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Daniel Berenger-Russell

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THE WATER UNDER THE BRIDGE IS DARKENING—AN ANALYSIS OF COPYRIGHT LAW AND THE PREVALENCE OF COPYRIGHT TROLLS

Daniel Berenger-Russell*

ABSTRACT

In this time of modern technology and booming social media, the growth in intellectual property protection is no surprise. It logically follows that with more robust intellectual property protection there exists a greater chance of infringement. The likelihood of innocently infringing on a person's registered copyright is at an all-time high. Due to the increased likelihood of innocent infringement, "copyright trolls" have emerged and developed unethical business tactics to prey off "innocent infringement." Just like fairytale trolls who hide under bridges hoping to pester bystanders, copyright trolls also seek to burden peoples' days. Not only do copyright trolls prey off innocent infringement, but they also bait their copyrighted work to entice infringement. The federal Copyright Act (the "Copyright Act") was written in 1976 and is not structured to handle the abusive behavior employed by copyright trolls with the help of the internet. Courts have little stopping power against these trolls and must defer to legislative actions; and although courts constantly hear cases, they have yet to set any real precedent. One solution is for the Copyright Act to undergo substantive changes to make copying and reproducing copyrighted works more difficult with greater notice of their status provided to the everyday consumer. This Comment will dive into the waters beneath a troll's bridge to understand why courts have not put an end to their abusive tactics. The Comment will look at a possible amendment to the Copyright Act of 1976 that can provide a solution against abusive infringement claims in our modern technological age. The Comment then offers an analysis of the leading copyright troll case in New Mexico and how copyright troll cases heard in other jurisdictions may provide guidance to the District of New Mexico to help understand which defenses are most likely to succeed. Clarity amongst the courts paired with a legislative amendment

* J.D. Candidate, University of New Mexico School of Law, Class of 2024. Thank you to Deborah Peacock and Marco Santamaria for inspiring this piece. Thank you to my peer editors for your meticulous feedback and encouragement during the writing and editing process.

will hopefully provide relief to “innocent infringers” and at the same time provide information to the legal field on how to deal with copyright trolls.

INTRODUCTION

Harry is not your ordinary photographer. Harry wants to make some extra cash by luring in and trapping the Generation Z¹ through their travel blogs, Instagram posts,² and TikTok videos.³ Harry takes photos and puts them on his internet website, hoping some millennial will use the photos without Harry’s permission so that he can charge them for copying his work. Harry lies in wait.

Now picture this. On an ordinary summer afternoon, Monica decides to update her company Instagram page that sells merchandise associated with the Albuquerque International Balloon Fiesta. Monica quickly searches the internet for a nice picture of the Sandia mountains to encompass the natural beauty that New Mexico has to offer. Copy, paste, and presto, Monica’s Instagram page now has a beautiful mountainous post to incentivize customers into buying her merchandise.

Fast forward two weeks. Monica receives a letter in the mail from Harry demanding \$30,000 for copyright infringement of the mountain photograph, with nonpayment resulting in a lawsuit that could cost her \$150,000. How could this be? How could one “innocent” use of a mountain picture that was so easy to access lead to a six-figure demand for damages? This simple hypothetical depicts an increasingly common occurrence amongst individuals throughout the country where Harry is known as a “copyright troll” and Monica an “innocent infringer.” The truth is that copyright trolls employ unethical business tactics to make a living. Copyright trolls are individuals that “are more focused on the business of litigation than on selling a product or service or licensing their copyrights to third parties to sell a product or service.”⁴ Copyright trolls play a numbers game where they seek “quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.”⁵ More generally, “[p]laintiffs are deemed to be copyright

1. See *Generation Z*, WIKIPEDIA, https://en.wikipedia.org/wiki/Generation_Z [<https://perma.cc/VW83-967K>] (“Generation Z . . . is the demographic cohort succeeding Millennials and preceding Generation Alpha. Researchers and popular media use the mid-to-late 1990s as starting birth years and the early 2010s as ending birth years. Most members of Generation Z are children of Generation X or younger Baby Boomers . . . [a]s the first social generation to have grown up with access to the Internet and portable digital technology from a young age, members of Generation Z, even if not necessarily digitally literate, have been dubbed ‘digital natives.’”).

2. See *Instagram*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Instagram> [<https://perma.cc/DVR3-4H5R>] (“Instagram . . . is a photo and video sharing social networking service . . . The app allows users to upload media that can be edited with filters, be organized by hashtags, and be associated with a location—via geographical tagging. Posts can be shared publicly or with preapproved followers.”).

3. See *TikTok*, WIKIPEDIA, <https://en.wikipedia.org/wiki/TikTok> [<https://perma.cc/4887-YZPS>] (“TikTok . . . is a short-form video hosting service . . . [i]t hosts user-submitted videos, which can range in duration from 3 seconds to 10 minutes.”).

4. *McDermott v. Monday Monday, LLC*, 17cv9230 (DLC), 2018 WL 5312903, at *2 (S.D.N.Y. Oct. 26, 2018).

5. *Id.*

trolls when they employ ‘abusive litigation tactics to extract settlements.’”⁶ On the other side, innocent infringers are individuals who do not have proper notice to the copyright registration of a work.⁷ To prove their innocence, an individual must demonstrate “both (1) a subjective good faith belief that his conduct was innocent, and (2) that this belief was objectively reasonable under the circumstances.”⁸ Just like their fairytale counterparts who wait under a bridge solely to charge a fare for ordinary bridge crossers, copyright trolls impose unnecessary burdens on innocent infringers to pay for damages that they did not mean to inflict.

