled without challenge for between \$3,000 and \$12,000 during these suits' prominence, one notable defendant decided to challenge his settlement offer and in the process became the poster-boy for the popular resistance movement against the recording industry.⁷⁷

In 2003, Joel Tenenbaum's parents received a letter demanding \$5,250 for seven songs that sixteen-year-old Joel had allegedly downloaded.⁷⁸ Joel sent a check for \$500, pleading his impoverished student status, which was returned to him.⁷⁹ Four years later, Sony, BMG, Warner Bros., and UMG filed a complaint against Joel, seeking the statutory maximum: \$150,000 per song downloaded, under 17 U.S.C. § 504(c), for willful infringement.⁸⁰ After two years of procedural posturing, the case went to trial in 2009, with the jury eventually awarding the music industry statutory damages of \$675,000, which Tenenbaum quickly appealed.⁸¹ As an initial surprise, the District Court found that the award violated the 5th Amendment's Due Process Clause.⁸² The court found that Tenenbaum received a minimal amount of actual benefit from the songs, and noted that the award was egregious when analyzed within contemporary punitive damages jurisprudence.⁸³ The award was reduced to \$67,500, in light of this court's constitutional maximum allowable of \$2,250 per song (three times the statutory minimum of \$750 per song).⁸⁴ This ruling begged an appeal, with its seemingly arbitrary new maximum, and both parties appealed to the First Circuit.⁸⁵ As expected, and

⁷⁷ *Timeline*, JOEL FIGHTS BACK, <http://joelfightsback.com/about-the-case/timeline> (last visited Aug. 20, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Complaint, Sony BMG v. Tenenbaum, No 1:07-cv-11446-NG (D. Mass. Aug. 7, 2007), available at <http://blogs.law.harvard.edu/cyberone/files/2008/11/j-01-1.pdf>.

⁸¹ Sony BMG v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010). The two cases between the RIAA and individuals that have proceeded to trial have provided pleas from the bench for Congress to reevaluate the statutory damages provisions in the Copyright Act. See Will Moseley, Note, *A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum*, 25 BERKELEY TECH. L.J. 311, 331 (2010). As of the time of publication of this Article, these pleas have gone unheeded.

⁸² Tenenbaum, 721 F. Supp. 2d at 116.

⁸³ *Id.* at 117.

⁸⁴ *Id.*

⁸⁵ Professor Charles R. Nesson and his Harvard copyright project are currently handling the case, and this was the first file sharing case to be heard by an appellate court. See Patrick Galvin, *First Circuit Hears Tenenbaum File Share Appeal*, THE HARVARD CRIMSON (Apr. 8, 2011), <http://www.thecrimson.com/article/2011/4/8/harrow-nesson-case-court/>; see also Memorandum of Law & Order at 31, Capital

nearly nine years after the onset of litigation, the First Circuit reversed the lower court's decision, opining that the constitutional question should have never been analyzed at the District Court level, and constitutional avoidance principles should have been engaged.⁸⁶ However, the court did not foreclose other opportunities, leaving Tenenbaum's motion for remittitur based on excessiveness of statutory damages viable; it remanded for reconsideration of damages based on common law, which the lower court could use to reduce the amount of the award and allow the plaintiffs to move for a new trial should a reduction be awarded.⁸⁷ Thus, the Tenenbaum saga continues still in 2012, nine years later.

Consequently, any litigant considering this type of suit need only look to the unending saga of the Tenenbaum case to be dissuaded from fighting back against a charge of infringement. Even harboring a legitimate defense provides no shelter from extraordinary expense and years of litigation. Thus, the rarity of cases creating case law in copyright infringement cases is not always attributable to a lack of defenses or lack of desire to fight back, but because these cases are generally settled prior to the onset of litigation due to the costs and problems briefly mentioned above and outlined below. Despite the apparent success of this model, the RIAA and the industry suffered unendingly negative press, and in 2008 the RIAA announced a moratorium on suing individuals for file sharing, and it is currently seeking new ways to combat the file sharing epidemic.⁸⁸

III. SPECULATIVE INVOICING AND PRE-LITIGATION SETTLEMENT

After the reluctant withdrawal of the RIAA from suits against individuals, copyright trolls have picked up the torch, given that the law currently allows for the use of this process. Modeled after the RIAA suits, these trolls find potential infringement, in one form or another, and then proceed to send a cease-and-desist letter either

Records, Inc. v. Thomas-Rasset, Case 0:06-cv-01497-MJD-LIB (D. Minn. July 22, 2011), available at <http://ia700504.us.archive.org/21/items/gov.uscourts.mnd.82850/gov.uscourts.mnd.82850.457.0.pdf> (reducing a jury verdict in the amount of \$1.5 million to \$2,250 per song, for a total of \$54,000. "The Court concludes that a statutory damages award of \$2,250 – 3 times the statutory minimum – per sound recording infringed is the maximum permitted under the due process analysis.").

⁸⁶ Sony BMG Music Ent. v. Tenenbaum, Case Nos. 10-1883, 10-1947, 2011 WL 4133920 (1st Cir. Sept. 16, 2011); see also Terry Hart, *Sony BMG v. Tenenbaum: District Court Erred in Reducing Jury Verdict*, COPYHYPE (Sept. 19, 2011). <http://www.copyhype.com/2011/09/sony-bmg-v-tenenbaum-district-court-erred-in-reducing-jury-verdict/>.

⁸⁷ *Tenenbaum*, 2011 WL 4133920, at *18–19.

⁸⁸ See, e.g., McBride & Smith, *supra* note 76.

coupled with a notice of the potential for, or threat of lawsuit. These letters generally demand a settlement amount, often far less than the statutory damages threatened in the letter, and provide a limited timeframe for settlement. Due to fear, or the collective action problem, most defendants settle, and thus these practices tend to stay under the legal radar. Subpart A below describes the purported processes of three examples of copyright trolls⁸⁹ currently at work in the United States. The first type focuses on newspapers and copyrightability of articles, the second type relates to eBay and counterfeit goods, and the third type focuses on music and movies, using the classical RIAA framework.⁹⁰ Following these specifics, Subpart B explains the practical effect of these pre-litigation tactics, and the potentially coercive and oppressive nature of their use. In reaction to this practical effect, a grassroots effort has arisen on the Internet, with multiple websites coming to the rescue of the file sharing community. Subpart C concludes by discussing these sites' prominence and impact.

A. The Players

1. *Righthaven and 'Hot News'*

In Nevada, an entrepreneurial group of lawyers has created a seemingly lucrative and fool-proof business model that operates within the newspaper and publishing industry.⁹¹ Since March 2010, Righthaven has filed more than 249 lawsuits in Nevada claiming copyright infringement.⁹² Righthaven's purported practice is to scour

⁸⁹ Ashby Jones, *On Coach and the Counterfeit Crackdown that Wasn't*, WALL ST.J. LAW BLOG (Feb. 11, 2011, 10:45 AM), <http://blogs.wsj.com/law/2011/02/11/on-coach-and-the-counterfeit-crackdown-that-wasnt/> (eBay and counterfeit goods); see *Copyright Trolls*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/copyright-trolls> (last visited Aug. 20, 2011) (newspaper copyrightability and music and movies).

⁹⁰ Jones, *supra* note 89; see ELEC. FRONTIER FOUND., *supra* note 89. For a brief yet sufficient explanation of the issues raised by these cases, see Swartout, *supra* note 29, at 511. For the sake of simplicity, the trolls focusing on pornography are included by reference and not discussed individually, as the legal issues are essentially the same.

⁹¹ See ELEC. FRONTIER FOUND., *supra* note 89.

⁹² Steve Green, *Righthaven Accuses Defendants of Running Up Legal Fees in Copyright Case*, LAS VEGAS SUN, Mar. 10, 2011, available at <http://www.lasvegassun.com/news/2011/mar/10/righthaven-accuses-defendant-running-lawyer-fees-c>; see also Mullin, *supra* note 10 ("Critics disagree that Righthaven could have any kind of positive effect and refer to the company as a 'copyright troll' engaged in shaking down blogs. Stephen Bates, an assistant professor at UNLV's Hank Greenspun School of Journalism, calls the Righthaven

continued . . .

the Internet, looking for reproductions of newspaper articles from either the Las Vegas Review-Journal or the Denver Post newspapers.⁹³ Upon finding a repost, either on a blog or on a forum of a website (irrespective of whether a citation is posted), they proceed to buy the copyright from the newspaper and sue the ‘infringing’ site.⁹⁴ These suits demand the statutory maximum of \$150,000 and a forfeiture of the website’s domain name.⁹⁵ Unlike some of its contemporaries discussed below, Righthaven does seem to be willing to take some of these cases to trial, as it files lawsuits without issuing cease-and-desist letters.⁹⁶ However, similar to its counterparts below, Righthaven seems to threaten indiscriminately, targeting bloggers, political groups, and political candidates.⁹⁷ Because these cases tend to settle pre-trial, the legal issues and defenses of the bloggers remain unsettled, and at one point it seemed as if Righthaven’s ability to mine and profit from this practice was unlimited due to a lack of DMCA restriction. However, the practice is currently under searching review by the courts and, at present, Righthaven is appealing a judgment denying it standing to sue and affirming the possibility of fair use as a defense for the bloggers it sued.⁹⁸

2. *eBay and Coach ‘Bagging’ Customers*

A recent case in California has exposed a similar practice by trolls

suits ‘lawful but preposterous’ and a ‘waste of judicial resources.’”).

⁹³ Green, *supra* note 92; ELEC. FRONTIER FOUND., *supra* note 89; *see also* Mullin, *supra* note 10.

⁹⁴ *See* Elec. Frontier Found., *supra* note 89.

⁹⁵ *Id.*; *see also* Mullin, *supra* note 10 (“None of the settlements have included a transfer of the defendant’s domain name to Righthaven, a demand made in each of the initial Righthaven complaints.”).