In the body of law that has developed over time, copyright trolls are a relatively recent occurrence arising out of the innovation and booming industry that has developed because of modern technology. The ease of access available to digital media users is ever increasing and yielding unprecedented copyright applications. But of course, what comes with more copyright applications and registrations is always an increased chance of violation. At the heart of our issue is *not* that Monica was wrongfully accused and charged with infringement; because Monica did infringe Harry’s copyright and the copyright owner is within his discretion to make a demand for remedy. The real issue is that copyright holders have the power to make such demands against parties who unwittingly infringe a copyright, and that the Copyright Act supports remedies for the infringer, however innocent.

Although the issue of copyright trolls only began two decades ago, copyright trolls are no stranger to the courts and legal system. The basis behind a copyright troll’s business tactic is to scare an infringer into a hefty settlement agreement. Studies have shown that most trolls succeed before the court’s legal intervention is required.⁹ Not only do copyright trolls succeed before their cases ever make it to trial, but the courts have failed to make any substantial holding in the few

6. *Freeplay Music, LLC v. Dave Arbogast Buick-GMC, Inc.*, No. 3:17-cv-42, 2019 WL 4647305, at *14 (S.D. Ohio Sept. 24, 2019).

7. *See, e.g., Golden v. Michael Grecco Prods., Inc.*, 524 F. Supp. 3d 52, at *66 (E.D.N.Y. 2021) (“Golden is not an innocent infringer because it was not objectively reasonable under the circumstances to believe that the Xena Photograph was free for any person on the internet to copy and repurpose. Golden avers that he believed that the image he found on Tumblr was ‘a promotional photograph,’ that was posted ‘with permission and was free to use.’ He offers no evidence beyond those statements. Accepting Golden’s argument would lead courts to apply lower statutory damages to any layperson’s use of the many copyrighted images available on the internet without notice of their copyrighted status. Moreover, Golden’s claim that he believed the Xena Photograph was ‘promotional’ cuts against his argument, because a ‘promotional’ photograph is, by definition, a commercial image. The mere fact that Golden found an image on Tumblr does not qualify him as an ‘innocent’ infringer, especially when he believed the image was promotional, and he is the proprietor of a website about the entertainment industry. Therefore, \$750 is the proper statutory damages award under the Copyright Act.”) (internal citations omitted).

8. *Id.* at *66 (quoting *Marshall v. Marshall*, No. 08 CV 1420 (LB), 2012 WL 1079550, at *25 (E.D.N.Y. Mar. 30, 2012)).

9. *See Matthew Sag & Jake Haskell, Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 573 (2018) (“Even when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to \$150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling. The plaintiffs play a numbers game, targeting hundreds or thousands of defendants and seeking quick settlements priced just low enough that it is less expensive for the defendant to pay than to defend the claim.”).

cases that do make it before a judge.¹⁰ This is largely due to copyright trolls feeding off the holes in the Copyright Act of 1976 (“Copyright Act”).¹¹

This Comment will attempt to understand why copyright trolls manage to succeed despite the existence of the Copyright Act and included within the Fair Use Doctrine.¹² Part I will discuss how copyright trolls persist in their practices by analyzing existing copyright law and how courts have applied the law in different jurisdictions. Included is an analysis as to why the Copyright Act is outdated. Part I also uncovers discrepancies among the jurisdictions and how the courts handle claims put forward in copyright troll cases. This analysis will reveal which jurisdictions are most likely to accept or deny a copyright troll’s argument and find which claims are most likely to succeed in a lawsuit, and the corresponding outcomes.

Part II searches for a remedy to this problem and provides information to practitioners on how to deal with copyright trolls. The first, and most crucial, solution is to amend the Copyright Act to remove the holes that lead to copyright troll success. Part II proposes an added layer of protection that makes copyrighted material more noticeable. The analysis will further show how troll analogies in the other areas of intellectual property can offer some guidance for copyrights. The most effective method to implement such changes is to clear the copyright troll waters through legislative change. But since legislative change can take considerable time to develop, Part II also seeks to offer useful information to practitioners on how to handle the ever-increasing claims that deal with copyright trolls. More specifically, Part II will dive into the leading copyright troll case from the District of New Mexico, the *Harrington* case, and analyze how a lack of precedent can be remedied by implementing key points from the foremost copyright troll cases in other jurisdictions.

I. THE EXISTENCE OF COPYRIGHT TROLLS

There are two reasons why copyright trolls have found success in recent years. First, the Copyright Act is no longer sufficient to provide protection for works that have been produced during the internet era that has increased accessibility and ability to be copied. Second, district courts nationwide have yet to make any substantial holding to limit the business tactics employed by copyright trolls. This Part explores each of these reasons in depth.

10. See generally *Harrington v. 360 ABQ, LLC*, No. 1:22-cv-00063-KWR-JHR, 2022 WL 1567094 (D.N.M. May 18, 2022); *Malibu Media LLC v. Duncan*, No. 4:19-cv-02314, 2020 WL 567105 (S.D. Tex. Feb. 4, 2020); *Malibu Media, LLC v. Doe*, No. 13-cv-01523-WYD-MEH, 2013 WL 4510363 (D. Colo. Aug. 26, 2013); *Malibu Media, LLC v. Doe*, No. 15 Civ. 4369(AKH), 2015 WL 4092417 (S.D.N.Y. July 6, 2015); *Mondragon v. Nostrak LLC*, No. 19-cv-01437-CMA-NRN, 2020 WL 607069 (D. Colo. Feb. 7, 2020).