⁹⁶ Richard Esguerra, *Righthaven’s Brand of Copyright Trolling*, Elec. Frontier Found. (Sept. 2, 2010), <http://www.eff.org/deeplinks/2010/09/righthavens-own-brand-copyright-trolling> (“[R]ighthaven starts with a full-fledged lawsuit in federal court with no warning. It’s sue first and ask questions later, which smacks of a strategy designed to churn up legal costs and intimidate defendants into paying up immediately, rather than a strategy aimed at remedying specific copyright infringements.”); *see also* Nicole Downing, *Using Fair Use to Stop a Copyright Troll From Threatening Hyperlinkers*, 12 N.C. J. L. & Tech. On. 155, 175 (2011) (providing a comprehensive analysis of the Righthaven cases and arguing that a fair use defense generally exists for bloggers, and that it should be demonstratively and conclusively recognized by the judiciary).

⁹⁷ *See* Mullin, *supra* note 10.

⁹⁸ *Righthaven LLC v. Hoehn*, No. 11-16751, 2011 U.S. Dist. LEXIS 65830 (9th Cir., *notice of appeal filed*, Jul. 19, 2011), *available at* <http://pub.bna.com/ptcj/RighthavenJuly19.pdf>; *see, e.g.*, Tamlin H. Bason, *Righthaven Files Appeal in Case That Denied Firm Standing, Recognized Fair Use Defense*, 82 BNA’s Pat., Trademark & Copyright J. 421 (2011).

attempting to prevent online counterfeiting.⁹⁹ Gina Kim bought a Coach brand bag at an authorized retailer, which, after deciding that she no longer wanted, attempted to sell on eBay.¹⁰⁰ Soon after creating a post for its sale, she received a cease-and-desist letter from Coach's law firm demanding \$300, an admission of wrongdoing, and threatening a \$2 million lawsuit.¹⁰¹ Despite Coach's final admission of mistake and the case's ultimate dismissal, Kim filed a complaint against Coach alleging a putative class action.¹⁰² Many issues arise in light of this complaint, including (1) questions over a retailer's (eBay) duty to monitor sales on its website; (2) whether these claims are frivolous, and if so, whether the filing parties should be punished; and most importantly, (3) how many victims of these demand letters have settled despite a lack of actual infringement, or without asserting a potentially viable fair use defense. This practice seems similar to that alleged in the Righthaven cases in that it seeks to find infringement indiscriminately and shoots first, asking questions later. And though this pursuit seems to be a good faith attempt to prevent counterfeiting, the existing legal structure yields the same potential for abuse—cavalier pursuit of claims.

3. *The US Copyright Group and “Dear John” Letters*

In contrast to the newspaper and counterfeit product examples explained above, the speculative invoicing model most reminiscent of RIAA practice is currently being pursued both in the United States and abroad.¹⁰³ The U.S. Copyright Group (“USCG”) is the most prominent example currently operating in America due to its successes and proliferation.¹⁰⁴ The purported USCG model involves either having a copyright assigned to it outright so that it may sue directly, or by taking a contingency fee case for enforcement of a copyright in a

⁹⁹ Jones, *supra* note 89.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Complaint for Damages, *Kim v. Coach*, No. 2:11-cv-00214-RSM (W.D. Wash. Feb. 8, 2011), available at <http://online.wsj.com/public/resources/documents/020811kimcoach.pdf>.

¹⁰³ The speculative invoicing model was rampant in England prior to 2011. For an explanation of and description of the conclusion of this practice, see *ACS: Law and MediaCAT Completely Shut Down Both Their Businesses*, TORRENT FREAK (Feb. 4, 2011), <http://torrentfreak.com/acslaw-and-mediakat-completely-shut-down-both-their-businesses-110204>. The major law firm promoting speculative invoicing in the UK, ACS: Law, has been shut down due to excessive abuses of consumers and indiscriminate use of demand letters. This should be somewhat prophetic.

¹⁰⁴ See Complaint, *Shirokov v. Dunlap*, No. 1:10-cv-12043 (D. Mass. Nov. 24, 2010), available at <http://www.internetcases.com/library/cases/2010-11-24-shirokov.pdf> [hereinafter “Complaint”]; see also Swartout, *supra* note 29, at 510–11.

film.¹⁰⁵ The USCG then monitors active downloading sites and sues thousands of “John Doe” defendants, requesting a subpoena to acquire downloaders’ individual information.¹⁰⁶ Once the court issues a subpoena, it is served on the users’ ISPs and demands names, addresses, and personal information about each John Doe; it then sends a demand letter to each person.¹⁰⁷ According to the cases, these letters generally consist of the same features listed above: the threat of a lawsuit and potential statutory damages of \$150,000, and a request to settle for pennies on the dollar.¹⁰⁸ Most of these demand letters seek to settle within a limited time frame. As an example, a summary of the letter could look like the following: “pay us \$1,500 within two weeks and this lawsuit will go away. If two weeks passes, you will have another two weeks, and the settlement amount will increase to \$2,500. If you refuse to settle within those four weeks, we will be forced to take the case to trial.”¹⁰⁹

To date, the USCG has represented producers of *The Hurt Locker*, *The Steam Experiment*, *Far Cry*,¹¹⁰ and most recently, *The Expendables*.¹¹¹ The firm has currently sued more than 20,000 John Does.¹¹² Many on the blogosphere and Internet reporting services have labeled the efforts of the USCG and this particular model of enforcement as especially predatory and irresponsible, not to mention disingenuous.¹¹³ Few defendants are ever formally sued in their individual capacities, indicating a lack of desire on the part of the plaintiffs to see these cases through to trial.¹¹⁴ Retaliating against this

¹⁰⁵ Complaint, *supra* note 104, at 4.

¹⁰⁶ See *USCG v. The People*, ELEC. FRONTIER FOUND., <http://www.eff.org/cases/uscg-v-people> (last visited Aug. 20, 2011).

¹⁰⁷ *Id.*

¹⁰⁸ Complaint, *supra* note 104, at 7.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.* at 2 n.1.

¹¹¹ Mike Masnick, *Expendables Producers Begin Process of Shaking Down Thousands for Cash*, TECHDIRT (FEB. 9, 2011, 10:11 PM), <http://techdirt.com/articles/20110208/15510213010/>. However, this case was recently dismissed voluntarily in light of jurisdictional issues, discussed *infra* Part III.D.3.

¹¹² See Thomas Mennecke, *German Porn Producer Files 670 New BitTorrent Lawsuits*, SLYCK (Sept. 22, 2010), <http://www.slyck.com/news.php?story=2054>.

¹¹³ See Nate Anderson, “Bullies”: P2P Lawyers Demand Sanctions Against Those Suing Them, ARS TECHNICA (Jan. 26, 2011, 4:39 PM), <http://arstechnica.com/tech-policy/news/2011/01/bullies-p2p-lawyers-demand-sanctions-against-those-suing-them.ars>; see also ELEC. FRONTIER FOUND., *supra* note 89; see also Evan Brown, *Class Action Lawsuit Challenges Bittorrent Lawsuit Factory’s Business Model*, INTERNET CASES (Nov. 25, 2010), <http://blog.internetcases.com/2010/11/25/class-action-lawsuit-challenges-bittorrent-lawsuit-factorys-business-model>.

¹¹⁴ See, e.g., Jerod Moya, *99,924 Sued So Far in Mass BitTorrent Lawsuits Campaigns*, ZERO PAID (Jan. 31, 2011), <http://www.zeropaid.com/news/92400/99->

continued . . .

perceived inequity, many organizations have begun to protect consumers from this practice by creating websites dedicated to informing them of their rights; these are discussed in detail below, in Subpart D.¹¹⁵ Further, some consumers targeted by the USCG have begun to strike back, filing a class action of their own.¹¹⁶ The complaint in *Shirokov* argues that speculative invoicing has been indiscriminately used, targeting consumers with insufficient evidence of actual infringement and coercing pre-trial settlement.¹¹⁷ Further, some of the claims argue that the demand letters are baseless, and rely on faulty interpretations of the law.¹¹⁸ No matter the potential outcomes of these challenges, the frequency of their occurrence indicates a shift in the tide of consumer response, from acquiescence to retaliation. These suits and the outcry regarding the practices indicate that something is amiss, that an imbalance exists, and that some level of oversight or punitive regulation of this practice is necessary to protect both sets of interests involved in a more predictable, equitable way.

B. The Process and Statutory Framework

“[The claimant’s] monitoring exercise cannot and does not purport to identify the individual who actually did anything. All the IP address identifies is an internet connection, which is likely today to be a wireless home broadband router. All [this] monitoring can identify is the person who has the contract with their ISP to have internet access [the claimant does] not know who did it and know that they do not know who did it.”¹¹⁹

The process used by content enforcement trolls in capitalizing on copyright violations is firmly embedded in and permitted by both the

924-sued-so-far-in-mass-bittorrent-lawsuit-campaigns (stating that actual lawsuits against alleged infringers have only just begun, and over 99,000 have been sued to date).

¹¹⁵ See *Subpoena Defense Resources*, ELEC. FRONTIER FOUND., <http://eff.org/issues/file-sharing/subpoena-defense> (last visited Aug. 20, 2011); see also SUBPOENA DEFENSE, <http://www.subpoenadefense.org> (last visited Aug. 20, 2011).

¹¹⁶ See, e.g., Complaint, *supra* note 104.

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ James Bench, *ACS: Law Judgment has Serious Implications for Digital Economy Act*, LIBERTY VOICE (Feb. 9, 2011, 11:09 AM), <http://www.libertyvoice.net/2011-02/acslaw-judgment-has-serious-implications-for-digital-economy-act> (explaining how the judiciary has banned speculative invoicing in the U.K. and Parliament is considering a statutory measure to prevent its practice).

DMCA and the common law.¹²⁰ First developed in the RIAA litigation, this process has remained, for the most part, unaltered. The current statutory framework has developed by virtue of the safe harbor provisions of the DMCA, which provide for limited or no liability for service providers when they act in a specific capacity, with liability passing through the ISP directly to the alleged infringers.¹²¹ Coach (and its analogs) and the USCG follow a similar process with some variation, and this process is outlined below. The Righthaven model differs significantly, however, and is discussed in Part IV. For the sake of consistency, the USCG method, as alleged in current cases, is outlined, and deviation as exhibited by the other actors is noted below where necessary.