11. See generally Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810).

12. See 17 U.S.C. § 107.

A. History of the Copyright Act and why it is no longer sufficient

Copyright law has always been a fundamental aspect of our nation, and with technology advancing, it only makes sense for copyright law to follow. This subsection begins by outlining the major updates and flaws to copyright law. Then, a breakdown of advancements in technology and the internet is discussed. Finally, this subsection concludes with an overview of the copyright registration process and rights that copyright trolls use to their benefit.

i. Important updates to the Copyright Act

Copyright protection has long been a staple of our nation's principles and history.¹³ Copyright protection obtained its greatest power from the United States Constitution in 1790 when Congress was granted the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴ This short sentence unlocked a vault offering protection to inventors, scientists, musicians, artists, photographers, and many others.¹⁵ With the basics of copyright protection laid out, creators nationwide sought protection.

After a series of revisions and decisive cases stemming from the Copyright Act of 1790,¹⁶ the final major update to the Copyright Act took place in 1976 and provided the following answers for creators: it reaffirmed duties of the Copyright Office to administer copyrights,¹⁷ offered extensions to the term of protection,¹⁸ and introduced the Fair Use Doctrine¹⁹ and First Sale Doctrine.²⁰ Finally, the Digital Millennium Copyright Act (DMCA) of 1998 insulated internet providers from liability of infringement when their subscribers copied an author's work without permission.²¹ These revisions not only provided answers to creators seeking protection but supposedly made the system more uniform and fair.

Amongst the revisions exists the largest flaw in the current Copyright Act: the lack of a notice of registration requirement. Although notice of copyright

13. See generally *A Brief History of Copyright in the United States*, COPYRIGHT.GOV, <https://www.copyright.gov/timeline> [<https://perma.cc/MRZ5-RWUC>] (providing a timeline of copyright interests in the United States dating back to 1790).

14. U.S. CONST. art. I, § 8, cl. 8.

15. See *What Does Copyright Protect?*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-protect.html> [<https://perma.cc/35YW-8CNY>] (explaining that copyright “protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.”).

16. See generally Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124; *Wheaton v. Peters*, 33 U.S. 591 (1834); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853); *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345 (Ct. Cl. 1973).

17. See Copyright Act of 1976, Pub. L. No. 94-553, § 706, 90 Stat. 2541, 2592 (codified at 17 U.S.C. § 706) (the Copyright Office was created in 1897 by Congress, but the Copyright Act sets out the duties of the Copyright Office).

18. See *id.* § 304, 90 Stat. at 2573–76 (codified as amended at 17 U.S.C. § 304) (copyright protection is currently the life of the author plus 50 years).

19. See *id.* § 107, 90 Stat. at 2546 (codified as amended at 17 U.S.C. § 107).

20. See *id.* § 109, 90 Stat. at 2548–49 (codified as amended at 17 U.S.C. § 109).

21. See Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–72 (codified as amended at 17 U.S.C. § 1201).

registration is required for all works registered prior to 1989,²² there has still been three notable changes to the Copyright Act that increasingly reduced the level of notice required.²³ First, the 1909 Act required the symbol “©” to be present on the work for copyright protection to exist.²⁴ Then in 1976, the Pre-Ratification of the Berne Convention relieved the harshness of the notice requirement by allowing a few works to have missing copyright symbols without the author losing rights.²⁵ Finally in 1989, the Post-Ratification of the Berne Convention completely “eliminated the notice requirement of U.S. copyright law prospectively.”²⁶ Congress encouraged notice by precluding individuals from asserting innocent infringement unless there was proper notice.²⁷ Clearly, the notice requirement has lost most of its authority, and this has left the door open for registered copyrights to exist with little to no notice to the public.

ii. *The internet has grown at a rate that the Copyright Act cannot keep up with*

When one stops and takes a look at the kind of work that was available for copyright protection in 1976, they see that copyright law formed in a time much different from the present day. Copyright laws developed in the “wake of the printing press.”²⁸ For much of its history, copyright law has “focused upon the protection of expressive works fixed in analog media—books, vinyl, tapes, films, and over-the-air broadcasting.”²⁹ In 1976, the internet was barely getting started. Originating as a research project in 1969, the internet did not become widely used among the public until the 1990s.³⁰ This means that the work receiving copyright protection consisted primarily of physical and tangible media such as: books, audio recordings on hard disks, film reels, and other physical media. The world of technology has come a long way from these physical forms of media. It is more common for music to be on cellphones and handheld devices; movies to be played on streaming services than purchased as hard copies; and social media as the main mode for transmission of news, photos, and videos than hard copy newspapers.³¹ Filing digital media for copyright protection is simply not the same as filing physical media for copyright protection.

Technology has evolved at a rate that is impossible for the law to keep up with because of the rapid growth of the internet. The number of internet users in the world has gone from less than 100 million in the 1980s to well over 2.5 billion users

22. Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, *Copyrights, Trademarks and State IP Protections*, in 2 INTELL. PROP. IN THE NEW TECH. AGE 516, 524 (2022).

23. *See id.* at 549–50.

24. *See id.* at 549.

25. *See id.*

26. *Id.* at 550.

27. *See id.*

28. *Id.* at 519.

29. *Id.* at 660.

30. Timothy B. Lee, *The Internet, Explained*, VOX (May 14, 2015, 12:38 PM), <https://www.vox.com/2014/6/16/18076282/the-internet> [<https://perma.cc/VMR9-RKSH>].