Initially, a content owner will solicit, or be solicited by, the potential copyright enforcement group (“troll”). At this point, the troll will either buy the copyrighted material outright (as occurs in the Righthaven cases) or the troll may take the case on behalf of the client, usually on a contingency basis. Upon securing the client, the troll will scour the Internet, looking for instances of uploading, or ‘seeding’ of the copyrighted materials; the paradigmatic case involves a movie in a P2P network.¹²² The troll will then collect the ISP addresses for each allegedly infringing user, in effect conducting their own *ex parte* investigation and discovery.¹²³ After compiling a list of these alleged infringers, and without due regard to any potential defenses (such as fair use), they file a suit in district court, either against each alleged infringer individually, or in the form of a reverse class action suit.¹²⁴

¹²⁰ See NIMMER & NIMMER, *supra* note 32, at § 12B.01[C][4] (“[I]nstead of drawing stark lines, Section 512 outlines a myriad of minute circumstances that can either afford or preclude access to its safe harbors. For that reason, one must anticipate much litigation over the concrete issues canvassed below before the contours of the law develop sharp edges.”); see generally 17 U.S.C. § 512 (2006); Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003) (holding that the subpoena provisions only apply to the hosting provisions of § 512(c), not to the conduit or caching provisions in § 512(a) and (b)).

¹²¹ See 17 U.S.C. § 512(a)-(c) (2006). These will not be discussed in detail here, however they include: acting as a mere conduit for information, simple system caching, and acting as a hosting site within strict parameters.

¹²² *USCG v. The People*, ELEC. FRONTIER FOUND., <http://www.eff.org/cases/uscg-v-people> (last visited Aug. 20, 2011). However, contrast the Righthaven cases, in which the instances of alleged infringement have already occurred.

¹²³ *Id.* Righthaven needs no IP address however, since a blogger’s name and information is generally open and visible.

¹²⁴ See David W. Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1689 (2005) (calling this type of suit “reverse private attorney general litigation.”). For this article, the term reverse class action will be used, since the “reverse attorney general” moniker implies an assertion of a public

These reverse class actions join thousands of alleged infringers into one suit, and make no distinction as to frequency of download, upload, or location of the occurrence of the alleged infringement.¹²⁵ Generally, a plaintiff must allege that the plaintiff owns the copyright, and that the alleged defendants copied this original work.¹²⁶ To pass the pleading stage the complaint must allege: (1) the original work is protected by copyright, (2) the plaintiff owns the copyright, (3) the copyright has been registered, and (4) how and when the defendant allegedly infringed.¹²⁷ The pleading will also generally include a claim that the infringement was willful, allowing for pursuit of statutory damages.¹²⁸

In properly pleading this complaint, the plaintiff requests a subpoena to obtain the names, addresses, and personal information from these, what are heretofore known as, “John Does.”¹²⁹ This subpoena power is statutorily provided in the safe harbor provisions of the DMCA, located in § 512.¹³⁰ The § 512(h)(1) subpoena request must include both a copy of the § 512(c)(3)(A) notification¹³¹ and a sworn statement that the “purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for [this] purpose.”¹³² Should all information be

benefit or public right, whereas here, the end sought is purely financial in nature.

¹²⁵ See *infra* Part III.D.2 for explanation of the problems associated with this type of joinder.

¹²⁶ See *Feist Publ'ns., Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”).

¹²⁷ *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992) (citing *Franklin Elec. Publishers v. Unisonic Prod. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991)); *Gee v. CBS Inc.*, 471 F. Supp. 600, 643 (E.D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

¹²⁸ 17 U.S.C. § 504(c)(2) (2006) (allowing for up to \$150,000 in damages for each act of infringement, with no required showing of actual damage).

¹²⁹ *Opderbeck*, *supra* note 124, at 1702.

¹³⁰ See e.g. *NIMMER & NIMMER*, *supra* note 32, at § 12B.09[A] (“If it follows the procedures outlined in the statute, a qualifying provider can avoid liability for its conduct in facilitating access to . . . infringing material. But the conclusion hardly follows that all parties should escape liability. Indeed, precisely because the service provide is immunized, it becomes all the more important for the copyright owner to discover the party actually responsible for uploading the infringing content in the first instance.”).

¹³¹ 17 U.S.C. § 512(c)(3)(A) (2006) (requiring that the notice given to the service provider (1) be signed by the plaintiff, (2) identify the work allegedly infringed, (3) state that it is to be removed or disabled, (4) give information sufficient for the service provider to contact the alleged direct infringer, (5) a statement of the plaintiff’s good faith belief that the infringer’s use is not authorized, and (6) state that the information included is correct under penalty of perjury).

¹³² 17 U.S.C. § 512(h)(1), (2)(C) (2006). This Article will not discuss the

continued . . .

correct, the clerk of the court will issue the subpoena, and the service provider, upon receipt, is to expeditiously disclose the information required by the subpoena.¹³³ The time within which service providers must comply pursuant to these requests is not delineated by statute and may take a substantial amount of time given the volume of requests they receive.¹³⁴ Assuming a streamlined data acquisition process,¹³⁵ the service provider delivers the name, address, and details of exactly where and when each allegedly infringed movie or song was downloaded.¹³⁶

Armed with this information, the troll then delivers individual non-negotiable settlement requests, explaining to the now identified John Does that they are being sued in district court for their alleged infringement of the copyright holder's copyrighted material.¹³⁷ This

distinction between ISPs acting as mere conduits and those that actively host material for end users, but will focus solely on the latter. For a discussion of the difference, see *Opderbeck, supra* note 124, at 1702.

¹³³ 17 U.S.C. § 512(h)(5) (2006). *But see In re Charter Commc's., Inc.*, 393 F.3d 771, 777–78 (8th Cir. 2005) (stating in dicta that “this court has some concern with the subpoena mechanism of § 512(h). We comment without deciding that this provision *may* unconstitutionally invade the power of the judiciary by creating a statutory framework pursuant to which Congress, via statute, compels a clerk of a court to issue a subpoena, thereby invoking the court's power. Further, we believe Charter has at least a colorable argument that a judicial subpoena is a court order that must be supported by a case or controversy at the time of its issuance.”).

¹³⁴ See Nate Anderson, *P2P Plaintiffs to Get Just 28 Time Warner IPs Each Month*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/07/judge-limits-time-warners.ars> (last visited Sept. 22, 2011) (regarding the Steam Experiment cases: “Assuming a lowball estimate of 1,000 IP addresses that belong to TWC, the company may take nearly three years to do all of its lookups.”).

¹³⁵ See Nate Andersen, *Time Warner Cable “A Good ISP for Copyright Infringers”*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/06/time-warner-cable-a-good-isp-for-copyright-infringers.ars> (last visited Sept. 22, 2011) (explaining the battles between the USCG on one hand, who demand swift access to subpoenaed information, and TWC, who argues that they only have the capacity to deal with 28 subpoenas per month, which, at the rate USCG serves them, would take two years to sift through).

¹³⁶ Notably, the statute does not require a service provider to notify its account holder that a request for her information has been received, nor must they notify her that they have given her information to a third party. See *NIMMER & NIMMER, supra* note 32, at § 12B.09[A] (explaining that “Congress did not adopt that suggestion [that the service provider be required to give notice to its customer]- - meaning that . . . it is under no obligation to let a subscriber even know that her personal information has been disclosed.”).

¹³⁷ *Opderbeck, supra* note 124, at 1705–06 (describing the process for the RIAA procedure, which is substantively identical to the current USCG litigation strategy). *Contra, see, e.g., Bason, supra* note 98, (describing a process which does not send cease-and-desist letters but proceeds straight to the lawsuit).

letter will include a written request for pretrial settlement.¹³⁸ Further, the letter will state that should the alleged infringer not settle, the troll will pursue a claim against the user for the statutory maximum of \$150,000 per violation, plus attorneys' fees.¹³⁹ Additionally, settlement is generally contingent upon the alleged infringer admitting wrongdoing and swearing in writing to never download or upload these files again. However, it also demands that the alleged infringer not remove or change the status of the infringing file during the pending claim.¹⁴⁰ The initial settlement generally expires within two weeks, and an extension is granted in consideration for an increased settlement amount.¹⁴¹ Should the alleged infringer decide to settle, the case will conclude at that point, and no individual suit will be filed. Should the defendant decide to fight the claim or quash the subpoena, presumably, the troll will file an individual suit to pursue its claim.

C. The Effect in Practice

At first blush, these demand letter tactics seem to be merely aggressive assertions of positive rights by copyright holders against those who have infringed their proprietary materials. However, upon closer examination, many flaws endemic to the system exist which prevent rational choice and informed decision making by the alleged infringers, and raise questions about the efficiency and usefulness of these tactics, in light of the fact that the current copyright regime not only permits but seemingly welcomes this style of private enforcement. The practical effect of these letters is to promote settlement, as the cost of going to trial in each case would be extraordinary. Putting aside the possibility that a copyright troll would actually take one of these individual defendants to trial¹⁴²—and assuming that it could follow through on the threats in the settlement letters¹⁴³—these settlement letters seem designed to elicit pretrial settlement from unsophisticated consumers. Thus, the existing system leaves coercive techniques widely available, and allows for the manipulation of unsophisticated defendants into early detrimental settlements. This Subpart discusses the coercive techniques used both

¹³⁸ See Mike Masnick, *Hurt Locker Subpoenas Arrive with New Language . . . And Higher Demands*, TECHDIRT, Sept. 3, 2010, available at 2010 WLNR 17592474 (stating the general amount reported was around \$2,500 per violation, but they have increased to \$2,900).

¹³⁹ Complaint, *supra* note 104, at 21.

¹⁴⁰ Arguably, it seems the only purpose for this requirement is to, in fact, allow more infringement.

¹⁴¹ Complaint, *supra* note 104, at 2.

¹⁴² See Moya, *supra* note 114.

¹⁴³ *Id.*

in the subpoena process and in the settlement letter itself, drawing and analogizing from principles of contract law. This Subpart further explains the nature of the collective action problem and concludes by explaining how the collective action problem squarely impacts speculative invoicing.

I. Coercion

As an initial matter, the subpoenas issued by the court not only allow unbridled access to information that would normally never be available to a third party, but the subpoenas also allow for unilateral pretrial discovery by the plaintiff *ex parte*, and without the future defendant's knowledge. Moreover, the service provider, upon receipt of the subpoena, is not required to notify the targeted individual that another party is seeking her personal information or that it has been obtained.¹⁴⁴ Fortunately for the alleged infringers, many ISPs supply this notice voluntarily, providing not only a notification, but also some brief information on the availability of the right to quash the subpoena, which is of huge benefit to the individual. As a general rule, most of these defendants have no conception of what it means to quash a subpoena, nor are they aware that they can prevent this information gathering or put up a defense. This ambush-style approach to the subpoena power, coupled with the defendants' lack of knowledge of their legal rights, serves to make these settlement offers procedurally coercive.

Moreover, the settlement offer itself is substantively coercive in the format it is presented. The paradigmatic settlement letter lists the draconian damages that the troll will seek should the infringer not settle, and provides a limited window in which to do so.¹⁴⁵ This serves to motivate settlement standing alone, and is amplified by the threat of an increase in settlement amount should the alleged infringer wait past the short allowance. This style of settlement offer also fails to inform the alleged infringer of any rights or potential defenses, and is indiscriminate in its application to infringers of all types. It does not explain the possibility of any valid defense, such as fair use, nor is each demand tailored to fit the unique circumstances of each case. An unsophisticated consumer located hundreds of miles from where the lawsuit was filed, holding a settlement letter that threatens a \$150,000 lawsuit will almost always settle, out of fear if for no other reason, and despite whether or not the consumer is innocent or has a valid defense. However, in spite of the seeming unfairness of this practice, letters

¹⁴⁴ See NIMMER & NIMMER, *supra* note 32, at § 12B.01.

¹⁴⁵ See Complaint, *supra* note 104, at 1.

demanding settlement are used in all areas of law, and in kind, the Copyright Act creates no penalties or restrictions on its use.

2. *Collective Action*

In addition to the coercive aspect of the proposed settlements, these demands capitalize on the inability of individual defendants to challenge and reject these settlement offers. The collective action problem is prevalent in these cases, and is exploited by the disaggregation of claims and lack of sophistication of the defendants.¹⁴⁶ The collective action problem is derived from economic theory and can be analogized to the prisoners' dilemma.¹⁴⁷ Broadly, this theory presumes that if a group of individuals could act collectively to mitigate their losses across a continuum (assuming that all participants are rational economic actors) they would choose to do so.¹⁴⁸ However, when the participants are unaware of the leverage they would have as a group, each is motivated only by their own self-interest: to gain the best deal for oneself at that moment.¹⁴⁹ Thus it follows that if a group could unite to challenge economic coercion while sacrificing some personal gain they would likely do so, if aware of the opportunity.¹⁵⁰ Conversely, a lack of knowledge about the group dynamic promotes short-term self-interest.

Copyright trolls capitalize on this dynamic and profit directly from its impacts. In a typical case, some evidence indicates that it would cost a troll around \$8,800 to sue each individual defendant and recover a profit substantial enough to justify the expense of a lawsuit.¹⁵¹ Aware of this potential cost, they decide instead to send a pre-trial settlement letter requesting \$5,000, saving the troll the cost of trial, and creating a lucrative business model, with almost no overhead.¹⁵² Because the settlement letters are produced en masse, the costs are minimal. Conversely, the defendants must act individually, due to a lack of knowledge about the class and extensive nature of the letters and the lawsuit. Thus, should an alleged infringer take a demand letter

¹⁴⁶ See Assaf Hamdani & Alon Klement, *The Class Defense*, 93 Calif. L. Rev. 685, 693–96 (2005) (explaining the dispersed defendant problem comprehensively).

¹⁴⁷ See generally Richard H. McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 210–18 (explaining the prisoner's dilemma game, and lamenting the use of this theory exclusively by law review articles when many other simple economic games exist as well).

¹⁴⁸ *Id.* at 215–17.

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Hamdani & Klement, *supra* note 146, at 694–95.

¹⁵¹ See Barnes, *supra* note 12, at 1392.

¹⁵² See Mattise, *supra* note 12, at B04 (indicating the average cost of settling a copyright infringement lawsuit for college students averages about \$5,000).

to a defense attorney, the cost of a valid defense, through appeal, could approximate between \$30,000 and \$100,000.¹⁵³ Thus, the alleged infringer is left with an illusory “choice:” (a) challenge the troll and hope for acquittal, with the eventual cost being \$30,000 at least *even if the alleged infringer wins*; (b) challenge the troll and lose, resulting in at least \$30,000 in attorneys’ fees, plus as much as \$150,000 in statutory damages, with the eventual cost approaching something as low as \$180,000 or as high as \$250,000; or (c) settle now for \$5,000. In any rational situation, the alleged infringer would settle, and any rational attorney would likely recommend it.¹⁵⁴ This is despite potential defenses, fair use claims, or even patently innocent behavior. Thus, the current legal structure not only allows for this practice, but indirectly promotes it, by making pre-trial settlement the least expensive and most rational alternative to vindication of rights.

Problematically, these individual defendants are isolated by not only distance, but by type of infringement. Thus, the class action method of defense is not generally a viable option.¹⁵⁵ If the defendants were allowed to challenge this behavior in class action form, they could defray their costs, and settle on more favorable terms.¹⁵⁶ However, due to the current structure of class action jurisprudence and the various discrepancies in each individual’s facts, this is an unlikely outcome.¹⁵⁷

D. Responses and Reactions

This marked discrepancy in bargaining power between trolls and alleged infringers has not gone unnoticed by both the Internet and consumer rights communities, nor has it escaped the criticism of the judiciary. In light of the superior leverage that these trolls have, many organizations and collateral white knights have entered the conflict to provide legal information and support to these alleged infringers. Further, some of the accused defendants have refuted the collective action problem, fighting back despite the cost. This Subpart first catalogs the electronic resources made available to alleged infringers

¹⁵³ See, e.g., Graham, *supra* note 12, at 1D (reporting that attorney fees for fighting the Recording Industry Association of America (“RIAA”) in court could range between \$ 30,000 and \$100,000).

¹⁵⁴ See Hamdani & Klement, *supra* note 146, at 696–97.

¹⁵⁵ *But see* Complaint, *supra* note 104 (demonstrating an example of a contemporaneous attempt to refute this statement. It remains to be seen whether the allegations in the Shirokov Complaint will proceed to trial, and whether the class action format of the suit will survive judicial challenge.).

¹⁵⁶ See Hamdani & Klement, *supra* note 146, at 711–14.

¹⁵⁷ *Infra* Part III.D.2; *cf.* Complaint, *supra* note 104, at 243 (arguing why class certification is appropriate).

in response to the discrepancy in bargaining power and asymmetries in information. Next, it describes the countersuits currently developing and their impact on the practice of speculative invoicing, both in spurring new collateral litigation, and in removal and rejection of frivolous claims. Finally, it explains how these solutions, while beneficial, are insufficient to cure the problem, and segues into Part IV, which proposes and discusses possible statutory remedies for this dilemma.

1. Internet to the Rescue

In light of these conflicts, many different Internet services have arisen to help combat speculative invoicing and protect consumers from its potentially predatory tactics. Arguably, the most famous service is the Electronic Frontier Foundation (“EFF”). The EFF is a lobbying and activist group that, according to their mission statement, promotes the free exchange of ideas, and works to protect digital rights for all consumers.¹⁵⁸ Founded in 1990, the EFF has conducted public interest work on free speech issues, e-privacy issues, protections for innovation, and most specifically, the file sharing battles since the nascence of the RIAA suits.¹⁵⁹ The EFF has provided many resources to help individuals mired in these suits, which include but are not limited to: links to local lawyers in each state who represent file sharers,¹⁶⁰ the filing of amici briefs on behalf of hundreds of individuals and groups including Joel Tenenbaum and the Righthaven targets,¹⁶¹ and the providing of an informational framework for how a putative defendant should analyze the validity of a claim on its subpoena defense page.¹⁶²

In addition to the EFF, many other sites have emerged to provide resources on a smaller scale. The Righthaven litigation has spawned a specific website dedicated to the protection of Internet users of copyrighted materials.¹⁶³ The site offers up-to-date information about

¹⁵⁸ ELEC. FRONTIER FOUND., <http://www.eff.org/about> (last visited Aug. 20, 2011).

¹⁵⁹ ELEC. FRONTIER FOUND., <http://www.eff.org/work> (last visited Aug. 20, 2011).

¹⁶⁰ ELEC. FRONTIER FOUND., <https://www.eff.org/issues/file-sharing/subpoena-defense> (last visited Aug. 20, 2011).

¹⁶¹ ELEC. FRONTIER FOUND., <http://www.eff.org/cases> (last visited Aug. 20, 2011).

¹⁶² ELEC. FRONTIER FOUND., <https://www.eff.org/issues/file-sharing/subpoena-defense> (last visited Aug. 20, 2011).