31. *See* Michael Griffin, *How News Has Changed*, MACALESTER (Apr. 10, 2017), <https://www.maclester.edu/news/2017/04/how-news-has-changed> [<https://perma.cc/JK6H-QCAK>].

in the 2010s.³² This exponential growth in internet users worldwide is projected to continue growing due to ease of access and availability of the internet worldwide.³³ The growth in internet users has been followed closely by an entrenchment of social media into everyday life. Social media is almost an everyday essential to people worldwide by providing them with updates from around the world.³⁴ Today, social media is used on average by over 80% of adults aged 18–49, over 60% of adults aged 50–60, and around 45% of adults over 65 years old.³⁵ This heavy usage of social media on apps, such as Facebook, Twitter, Instagram, and TikTok, leaves many users open to frequently taking and using other people’s social media posts as their own.

iii. Copyright filing and registration in the modern age

Most content in the modern age is available to be copyrighted and open for protection. Common social media platforms typically post media in the form of photos or videos. Photos and videos are prime candidates for copyright protection depending on the creators’ concerns. With the increase in social media usage, it makes sense that there is an increase in copyright registrations. Copyright law is a spectrum where on one end are the major parts of the Copyright Act that awards authors with immense protections, and on the other end is leniency granted by the Fair Use Doctrine. Copyrights exist without actually filing in any legal system; but filing with the Copyright Office awards the creator certain privileges and benefits that include:

1. Public Record of Ownership—Making your ownership public is important for notifying the public to prevent their unauthorized usage and is also key for copyright lawsuits as proof of ownership needs to be shown in order to win.
2. Presumption of Ownership—Registration defaults to the courts a presumption of your ownership and thus places a burden to demonstrate otherwise on anyone seeking to challenge it.
3. The Ability to Enforce Copyrights by Filing a Copyright Infringement Lawsuit—To even bring a lawsuit for copyright enforcement or infringement requires registration with the Copyright Office.
4. Eligibility for Statutory Damages, Attorney Fees, and Costs of Suit—statutory damages are only available in a copyright lawsuit if the work was registered prior to infringement. Also, other forms of damages are usually difficult to prove.
5. Protection Against Importation of Infringing Works—Registration allows the creator to participate in the U.S. Customs and Border Protection

32. See *Worldwide Internet Users 2013 Forecast*, INSIGHT, at 1 (Oct. 26, 2013), https://stats.areppim.com/archives/insight_internetxfcstx2013.pdf [https://perma.cc/3355-5TMG] (showing an increasing curve of internet users in millions from 1980 to 2025).

33. See *id.*

34. See *Social Media Fact Sheet*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/internet/fact-sheet/social-media> [https://perma.cc/J4AG-2EHA] (showing social media usage over time based on various factors, such as age, race, gender, and income).

35. See *id.*

program which allows seizure of imported goods that violate your copyright rights.³⁶

There are, of course, numerous other benefits, but those listed above are essential to this Comment. Based on those benefits listed above, it is obvious that an individual wishing to abusively make money off settlement agreements would need registration first to succeed. Gaining copyright registration is fairly straightforward—simply file an application (electronic or via mail) with the U.S. Copyright Office and wait for an answer.³⁷ As long as an individual truly is the original author and did not derive the work from another, then a registration will be issued. The process is relatively easy, and any social media creator or internet publisher should have no issues filing. But what about infringement?

Once a creator has taken the necessary steps to gain copyright registration, their work is protected and ready for any ensuing litigation. But lawsuits only arise when the author wishes to enforce protection or claim infringement. Thus, to bring a claim of copyright infringement, the plaintiff has the burden of proving by a preponderance of the evidence that: (1) the plaintiff is the owner of a valid copyright; and (2) the defendant copied original expression from the copyrighted work.³⁸ This standard of copyright infringement does have limitations. As mentioned earlier, the Fair Use Doctrine (“Fair Use”) was implemented in the Copyright Act in 1976.³⁹ Fair Use sets out to allow individuals to use copyrighted material to a certain degree without permission from the owner.⁴⁰ Fair Use allows flexibility to people who would otherwise be liable for copyright infringement. Codified in Section 107 of the Copyright Act, Fair Use determines whether an individual’s use is fair by considering the following factors:

1. The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.⁴¹

Two kinds of damages are available to copyright holders.⁴² Actual damages are awarded to the copyright holder if they can prove the value of damages suffered

36. Antonoplos & Associates, *The Benefits of Copyright Registration*, ANTONOPLOS & ASSOCS.: ATT’YS AT LAW (Apr. 5, 2021), <https://www.antonlegal.com/blog/the-benefits-of-copyright-registration> [<https://perma.cc/T7L8-QVP8>].

37. See generally *Register Your Work: Registration Portal*, COPYRIGHT.GOV, <https://www.copyright.gov/registration> [<https://perma.cc/8G6V-TH2P>] (directing to the Copyright Office registration portal).

38. See 17 U.S.C. § 501.

39. See Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107).

40. See *Copyright and Fair Use: A Guide for the Harvard Community*, HARVARD UNIV. OFF. OF THE GEN. COUNS., at 8 (May 31, 2016), https://ogc.harvard.edu/sites/hwpi.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_bea_july_2023.pdf [<https://perma.cc/3SN3-S39S>].

41. 17 U.S.C. § 107.

42. See 17 U.S.C. § 504.

and the amount of profits the infringer obtained.⁴³ Actual damages tend to be difficult to prove because the act of proving the value of the damages suffered is wildly variable depending on the type of work, how much it was copied, and what it meant to the author.⁴⁴ The second, and more common type of damages awarded to authors is statutory damages which allow the author to recover \$750 to \$30,000 for all infringement involved in the action.⁴⁵ If the court finds that the infringement was willful, then at its discretion, the court may award up to \$150,000 in statutory damages.⁴⁶ Statutory damages are only available to authors who register their work with the Copyright Office within three months of publication, or before any infringement begins.⁴⁷ The reason that copyright trolls extort statutory damages is because statutory damages make it easier to scare defendants into quick settlements.⁴⁸ The high risk of significant monetary loss in a lawsuit with statutory damages is outweighed by the smaller risk of settling for lower damages.⁴⁹ For this reason, the most common route taken by plaintiffs is the statutory damage path.