¹⁶³ RIGHTHAVEN VICTIMS, <http://righthavenvictims.blogspot.com> (last visited Aug. 20, 2011) (providing a list of all currently pending Righthaven litigation, options for avoiding litigation, fair use information, and how to combat a lawsuit);

continued . . .

all the Righthaven suits, and provides defense tactics and information useful for defending against these suits. Further, a website exists which is dedicated to helping all Internet users under threat of infringement litigation, aptly named subpoenadefense.org.¹⁶⁴ Linked to the EFF site, subpoenadefense.org provides information on how an alleged infringer may combat a subpoena, and provides a specific list of steps to follow in order to protect digital rights should a person be targeted.¹⁶⁵ Finally, an online handbook has been produced for those affected by or interested in speculative invoicing.¹⁶⁶

Chillingeffects.org also plays a large role in advocacy for digital rights on the Internet.¹⁶⁷ Created by the EFF in conjunction with many prominent law school clinics,¹⁶⁸ Chillingeffects.org explains online rights from a strictly legal perspective. It also contains a clearinghouse for cease-and-desist letters—including an uploading feature that allows for law student analysis of the letters—and provides information on the First Amendment and its intersection with the Internet and digital rights.¹⁶⁹ Additionally, a group at the University of Washington created a site worthy of note dedicated to exposing the indiscriminate nature of take down notices and P2P copyright enforcement.¹⁷⁰ This site ran bots that were “able to generate hundreds of real DMCA takedown notices for computers at the University of Washington that never downloaded or shared *any content whatsoever*.”¹⁷¹ They officially published their findings as well, describing how their printer received a DMCA takedown notice.¹⁷²

These websites are interesting considering their utility—but of

see also Comprehensive List of Copyright Infringement Lawsuits Filed by Righthaven, LLC, RIGHHAVEN LAWSUITS, <http://www.righthavenlawsuits.com/lawsuits.html> (last visited Aug. 20, 2011).

¹⁶⁴ SUBPOENA DEFENSE, *supra* note 115.

¹⁶⁵ *Id.*

¹⁶⁶ *The Speculative Invoicing Handbook*, BEING THREATENED? (2009), <http://www.beingthreatened.com/resources/The-Speculative-Invoicing-Handbook.pdf>.

¹⁶⁷ CHILLING EFFECTS, <http://www.chillingeffects.org/index.cgi> (last visited Aug. 20, 2011).

¹⁶⁸ *See id.*

¹⁶⁹ *Id.*; *Report Receiving a Cease & Desist Notice*, CHILLING EFFECTS, <http://www.chillingeffects.org/input.cgi> (last visited Aug. 20, 2011).

¹⁷⁰ TRACKING THE TRACKERS, <http://dmca.cs.washington.edu/> (last visited Aug. 20, 2011).

¹⁷¹ *Id.*

¹⁷² Michael Piatek, Tadayoshi Kohno, & Arvind Krishnamurthy, *Challenges and Directions for Monitoring P2P File Sharing Networks —or—Why My Printer Received a DMCA Takedown Notice* (2007), available at http://dmca.cs.washington.edu/dmca_hotsec08.pdf.

most curious import is the sites' proliferation and apparent necessity. The availability and frequency of these sites indicates an asymmetry in information between the litigating parties and a previously unmet need, and hints that the copyright enforcement regime is flawed because it allows these procedures to proliferate unchecked. The sheer number and size of these sites indicate grassroots dissatisfaction with the current regime, and point toward a perceived abuse of unsophisticated defendants. This grassroots movement may further indicate that suits and demands made against consumers are failing to change existing norms regarding file sharing, and conversely, are having a potentially reverse effect on its deterrence.¹⁷³ While no empirical research has shown what impact, if any, these end user protection sites have on informing targets of their rights or preventing lawsuits, the sites' frequencies can at least serve to indicate the existence of a present demand. One potential indicator of these sites' impact seems to be the rise of countersuits, filed by end users, which challenge the practices of these trolls and ignore the collective action problem.

2. *Countersuits and Fighting Fire with Fire*

Of the thousands of John Does sued or whose information was subject to subpoena, a few brave souls have challenged these settlement offers, in contradiction of collective action concerns. These lawsuits have challenged the technical and procedural aspects of the claims, ranging from substantive issues such as fraud and misrepresentation to procedural issues like improper joinder. The most notable case currently pending is *Shirokov v. Dunlap*.¹⁷⁴ Shirokov was one of the thousands of targets in the *Far Cry* demand dissemination by the USCG, which, according to the Complaint, offered a pretrial settlement of \$1,500 if settled within the first two weeks, after which the settlement amount rose to \$2,500.¹⁷⁵ According to the Complaint, Shirokov claims that the USCG is not entitled to statutory damages as threatened in the demand letters, because many of the alleged infringements occurred prior to the

¹⁷³ See Odperbeck, *supra* note 124, at 1688–89.

¹⁷⁴ Complaint, *supra* note 104.

¹⁷⁵ *Id.* at 40 (quoting the USCG pretrial settlement letter: “In exchange for a comprehensive release of all legal claims, which will enable you to avoid becoming a named defendant, our firm is authorized to accept the sum of \$1,500 as full settlement for its claims. This offer will expire at 5pm EST on June 11, 2010. Thereafter, our client will accept no less than the sum of \$2,500 to settle this matter, but this increased settlement offer will expire on June 30, 2010.”).

registration of *Far Cry*'s copyright.¹⁷⁶ Shirokov alleges that the USCG was fully aware of this as copyright specialist attorneys,¹⁷⁷ and that it sent the demand letters in spite of this knowledge, thus coercing unsophisticated defendants into unjustified settlements on the basis of fraudulent claims and unsupported assertions.¹⁷⁸ Shirokov further argues that misrepresentations were made on the copyright registration itself (alleging incorrect first dates of publication), which if true, render these claims of significantly less monetary value than they would have been if registered in a timely and effective manner.¹⁷⁹ While there is some debate surrounding the legal accuracy of Shirokov's claims,¹⁸⁰ should they be substantiated, the *Far Cry* claim will be reduced to a non sequitur with regard to many defendants, and will result in mere actual damages for the others.¹⁸¹

3. *Judicial Acknowledgement of Procedural Deficiencies*

Alternatively, many judges have begun to recognize serious flaws in the cases as filed by these various copyright trolls and the music and movie industries.¹⁸² Recently, cases against copyright trolls have

¹⁷⁶ *Id.* at 4 (“Under 17 U.S.C. § 412(l), no award of statutory damages or of attorney’s fees may be made for infringements that commence before the registration of an unpublished work.”).

¹⁷⁷ DUNLAP, GRUBB, & WEAVER, <http://www.dglegal.com/services/intellectual-property/copyright>.

¹⁷⁸ Complaint, *supra* note 104, at 6.

¹⁷⁹ *Id.* But see Scott Hervey, *Technicalities Surrounding Statutory Damages Under the Copyright Act Trigger Suit Against Law Firm Prosecuting Online Infringement Actions*, THE IP LAW BLOG (Dec. 12, 2010), <http://theiplawblog.com/archives/304473-print.html> (arguing that the publication date which Shirokov’s complaint bases its allegation on, despite the Complaint’s allegations, may actually be the correct date, as the US publication date and English version may be a derivative work).

¹⁸⁰ See Hervey, *supra* note 179.

¹⁸¹ See Complaint, *supra* note 104, at 49 (repeating that the actual damages of \$26.99 are a far cry from \$1,500); see also *Evidence Against Bittorrent Users Slammed in Court*, TORRENT FREAK (Aug. 24, 2011), <http://www.torrentfreak.com/evidence-against-bittorrent-users-slammed-in-court-110824> (explaining that most recently the information gathering systems used by organizations in Europe may be indiscriminate in their processes).

¹⁸² See *Elektra v. O’Brien*, *Thoughtful Decision in 2007 California Case*, RECORDING INDUSTRY VS THE PEOPLE (Jan. 18, 2008), <http://www.recordingindustryvspeople.blogspot.com/2008/01/thoughtful-decision-in-2007-california.html> (quoting *Elektra v. O’Brien*, ILRWeb (P&F) 1555 (C.D. Cal. 2007)) (“The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.”).

implicated improper joinder of claims in federal court.¹⁸³ Occurring in P2P lawsuits in which downloaders have been sued for downloading pornographic movies, and as also seen in the *Righthaven* cases, judges have refused to allow these reverse class actions to go forward, citing improper joinder of claims.¹⁸⁴ In West Virginia, Illinois, and Texas, judges have hamstrung these cases, requiring that each individual defendant bear some relationship to the state of jurisdiction.¹⁸⁵ To properly sue a class of individuals, personal jurisdiction must be present for each person individually.¹⁸⁶ In an extreme case, a judge reduced a potential class from 1800 to 2, *sua sponte*.¹⁸⁷ And of particular note, a case filed against in excess of 23,000 file sharers was voluntarily dismissed when the judge limited the availability of subpoenas to those within the personal jurisdiction of the D.C. court.¹⁸⁸ The net effect of these decisions, should they become uniformly adopted, would eventually result in the requirement that the trolls sue and seek a subpoena for each person individually, sounding the death knell for the profitability of this business model, which previously required so little overhead. However, currently these decisions lack uniformity, and are jurisdiction specific. But despite such problems, these decisions do indicate a growing judicial intolerance for overbroad jurisdictional claims, which the judiciary has

¹⁸³ Nate Anderson, *Judge Administers Another Beatdown to P2P lawyers, Severs Cases*, ARS TECHNICA (Apr. 4, 2011, 12:02 PM), <http://arstechnica.com/tech-policy/news/2011/04/judge-administers-another-beatdown-to-p2p-lawyer-severs-cases.ars>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; see generally *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 808 (1985) (explaining the rationale behind requiring minimum contacts for defendants brought into another state. “The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff’s claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney’s fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.”).

¹⁸⁷ Anderson, *supra* note 183.

¹⁸⁸ See, e.g., *The Expendables Makers Dismiss Massive Torrent Lawsuit*, TORRENT FREAK (Aug. 25, 2011), <http://torrentfreak.com/the-expendables-makers-dismiss-massive-bittorrent-lawsuit-110825> (explaining that the effect of only allowing suits to go forward against those in the District of Columbia had the practical effect of reducing the defendant class by 99%).

begun to recognize as overt attempts to consolidate and mitigate court costs.

These jurisdiction and joinder issues are eerily reminiscent of those recognized by judges in cases involving the RIAA.¹⁸⁹ At the height of the suits against individuals, the RIAA used these same tactics.¹⁹⁰ Due to public outcry against these suits, and fearing more negative publicity, the RIAA eventually ended its use of the practice.¹⁹¹ Unlike the RIAA cases, however, copyright trolls on the whole do not have to worry about their public image, as they are not beholden to consumers for their income. Whereas grassroots resistance and judicial bench slapping eventually persuaded the RIAA to abandon these types of suits, the same disincentive does not lie with these copyright trolls. Popular opinion is predictably irrelevant to these groups, who are only in the fight to make a profit and do not rely on the end users to support their business model downstream.

As mentioned above, many websites and social groups have risen to the defense of these targets. And in most cases, these advocates have remained off the litigation radar of the trolls. However, in one notable instance, these two conflicting interests have collided, resulting in an ironic turn of events. Graham Syfert, an attorney acting in his own capacity, created a website with readymade motions to quash subpoenas.¹⁹² These can be purchased for \$19.95, and are sufficient to challenge any subpoena for information and include a protective order.¹⁹³ These forms and the website make no qualms about who they are intended for: “The forms were designed for self-help defendants (pro se) to file on their own behalf in lawsuits where their internet service provider contacted them, notifying them of a subpoena seeking their identity in copyright litigation (e.g. *Far Cry*, *Hurt Locker*).”¹⁹⁴ This was not to be the end of the story however, as the USCG has sued Syfert and asked for \$5000 to reimburse them for the amount of costs incurred in dealing with these motions to quash.¹⁹⁵ The USCG has further asked for sanctions from the judge to

¹⁸⁹ See Odperbeck, *supra* note 124, at 1708 (noting the various cases in which the RIAA’s suits were dismissed for improper joinder).

¹⁹⁰ *Id.*

¹⁹¹ See McBride & Smith, *supra* note 76.

¹⁹² PRO SE – BASIC MOTION TO QUASH PACKAGE, <http://store.payloadz.com/go/?id=842325> (last visited Aug. 20, 2011).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Nate Anderson, “*Hire Me or Eat Sh*t*”: *Accusations Fly Over DIY P2P Defense Kits*, ARS TECHNICA, (Dec. 1, 2010, 9:32 AM), <http://arstechnica.com/tech-policy/news/2010/12/hire-me-or-eat-sh-t-accusations-fly-over-diy-p2p-defense-kits.ars>.

reprimand Syfert.¹⁹⁶ Multiple judges have thrown these complaints out, and currently, the motion for sanctions is pending.¹⁹⁷

Thus, the entire file sharing enforcement story can be summarized by the simple chain of events outlined above and the opportunism displayed: infringers capitalize on an antiquated copyright system belabored by new technology to achieve a windfall in free music; content owners and their lawyers leverage the flawed system by creating a speculative invoicing reverse class action model to achieve a windfall on the backs of the infringers; and other lawyers create defensive mechanisms to achieve a windfall off the backs of the content lawyers. No matter which side one takes, it seems doubtful that the system is operating efficiently, achieving just outcomes, and promoting the underlying goals of copyright law. Though the consumer defense websites protect targets in a modest way, they have not been able to stem the tide of lawsuits and subpoena requests, which will likely continue to grow as more and more content owners discover the profits that can be amassed by this model. Conversely, technology and popular opinion seem driven to rebel against these enforcement practices, but seem insufficient to fill the lacunae in the law that allow for these practices.¹⁹⁸ Further, the judicial pushback, while inspired, is also insufficient to prevent abuses of this system and protect the legal rights of all parties involved because of disaggregation and dispersion of claims. There must be a new method introduced for resolving these problems, and this responsibility lies with Congress.

IV. PROPOSED REMEDIES

“[Y]ou could file a complaint and have a licensing agreement or settlement two weeks later, or you could send an infringement letter, and have a license agreement or settlement letter without even filing a complaint.”¹⁹⁹

When examining these threats, demands, and lawsuits, one cannot help but notice that these are at best, inefficient and unpredictable ways to enforce copyright, or at worst, opportunistic and fundamentally unfair exploitation of unsophisticated consumers. In either instance, some level of regulation is necessary to prevent opportunistic, as opposed to restorative, copyright enforcement.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Odperbeck, *supra* note 124, at 1714–22.

¹⁹⁹ Complaint, *supra* note 104, at 25 (quoting a USCG primer on licensing).

While pre-trial settlement, if performed within the confines of existing law, is technically sound, some protection for consumers is necessary to prevent the lacunae in copyright law from being converted into a windfall opportunity for attorneys at the expense of unsuspecting individuals, instead of a source for enforcement and prevention of unauthorized dissemination of proprietary materials.²⁰⁰ Copyright trolls have superior bargaining power, and if the counterclaims and allegations of their victims are true, they are exploiting the ignorance of the accused with minimal evidence and rank speculation. Unquestionably, the current regime is inefficient and unpredictable, and does not provide sufficient incentives, or disincentives, for proper adjudication of these issues or even effective judicial line drawing.²⁰¹ On the contrary, the system seems designed to promote swift settlement, without any regard for the rights of the victims who may be innocent or within a fair use defense.²⁰² Even if these cases were to be adjudicated, judges' merit-based adjudication does not promote national uniformity or predictability. However, at least within a merit-based decision regime, there is potential for the type of judicial line drawing necessary to prevent frivolous or unfair lawsuits.

Conversely, allowing these cases to proceed in reverse class action form is questionable both in procedure and substance, as outlined above. But, wholesale copyright infringement by repeat infringers is not tolerated under the current Copyright regime; therefore, an appropriate balance must be struck to allow for the prosecution of legitimate claims while deterring frivolous and unfounded claims. Though the Internet provides some sources of information for putative defendants, this does not solve the problem; many individuals might not find this information, and those who do may not interpret it correctly—thus, this is an inefficient way to protect digital rights. While some argue that wholesale copyright law revision is the only truly predictable and reliable way to correct these problems,²⁰³ such

²⁰⁰ See Mullin, *supra* note 10 (“Critics disagree that Righthaven could have any kind of positive effect and refer to the company as a ‘copyright troll’ engaged in shaking down blogs. Stephen Bates, an assistant professor at UNLV’s Hank Greenspun School of Journalism, calls the Righthaven suits ‘lawful but preposterous’ and a ‘waste of judicial resources.’”).

²⁰¹ See generally Moseley, *supra* note 81, at 336 (citing Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1357–58 (2004)).

²⁰² The fair use defense, as stated above, would be most likely in the newspaper article and blog context and not as likely in the music and movie downloading cases.

²⁰³ See QUESTION COPYRIGHT.ORG, <http://www.questioncopyright.org> (Question copyright’s mission is to: “reframe and expand the range of public debate about copyright; to show the economic, artistic, educational and social effects of distribution monopolies; and to help creators and their allies realize the potential of

continued . . .

sweeping Congressional action seems unlikely at this point, and is strictly aspirational at present. Given the historic influence of content holders at the bargaining table, wholesale revision rejecting the classical business models, while eventually necessary, is improbable in the short term. However, there is some precedent for Copyright Act amendment; Congress has shown willingness in the past to revise the Act.²⁰⁴ Therefore, this Part suggests two options for statutory amendment that are potentially viable, should a partial revision arise for negotiation. These options would be most effectively advocated by consumer digital rights groups, who could potentially gain a seat at the bargaining table.

A. DMCA Amendment Proposal #1: Fair Use

As a threshold matter, a fundamental lacuna in the current system stems from the potential for indiscriminate use of the subpoena power by content owners and the use of the reverse class action device to join multiple defendants. With the current minimal checks on the use of these methods, abuse can, and seems to have proliferated, allowing for widespread dissemination of coercive settlement letters to individuals who may, or may not be actually infringing or within an arguably sufficient legal defense, such as fair use. Currently, § 512(h) requires a plaintiff to submit to the court a copy of notification, a proposed subpoena, and a sworn declaration that the purpose for which the subpoena is sought is to identify an infringer and that it will be used for no other purpose.²⁰⁵ Further, the notification required in § 512(c)(3)(A) requires a good faith declaration that the copyrighted material is owned by the claimant, and that the claimant believes that it is being infringed.²⁰⁶ If amended, this provision could serve to better deter indiscriminate suits and favor merit based suits. This provision should require a higher standard of sworn statement, and it should additionally require some due diligence on the part of the plaintiff. This higher threshold can be accomplished by the addition of a section (vii), which would, in addition to the requirements above, create an additional requirement of:

freedom-based distribution.”) (last visited Aug. 20, 2011); *see infra* Part V. *See generally* Raymond Shih Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 312–21 (2002).

²⁰⁴ *See e.g.*, *Copyright Law of the United States of America*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/title17/92preface.html> (providing a list of all amendments to the Copyright Act, which as of the date of this Article, total 62 separate amendments since 1976) (last visited Aug. 20, 2011).

²⁰⁵ 17 U.S.C. § 512(h) (2006).

²⁰⁶ 17 U.S.C. §512 (c)(3)(A)(v) (2006).

(vii) A statement that the complaining party has examined the purported infringement and believes in good faith that there is no potential fair use or exempt use, as defined by this Act, of the alleged infringer.

While this would certainly transfer an additional burden to the copyright owner, it would be minimal, and would stimulate a proper cost-benefit analysis by the content owner or troll prior to initiation of the lawsuit. The Copyright Act should serve to restore injured parties, not provide a windfall for those levying unmeritorious suits. Currently, suits are filed with minimal information and fail to take into account any potential fair or exempt uses the defendants might be engaging in.²⁰⁷ While this provision would require an increase in investigation costs for content owners, the protections given to consumers would be vast, and this would protect their private information from all except the most worthy of adversaries. Moreover, this would not remove the remedy of private enforcement for content owners, which is necessary in the current regime. It would only prevent abuse and cavalier filings.

Notably, this is not an entirely novel approach, as a similar rule was prescribed in the *Lenz* case.²⁰⁸ In *Lenz*, a YouTube movie (created by Lenz) which featured a baby dancing to a Prince song (“Let’s go crazy”) received a take-down notice from YouTube on the basis of copyright infringement for the use of the song.²⁰⁹ Lenz and the EFF sued Universal under § 512(f), claiming that Universal issued the takedown, with the knowing material misrepresentation that she was infringing their copyright.²¹⁰ Though the case is still pending, the court indicated that a copyright owner has some duty to investigate a potential fair use of an alleged infringer prior to issuing take down notices.²¹¹ *A fortiori*, a party who intends to send a letter demanding

²⁰⁷ See Moseley, *supra* note 81, at 326–27 (explaining that while fair use in the P2P context is not currently resolved, the courts, at least in dicta, have indicated some awareness and recognition of potential fair uses for P2P file sharers); see, e.g., Memorandum and Order at 35–37, *Sony BMG Music Ent. v. Tenenbaum*, No. 07cv11446-NG (D. Mass. Dec. 7, 2009).