With an overview of the two ends of the Copyright Act spectrum reviewed, it is useful to take a look at the statistics behind copyright claims. In the fiscal year of 2000, the Copyright Office registered 515,612 works of art.⁵⁰ Twenty years later, the Copyright Office received 456,815 registrations for works of art.⁵¹ In fact, roughly 500,000 copyrights were registered each year from fiscal year 2000 to 2021. But when compared to 1980, just shortly after the Copyright Act was enacted, the number of copyrights registered was less than it has averaged since 2000—464,743.⁵² Although not significantly less, the important distinction is the type of material being copyrighted.

Alongside the increase in registration, there has been an even larger increase in the number of copyright infringement claims. Since 2008, the number of copyright cases filed has fluctuated, but generally has still increased as depicted in Chart 1 below.⁵³

43. See 17 U.S.C. § 504(b).

44. See *What Are Statutory Damages and Why Do They Matter?*, COPYRIGHT ALL. [hereinafter *Statutory Damages*], <https://copyrightalliance.org/faqs/statutory-damages-why-do-they-matter> [<https://perma.cc/GF9D-RBG4>] (“Statutory damages are important because the alternative type of damage award is ‘actual damages,’ which must be proven in court and can be very difficult to establish. Actual damages include profit that the copyright owner lost as a result of the infringement (for example, a license fee) as well as any additional profits the infringer received as a result of the infringement.”).

45. See 17 U.S.C. § 504(c)(1).

46. See 17 U.S.C. § 504(c)(2).

47. *Statutory Damages*, *supra* note 44.

48. Connie Boutsikaris, *The Rise of Copyright Trolls*, DUNNER L. (Mar. 28, 2017), <https://dunnerlaw.com/the-rise-of-copyright-trolls> [<https://perma.cc/R8MC-PX6C>].

49. *Id.*

50. U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, at 4–5 (2000), <https://www.copyright.gov/reports/annual/2000/ar2000.pdf> [<https://perma.cc/5DFP-FR6M>].

51. U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, at 8 (2021), <https://www.copyright.gov/reports/annual/2021/ar2021.pdf> [<https://perma.cc/5ZT8-ENZ4>].

52. U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, at 4 (1980), <https://www.copyright.gov/reports/annual/archive/ar-1980.pdf> [<https://perma.cc/65N4-9A5P>].

53. *Fewer Copyright Infringement Lawsuits Filed*, TRAC REPS. (Sep. 29, 2017), <https://trac.syr.edu/tracreports/civil/483> [<https://perma.cc/53CH-79DG>].

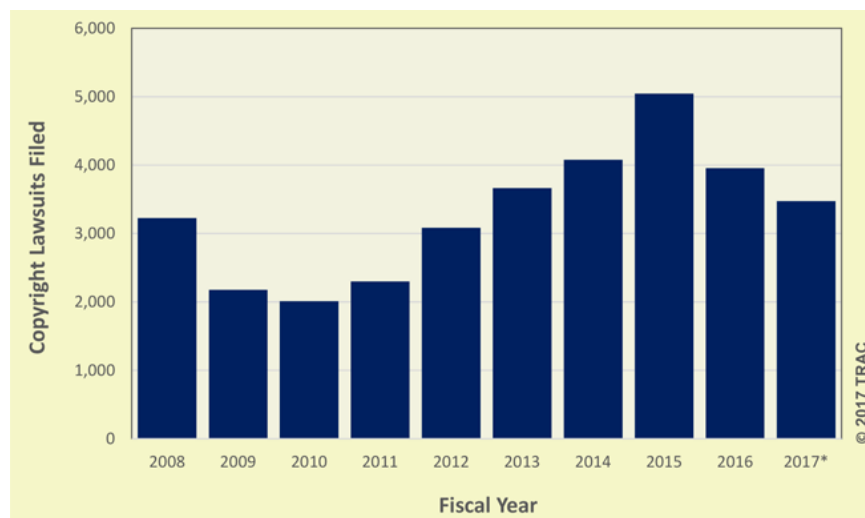


Chart 1: Shown is the gradual increase in the number of copyright lawsuits filed in Federal District Court from 2008 until 2017. A general upward trend can be seen despite the uncharacteristic drop between 2016 and 2017. The lower number in 2017 is partly due to data only being taken from the first 11 months of the year.

The dip following the 2015 fiscal year is largely due to 2015 having an unprecedentedly high number of claims and 2016 and 2017 simply tapering off back to the higher number averages seen in 2013 and 2014.⁵⁴

In between this fine line of the protections guaranteed by the Copyright Act and the relief granted by the Fair Use Doctrine lies the eerie realm where entities known as copyright trolls reside. With the help of an increased number of copyright registrations from social media alongside the easy accessibility of the internet, copyright trolls use the statutory damages in the Copyright Act to profit off of individuals. Background into the claims copyright trolls bring to various courts can guide and provide solutions for the U.S. District Court for the District of New Mexico (“District of New Mexico”).