²⁰⁸ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Ca. 2008).

²⁰⁹ *Id.* at 1152.

²¹⁰ *Id.* at 1155.

²¹¹ *Id.* at 1154. (“Accordingly, in order for a copyright owner to proceed under the DMCA with ‘a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,’ the owner must evaluate whether the material makes fair use of the copyright.”); this is of specific import in the *Righthaven* cases, which some have argued should require a DMCA take-down notice prior to the initiation of a lawsuit. See generally Esguerra, *supra* note 96. Should the law come to require Righthaven style trolls to issue take

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settlement and payment should have to surmount a similarly high burden prior to issuing these letters. Congress should take the opportunity to close the loop on the predictive fair use analysis, requiring in demand letters and subpoenas what the courts are beginning to require in take down notices. The Amendment above would create this burden, and protect alleged infringers and innocent infringers from these potentially coercive settlement claims. However, while this provision would provide substantial protection for the victims in the newspaper and blog context, this type of amendment would not likely protect the movie and music sharers, who do not potentially have a fair use defense. Thus, an alternative amendment is necessary to protect their interests, while vindicating the interests of content owners simultaneously.

B. DMCA Amendment #2: Deterring Meritless Lawsuits

As an alternative to the proposed Amendment above, another regulation for protection should be implemented to protect alleged infringers burdened by unfounded speculative invoicing methods. Despite the potentially coercive nature of these settlement letters and their allegedly exploitative methods, technically these practices are legally sound (excepting the abuses of the DMCA listed above).²¹² Barring a wholesale ban on the practice, which is both unlikely and unprecedented, a new amendment should be inserted into the Copyright Act to punish actors who do not demand settlements within the confines of the existing legal structure or operate fairly. Thus, a new provision should be added which allows for substantial penalties, including treble damages, for attorneys who request subpoenas in bad faith, or who send settlement letters to innocent parties or those whom they know, or should have known, would be exempt. The proposed amendment would fit within the existing § 512(h) and should read:

(7). — Unless otherwise provided, any person who threatens a lawsuit by mail, electronically, or in person; or any person who issues requests for pretrial settlement of infringement claims after obtaining a subpoena under this section and who knows, or should have known, that the alleged settlement was based on false statements or misrepresentations, including material omissions, shall be liable for any damages,

down notices prior to the initiation of a lawsuit, a requirement that the filing party research and make a threshold determination that no fair use defense exists would decimate the frequency of these lawsuits.

²¹² See *supra* Part III.

including costs and attorneys' fees incurred by the alleged infringer, and any damages including costs and attorneys' fees of any service provider who is injured by such conduct as the result of the service provider relying upon such subpoena in removing or disabling access to the material or activity claimed to be infringing, or in disclosing the identity and private information of the alleged infringer. Treble damages shall be available in cases of willful or wanton disregard by the party obtaining the subpoena.

With this proposed Amendment, the party seeking a subpoena under § 512(h) would be required to perform some level of due diligence prior to its issuance of a wave of pretrial settlement letters. Importantly, though this Amendment would add some burden on content owners and trolls, it would not remove this settlement device from use; it would merely require that the use be merited by the facts and existing law, and make mandatory that which should already be ethically pursued. This provision would deter frivolous claims, and would prevent the innocent from being targeted, or being negligently caught in a web of disseminated claims. Further, this provision would provide draconian treble damages in its prevention of false claims, and deter their filings, supplementing the existing Rule 11 requirements. Most importantly, this provision does not hamstring plaintiffs, who may still sue alleged infringers and pursue the existing business model, so long as they are pursuing meritorious claims and are making these claims in good faith. This Amendment merely attempts to protect the innocent, who may not be able to defend a case or are pigeonholed by the collective action problem, by deterring frivolous suits.

These proposed amendments would serve to deter frivolous suits in two ways: (1) by requiring some due diligence on the part of the plaintiff prior to the issuance of coercive settlement letters and the filing of lawsuits; and (2) by creating substantial penalties for violations or misrepresentations in the pursuit of claims. These provisions are necessary not only for the protection of end users who are unaware of their rights, but to additionally act as a check on the growth and outsourcing of copyright infringement enforcement, which is arguably on a path toward becoming a form of electronic bounty hunting. However, while these provisions would serve, in the short run, to prevent the abuse of innocent infringers and protect the rule of law in this limited arena, they do not counteract the more systemic problem present in the speculative invoicing scheme, that of its misalignment with copyright's goals and purpose. Part V discusses

this conflict below.

V. MISALIGNMENT WITH COPYRIGHT FUNDAMENTALS

“Just at the time digital technology could unleash an extraordinary range of commercial and noncommercial creativity, the law burdens this creativity with insanely complex and vague rules and with threat of obscenely severe penalties.”²¹³

Aside from the granular problems stated above, and recognizing that the proposed amendments would in fact add to the problem astutely noted in the quote above by Lawrence Lessig, there is a global, more systemic conflict at issue within the realm of copyright enforcement litigation deserving mention. The practice of copyright law has devolved to a model of pure profiteering, with vindication generally coming in the form of a quick and dirty pre-trial settlement. More fundamentally, the law itself necessitates the hiring of an expert to analyze and decipher its labyrinthine procedures and regulations. Panning out, and examining the forest, as opposed to the trees, it seems questionable how any of these specific styles of litigation serve copyright law’s fundamental goal of promoting the progress of science and the useful arts.²¹⁴ This Part briefly analyzes the premises on which copyright law in America is based. It then questions whether the current copyright enforcement scheme and the use of speculative invoicing serve to incentivize authors to create, and whether or not the processes serve copyright law’s fundamental goals. It concludes with a preliminary recommendation for future amendment to the copyright regime and endorses in theory some manner of global reform.

Copyright law in America, as opposed to many other regimes, is premised on utilitarian notions.²¹⁵ Whereas Europe, most notably

²¹³ LAWRENCE LESSIG, *FREE CULTURE* 19 (2004).

²¹⁴ U.S. CONST. art. I § 8, cl. 8 (“The Congress shall have 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 . . .”).

²¹⁵ See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990) (“By contrast, [to the moral rights system in France] the U.S. Constitution’s copyright clause, echoing the English Statute of Anne, makes the public’s interest equal, if not superior, to the author’s. This clause authorizes the establishment of exclusive rights of authors as a means to maximize production of and access to intellectual creations.”); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154–55 (1975) (stating that the Copyright Act’s grant to the author is limited and delimited by exclusive rights. The author does not have an unlimited monopoly under her control merely by virtue of her being the author); see also Jessica Litman, *continued . . .*

France, considers copyright a moral right in the Lockean sense, inuring to the author upon creation and having inextricable ties to its creator,²¹⁶ American copyright law is premised on the foundation that progress is achieved by allowing proprietary works to pass back into the public domain, thus allowing for greater access, resulting in greater eventual societal growth.²¹⁷ This premise exists as a contract between the public and the creator, which confers a limited monopoly on the author, provided that the work passes to the public upon its termination.²¹⁸ The public domain purpose is reflected not only in the copyright laws but also in the patent laws.²¹⁹ It was no coincidence

The Public Domain, 39 EMORY L.J. 965, 970 (1990) (explaining the public goods problem and the need for incentives to create). For an extended analysis of the Statute of Anne and the development of Copyright law in America, see Laura N. Gasaway, *Copyright Basics: From Earliest Times to the Digital Age*, 10 WAKE FOREST INTELL. PROP. L.J. 241, 244 (2009) (“The grant of a limited monopoly to authors is predicated on the premise that the public benefits from the creative activities of the authors. The exclusive rights granted to the copyright owner are a necessary condition to the full realization of such creative activities.”).

²¹⁶ See, e.g., Ginsburg, *supra* note 215, at 991 (“French copyright law is said to enshrine the author: exclusive rights flow from one’s (preferred) status as a creator.”). For a theoretical underpinning of the moral right theory, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305–06 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690) ([E]very man has a *property* in his own *person*. . . . The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.”). For a critique of this theory, compare Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993), with Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 298–314 (1988).

²¹⁷ See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 790 (“The limitation on Congress’s power to grant copyrights only ‘for limited Times’—in tandem with the denial of copyright to matter which, by its nature, is not the original expression of an ‘Author’—protects and continually enlarges the public domain, which is as significant to the cause of learning as the creation and distribution of new works.”); see also Gordon, *supra* note 216 at n.236.

²¹⁸ See, e.g., *Sony Co. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”). But see Litman, *supra* note 215, at 1013–14 (arguing that the ‘quid pro quo’ justification of copyright law cannot explain the denial of protection for *scenes a faire*, neologisms, or the protection granted to facts in directories and catalogs).

²¹⁹ That both patents and copyrights exist for limited terms embodies the notion that protection is merely an incentivizing force and not one to reward authors

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that these two provisions would be linked in the Constitution, as the intent underlying both principles, copyright and patent, is the same: America's growth depends on creativity; creativity builds on earlier creativity, and there is nothing truly new under the sun.²²⁰ Thus, protection of intellectual property is a primary instrument for protecting creativity, but this is the by-product of a more fundamental goal; copyright law is predominantly a vessel for incentivizing creative and intellectual growth, with the eventual result being a rich and diverse public domain. Hence, the Constitution secures only for limited times to authors and inventors the right to exploit the value of their work.²²¹ Eventually the public is to receive the fruits of this labor, to build and create upon ad infinitum. However, some have argued that the tide respecting this delicate balance has shifted imperceptibly to a culture of creators' rights.²²²

Arguably, society has come to value the rights of authors and creators above all else, reflecting a moral or natural rights view,²²³ and resulting in complex laws and Sisyphean procedures for licensing and using others' work.²²⁴ While copyright in its infancy only protected against republication of others' works, it has evolved to encompass those who build upon or transform others' works as well.²²⁵ Lawrence Lessig, in his seminal account of societal regression away from free culture in America argues: "[T]he law's role is less and less to support creativity, and more and more to protect certain industries against competition."²²⁶ Despite this innocuous yet pervasive shift away from copyright's roots, the original tenants of copyright should still technically apply, and Congress should take the opportunity to force

exclusively. Contrast trademarks and trade secrets, which may exist in perpetuity so long as the statutory or common law factors and pre-requisites are met.

²²⁰ See Litman, *supra* note 215, at 966 ("The process of authorship, however, is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea."). For an interesting visual depiction of this theory, see Nina Paley, *All Creative Work is Derivative (Minute Meme #2)*, QUESTIONCOPYRIGHT.ORG (Feb. 9, 2011), http://questioncopyright.org/minute_memes/all_creative_work_is_derivative.

²²¹ U.S. CONST. art. I, § 8, cl. 8.

²²² LESSIG, *supra* note 213, at 18–19.

²²³ *Id.*

²²⁴ See generally T. Robert Rehm, Jr., *Navigating the Open Source Minefield: What's a Business to Do?*, 10 WAKE FOREST INTELL. PROP. L.J. 289 (2010) (explaining the necessity for diligence in, and how a business is to draft, review, and prepare licensing agreements in the digital age).

²²⁵ LESSIG, *supra* note 213, at 19.

²²⁶ *Id.*

back the tide of “creatorism” washing on its shores.

The discussion above regarding pre-trial settlement provides a perfect example of this trend—the current wave of lawsuits outlined above seemingly do nothing to promote or protect the fundamental goals of copyright law. In the beginning, the RIAA could plausibly argue that its suits were pursued for two reasons: (1) to recoup its hemorrhagic losses seen in the 1990s, and (2) to deter future downloading, thus incentivizing creation.²²⁷ Since the RIAA was representing authors and creators, these goals were not entirely misaligned with those of copyright law generally. Thus, these suits were arguably defensible, although the damages the RIAA pursued were not compensatory, nor at their core incentivizing, but were actually punitive and opportunistic.²²⁸ The current regime however, is even more attenuated and less defensible under the American quid pro quo utilitarian model. Within the modern speculative invoicing scheme, copyright trolls in many instances own the copyrighted work, be it through purchase as in the newspaper article cases, or assignment, as in some movie and music scenarios. These trolls are not vindicating creators’ rights and the system is not rewarding or incentivizing creation by allowing these third parties to profit. This regime does not incentivize creation, nor does it promote the progress of science. If anything, these actions stifle creativity by deterring any author reasonably aware of copyright enforcement from creating something that could begin to encroach on an earlier work.²²⁹ This, in fact, prevents creation in the most sinister of ways: the instant an author rejects an idea or stops the creative process to concern herself with copyright laws and restrictions, the creative process has been forever changed, even if imperceptibly, and the end product will never be the same as it would have been without this abortive interference.

These lawsuits seek not to recoup costs so that authors and inventors—or even future authors and inventors—can continue to create and add to the cultural milieu; they instead relish a system that makes infringement enforcement profitable. Trolls cannot be blamed for the existing system; that dubious distinction lies with those in Congress who have shifted the focus of copyright law from utilitarian ideals to one of moral rights. From a purely economic standpoint, the end of infringement would be a negative result for the trolls discussed above. The net profit margin on these lawsuits is much higher than any standards that record or movies sales would net. One classic

²²⁷ See Swartout, *supra* note 29, at 502–05.

²²⁸ See Elektra, *supra* note 182.

²²⁹ See Lawrence Lessig, *In Defense of Piracy*, WSJ.COM, (Oct. 11, 2008), <http://online.wsj.com/article/SB122367645363324303.html>.

example was evidenced by the RIAA suits in 2003, where the RIAA sued four students for a combined total of \$100 billion, which at the time, constituted six times the total profit of the film industry in 2001.²³⁰ Thus, this practice serves not to support and buttress copyright goals, but seeks to exploit gaps in the system which occur when underlying policy is distorted by conflicting positive rules drafted and lobbied by interested parties.

Therefore, Congress should reevaluate the current copyright regime as it stands, and recognize that Pandora has opened the box with regard to infringement on the Internet. The box is wide open, and the technological advancements that have emerged, including P2P technology and circumvention software, will continue to outpace enforcement regimes. As seen by file sharing websites like Napster, Grokster, Limewire, and The Pirate Bay, technology will continue to find new ways to provide free software, music, and movies on the Internet to an ever-increasing number of downloaders. Acknowledgment of this fact will catalyze evolving recognition that the current regime is incapable of accommodating this level of consumer access. The solution may be criminal enforcement against individual downloaders, and the current administration has indicated interest in pursuing IPR as a policy agenda.²³¹ Further, the solution may lie in continuing to sue file sharing websites as they present, in a game of veritable “Whac-a-Mole.”²³² An alternative solution may be to scratch the Copyright Act and start over, this time allowing consumer rights’ groups to have a seat at the negotiating table with the content owners who have traditionally drafted this legislation.²³³ No matter, the

²³⁰ LESSIG, *supra* note 213, at 51.

²³¹ Prioritizing Resources and Organization for Intellectual Property Act of 2008 (“PRO-IP Act”), Pub. L. No. 110-403, 122 Stat. 4256–4280 Sect. 301 (2008) (created an IP Czar dedicated to intellectual property enforcement); Combating Online Infringement and Counterfeits Act S. 3804, 111th Cong. (2009–2010); PROTECT IP Act, S. 968, 112th Cong. (2011) (pending) *available at* <http://leahy.senate.gov/imo/media/doc/BillText-PROTECTIPAct.pdf> (last visited Sept. 19, 2011); *see* Anti-Counterfeiting Trade Agreement (Informal Predecisional / Deliberative Draft Oct. 2, 2010), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Text_ACTA_02Oct2010-eng.pdf (last visited Aug. 20, 2011); *see also* ACTA Fact Sheet and Guide to Public Draft Text, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text> (last visited Aug. 20, 2011); *see also* ADMIN’S WHITE PAPER ON INTELL. PROP. ENFORCEMENT LEGISLATIVE RECOMMENDATIONS (March 2011), *available at* http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf (last visited Aug. 20, 2011).

²³² *See Electronic Whac-A-Mole Game Instructions*, HASBRO (2003), http://www.hasbro.com/common/instruct/Whac_a_Mole.pdf.

²³³ Drew Wilson, *Consumer Groups Want to Halt ACTA Negotiations*, *continued . . .*

system should be adjusted to recognize the difference between an author and an assignee, and delimit the protection granted to each. This is not unprecedented, as seen with VARA.²³⁴ Congress should create a distinction between these two types of IP enforcers, and should definitively create law making the current regime of speculative invoicing, which is ethically questionable, conclusively prohibited.

In the short run, while suits against individuals and websites will likely continue, the rest of these proposed solutions are unlikely to occur anytime soon. As explained above, the political currents seem to be moving toward a more content/current creator focused direction, and are less concerned with the public domain, future creators, or end users. Thus, the proposed amendments to the Copyright Act listed above should be adopted to provide an intermediary, stop-gap remedy that could serve to protect consumers from false or improper claims in the interim. Further, Congress should recategorize the types of actors allowed to enforce copyright and define and delimit the parameters of this allowance to both support creators' rights, and curtail assignee rights. In any case, Pandora's Box will not be closing anytime soon, nor will the contents of the box ever be reclaimed; consumers have embraced the evils that have come forth, and have vowed to defend them and prevent their reclamation.

VI. CONCLUSION

The current proliferation of reverse class actions and speculative invoicing has elucidated a chasm between the legal theory and the actual practice of copyright enforcement. Not only do some of the copyright enforcers described above allegedly abuse the procedures outlined in the Copyright Act, these types of enforcement fundamentally distort the purpose of copyright law and undermine the utilitarian goals on which the American system is premised. There are two solutions to these problems stated above, one of which focuses on the short term and the other on the long term. In the short term, Congress could amend the Copyright Act again, requiring further

ZEROPAID.COM (June 25, 2009), <http://www.zeropaid.com/news/86492/consumer-groups-want-to-halt-acta-negotiations>; see Mike Masnick, *Latest ACTA Negotiation Kicks Off By Making It Difficult For Consumer Rights Groups to Attend*, TECHDIRT (Sept. 22, 2010, 3:34 PM), <http://techdirt.com/articles/20100922/03550511108/>.

²³⁴ Visual Artists Rights Act of 1990 ("VARA"), Pub. L. No. 101-650, tit. VI, 104 Stat. 5089, 5128-33 (1990) (codified at 17 U.S.C. § 106A (2006)) (providing rights of attribution and integrity specifically, and exclusively to *authors* of certain visual works only; this distinction borders on the recognition of moral rights in an author, which runs counter to the utilitarian notions of American copyright law, but makes a valid distinction with regard to who should be able to enforce a copyright).

diligence on the part of plaintiffs' attorneys prior to the onset of litigation. Further, an amendment providing for severe penalties for improper techniques in pretrial settlement could make the current copyright enforcement scheme fair to both parties engaged in its system. The long-term solution is one debated heavily in all aspects of copyright scholarship; that of systemic reform. Copyright law's purposes and goals as a utilitarian model are undermined and eroded by the current enforcement regime. Moral rights have innocuously invaded the legal and corporate consciousness, and legislation has begun to reflect this paradigm as persuaded by these lobbies.²³⁵ Congress must eventually confront the labyrinthine structure of the Copyright Act and its internal inconsistencies, otherwise conflicts like those outlined above will continue to manifest as the Act falls hopelessly behind the rapid technology curve. The Legislature should rethink the current regime and should create a new model, re-focusing on creativity, sharing, and the public domain.

²³⁵ See generally 17 U.S.C. § 512 (2006); see generally 17 U.S.C. § 1201 (2006).