B. A look into how other states have handled copyright trolls

An analysis of copyright trolls in the District of New Mexico shows that judges are unclear on how to deal with copyright trolls and are therefore hesitant to make any strong precedent to put order to this issue. There is only one copyright troll case that has been heard in the District of New Mexico despite numerous undocumented settlements.⁵⁵ To attempt to clear the murkiness of the copyright troll waters and resolve the growing concerns of this Court, a look into other federal district courts will offer useful insight to guide New Mexico’s path. The Tenth Circuit has heard a total of fifteen copyright troll cases; most of which are located in the District of Colorado. To expand this search, cases from Arizona and Texas are

54. *See id.*

55. *Harrington v. 360 ABQ, LLC*, No. 1:22-cv-00063-KWR-JHR, 2022 WL 1567094 (D.N.M. May 18, 2022).

examined, as those states are most geographically proximate to New Mexico. A few other distant state cases are also analyzed for their relevance in this area of law.

A major strategy of copyright troll litigation is to file numerous suits against unnamed “John Doe” defendants and hope for settlements from a few of them (commonly known as “John Doe suits”).⁵⁶ Although John Doe and “Multi-Defendant John Doe”⁵⁷ lawsuits are not the focus of this Comment, nor exclusive to copyright trolls, a look into the statistics surrounding them can provide background of the quantity of suits being filed by copyright trolls. Chart 2 below⁵⁸ depicts the increase in John Doe suits nationwide:

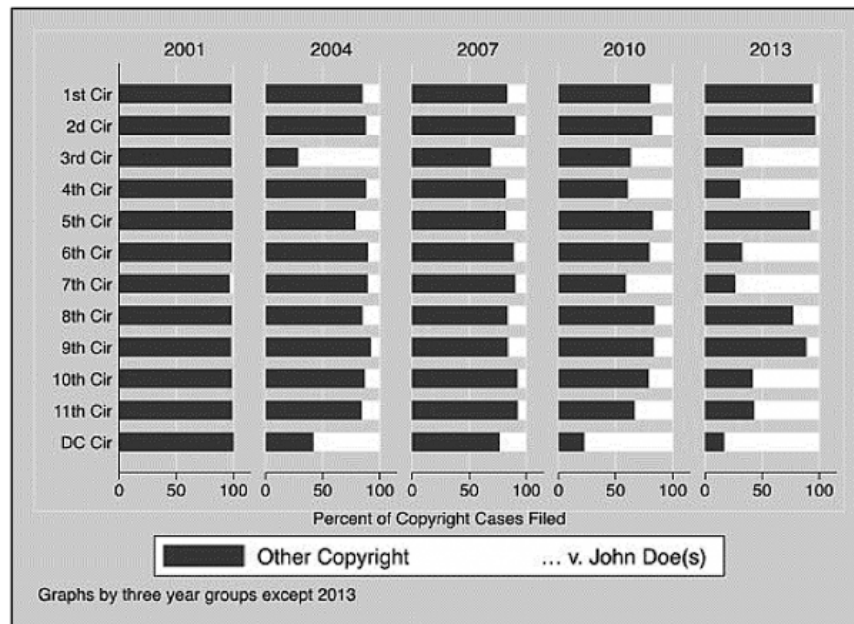


Chart 2: Shown is the percentage of copyright cases filed annually that are John Doe suits. A gradual trend of increasing John Doe suits is likely indicative of an increased number of copyright troll cases being asserted.

From Chart 2, it is clear that copyright cases in several Circuits are being replaced by John Doe suits, indicative of the growth in copyright troll cases. But among the other states, New Mexico is in desperate need for guidance on copyright trolls. New Mexico has seen an enormous spike in its film industry in recent years.⁵⁹ The State has seen unprecedented spending towards growing the film industry and is recognized as having the “gold standard” (when it comes to incentivizing the

56. See generally Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 (2015).

57. See *id.* at 1114–15.

58. *Id.* at 1117.

59. See Adrian Gomez, *New Mexico Film Industry Brings in Record \$855.4M*, RIO RANCHO OBSERVER (July 17, 2022), <https://trobsobserver.com/new-mexico-film-industry-brings-in-record-855-4m> [<https://perma.cc/M88Q-95K5>].

industry.⁶⁰ It is likely for this growth in film production to be followed by ensuing copyright registrations and inevitable litigation. With the District of New Mexico only having heard one case dealing with copyright trolls, it will be difficult for the state to protect against them without seeking guidance from the other states.

The one District of New Mexico case is *Harrington v. 360 ABQ, LLC*.⁶¹ In this case, Mr. Harrington was a photographer and 360 ABQ was a real estate brokerage firm.⁶² 360 ABQ used one of Mr. Harrington's photographs of the Albuquerque skyline without his permission.⁶³ Mr. Harrington sued for copyright infringement and 360 ABQ brought counterclaims of copyright misuse.⁶⁴ The Court dabbled through the idea of Mr. Harrington being a copyright troll by discussing his settlement tactics, but ultimately only dismissed Mr. Harrington's motion to dismiss the counterclaim.⁶⁵ The Court acknowledged that copyright trolls exist and that Mr. Harrington could be one, but the Court made no legal determination on how to deal with them.⁶⁶

In the Part II analysis, the Comment dives deeper into the reasoning behind the District of New Mexico's decision in *Harrington* and each court's decision in a few select cases from other jurisdictions. Analyzing cases from other jurisdictions will reveal the merits behind copyright troll cases. This will help clear inconsistencies in the Tenth Circuit and provide recommendations to the District of New Mexico as to how to deal with copyright trolls in the future.

II. AMENDING THE COPYRIGHT ACT AND SETTING UP NEW MEXICO CASE LAW ON COPYRIGHT TROLLS

The issue of copyright trolls is most effectively resolved through an amendment of the Copyright Act. Unfortunately, statutory amendment is not a quick process and can take years to go from proposal to taking effect.⁶⁷ Thus, providing guidance to the District of New Mexico on how other federal district courts have handled copyright trolls can provide a speedy remedy to illuminate the waters and help alleviate copyright troll issues while any potential statutory amendments are pending. This analysis is therefore divided into three sections to provide a rounded solution to copyright trolls. The first section suggests an amendment to the Copyright Act that will offer registrants an optional extra layer of protection for copyrighted work that prohibits the registrant from bringing infringement demands typical of copyright trolls. The second section provides an example of the actual usage and implications of the Copyright Act amendment. The third section analyzes copyright troll cases from other federal district courts and synthesizes the most effective

60. *Id.*

61. No. 1:22-cv-00063-KWR-JHR, 2022 WL 1567094 (D.N.M. May 18, 2022).

62. *Id.* at *1.

63. *Id.*

64. *See id.*

65. *See id.* at *3-4.

66. *See id.*

67. *See* H.R. Doc. No. 110-49, at 3 (2007), <https://www.govinfo.gov/content/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf> [<https://perma.cc/3LJ6-XQ5D>] (Congress is only required to assemble once a year to review potential statutory changes).

methods from each to develop a comprehensive solution for the District of New Mexico. Pieced together, the three sections of this analysis will help propose relief from the abuse that copyright trolls direct towards innocent infringers.

A. An amendment to modernize the Copyright Act

With the Copyright Act becoming increasingly outdated as technology and social media advance at unprecedented rates, it is no surprise that amendments to the Copyright Act are imminent and necessary. Among various amendments that are designed to address the divide between the Copyright Act and technology, there is currently no amendment that seeks to suppress copyright trolls by requiring notice of registration.⁶⁸ This subsection explores a proposed amendment to the Copyright Act to offer guidance to the Legislature on solutions to copyright troll abuse. Simply put, the proposed amendment sets out to offer an optional route to take when registering a copyright with the Copyright Office. The optional route would require the registrant to put a small watermark in the corner of social media or internet photos and videos. If the registrant chooses not to implement the watermark, then they cannot bring mass lawsuits that entail the maximum statutory damages against innocent infringers due to the lack of notice given. If the registrant chooses the watermark option, then they will be guaranteed to have enforceable rights and the availability of infringement remedies because any person who copies their work has notice of the copyright and is no longer an innocent infringer.

Insight and analysis into previously proposed Copyright Act amendments offers useful support for this currently proposed amendment. In 2021, U.S. Senator Thom Tillis proposed an amendment to the DMCA.⁶⁹ The purpose of this proposal was to implement a notice-and-staydown system as opposed to the current notice-and-takedown system that was introduced in the DMCA.⁷⁰ Both systems require the author to send a notice letter to website owners and service providers that host copyrighted material and request that they take down the material that is infringing on a copyright.⁷¹ The difference is that the notice-and-staydown system sets out to not only takedown the infringing material, but ensure it is not reposted.⁷² Although pushed back until 2022, Tillis's proposed amendment does not provide relief from copyright trolls because it only seeks to stop service providers from hosting infringed material. The material is still infringed upon because there was no effective notice

68. See *Legislative Developments*, COPYRIGHT.GOV, <https://www.copyright.gov/legislation> [<https://perma.cc/B4MB-HJKK>] (providing all currently pending Copyright Act amendments).

69. See Christina L. Martin, Jodi Benassi, Anisa Noorassa & Robert W. Zelnick, *2022 IP Outlook Report: The Developments Shaping Copyright Law*, MCDERMOTT WILL & EMERY, at 3, <https://www.mwe.com/pdf/2022-ip-outlook-report-the-developments-shaping-copyright-law> [<https://perma.cc/8D3F-A2J6>].

70. See *What is the DMCA Notice and Takedown Process?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/what-is-dmca-takedown-notice-process> [<https://perma.cc/T5RA-H6UK>] (the notice-and-takedown system requires service providers to takedown copyrighted material off their websites upon a demand letter from the author).

71. See *id.* "A service provider can be an internet service provider (e.g., Comcast), website operator (e.g., eBay), search engine (e.g., Google), a web host (e.g., GoDaddy) or other type of online site-operator."

72. See Martin et al., *supra* note 69.

that the content was copyrighted. Tillis's statute is structured around stopping real, illegal infringers who are intentionally trying to copy work without the author's permission. This is different from copyright trolls who are trying to get individuals to innocently copy their work to trigger litigation and force settlements. Tillis's proposal effectively stops a different kind of infringement than what happens with copyright trolls. So, despite being useful, this proposal does not provide the relief that is needed and does not serve to stop copyright trolls.

A key takeaway from the Tillis proposal is the emphasis on the need for notice within the Copyright Act. Tillis's proposal targets a different area of copyright infringement than the issue of copyright trolls does, but the issue of notice is still consistent with this Comment. This amplifies the main point of the watermark for this Comment's proposed amendment—a heightened notice requirement.

Another proposed solution comes from a law review article that discusses the impact of statutory damages in the Copyright Act. Published in 2012, author James DeBriyn writes about why statutory damages need to be removed from the Copyright Act in order to halt copyright trolls.⁷³ DeBriyn argues that the removal of statutory damages would stop copyright trolls because it disincentivizes their mass litigation business model while still protecting copyright holders by compensating them through actual damages.⁷⁴ One critique of this argument is that actual damages are difficult to prove and therefore insufficient for copyright holders who have had their work copied by actual infringers. The main intention behind the introduction of statutory damages was, and still is, to provide a feasible remedy to copyright holders when showing proof of the monetary value lost to them through infringement is too difficult.⁷⁵ This is often the case because showing the loss in the value of the work due to increased distribution by the infringer is nearly impossible to prove with certainty. But this is not said to undermine DeBriyn's argument because it is undoubtedly a good solution: removing statutory damages eliminates copyright trolls by denying them the main source of income in their business model. Inadvertently, however, removing statutory damages poses a major threat to legitimate copyright holders who fear serious infringement and therefore may ultimately cause more harm than relief.

The proposed Copyright Act amendment removes statutory damages to those who abuse them. By offering an optional route where the registrant places a small watermark somewhere on their copyrighted graphical work, they are guaranteed the right to statutory damages as long as they do not file mass lawsuits that could be frivolous. This right is still guaranteed to individuals who did not choose the watermark option (as long as they do not bring mass lawsuits). Filing mass frivolous lawsuits is not defined solely by the large number of infringement actions and attempts to negotiate settlements; but also by a copyright owner that “is more focused on the business of litigation than selling a product or licensing their copyrights to third parties.”⁷⁶ Waiving the optional route removes the registrant's

73. See generally James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79 (2012).

74. See *id.* at 106–110.

75. See *Statutory Damages*, *supra* note 44.

76. *Oppenheimer v. Scarafile*, No. 2:19-cv-3590, 2022 WL 2704875, at *4 (D.S.C. July 12, 2022).

access to statutory damages if it can be shown that they are filing mass lawsuits (i.e., sending demand letters to hundreds or thousands of individuals as opposed to demanding relief from a few individuals who may have infringed). With increased protection comes easier access to rewards through damages.

Examining the other areas of intellectual property there exists an issue of patent trolls that is a monster of its own kind. However, the remedies provided in this area can offer guidance in the context of copyright trolls. “Patent trolls purchase the rights to a patent and wait for another company to unsuspectingly infringe on the patent.”⁷⁷ Patent trolls force the infringing company to pay high licensing fees through the threat of permanent injunction.⁷⁸ Patent trolls abuse the system in a substantially different way from copyright trolls, yet the method of obtaining patent rights carries substantial guidance towards how the method of registering a copyright should be amended. A key element in obtaining a patent is notice of its publication. This principle is codified in Title 35 of the U.S. Code, where a patent owner must give “notice to the public . . . either by fixing thereon the word ‘patent’ or the abbreviation ‘pat.’, together with the number of the patent.”⁷⁹ An applicant is not entitled to any damages or relief if this notice was not performed correctly.⁸⁰ Despite gaining its protections from the same place as copyrights,⁸¹ patents require substantial notice of registration to the public while copyrights do not. Again, shown is the purpose behind implementing the optional watermark for copyrighted works in order to increase notice.

Inherent within the proposed copyright troll amendment is the fear of degrading, diminishing, or otherwise altering the creativity that is behind a copyrighted piece of work with a watermark placed over it. The watermark does not need to be massive or distracting; a simple “©” or similar notation in an inconspicuous—yet noticeable—location of the work. A transparent symbol or text is sufficient because the point is to simply offer supplemental notice to a reader to help deter accidental infringement. Whatever symbol or text used is sufficient as long as any reasonable person would be put on notice that the work is copyrighted. The premise behind this watermark is that most accidental usage comes from readers scrolling through social media or the internet, seeing a picture or video they like, and screenshotting, copying, and pasting the work for their own use. This entire process can take place without ever reading an image or video caption—which is where most copyright notice attempts can be found.

With the basis of this proposed amendment well-grounded in previous proposals, comments, and areas of law, this optional route amendment to the Copyright Act is the best solution because it effectively provides notice to readers and at the same time leaves the option for statutory damages available to serious copyright holders who are not trying to abuse the system. Implementation of this proposed amendment into the Copyright Act would slow copyright trolls and lead to a fairer system for protecting creative works. While providing a long-term and

77. DeBriyn, *supra* note 73, at 104–05.

78. *Id.* at 105.

79. 35 U.S.C. § 287(a).

80. *See id.*

81. *See* U.S. CONST. art. I, § 8, cl. 8 (both patents and copyrights originate in the U.S. Constitution).

permanent solution, amending the Copyright Act through Congress is a lengthy process and would not provide immediate relief from copyright trolls. Therefore, the solution to remediate this situation before Congress acts is to have the federal district courts lead the way over the copyright troll bridges.

B. A working example of the Copyright Act amendment.

Before moving on to the solution provided by the courts, it is helpful to visualize what the optional Copyright Act amendment would look like in practice. Take for instance this beautiful image of the Sandia Mountains.⁸² In this hypothetical example, the photograph was taken one evening at sunset. The photographer copyrighted and posted the photo to their website with a small copyright logo inside the description. This particular photographer can be described as a copyright troll.



Figure 1: A scenic photograph of the Sandia Mountains and Rio Grande River.

Now comes your typical millennial. They want to use the photograph on their Instagram page to gain followers. By searching the internet for “Sandia Mountains” this picture pops up and they copy, paste, and post it to their Instagram page. Because the millennial did not get permission from the copyright troll photographer, she receives a demand letter requesting \$30,000 for copyright infringement. Intimidated by the high price and risk of litigation, but persuaded by a lower risk settlement option, the millennial settles with the photographer and they go their separate ways. An innocent infringer loses out and a copyright troll makes money.

Let us implement the proposed Copyright Act amendment. When registering a photo with the Copyright Office, the photographer is given the option to take the new amended route or deny it. By denying the amended route, the

82. G. Thomas, *Sandia Mountains and the Rio Grande* (photograph), WIKIMEDIA COMMONS (June 2, 2006), <https://commons.wikimedia.org/wiki/File:SandiaMtnNM.jpg> [<https://perma.cc/C6KC-KQKT>].

photographer is barred from seeking maximum damages in lawsuits against innocent infringers through statutory damages and must resort to the much harder to prove actual damages. This means the millennial is not intimidated by the demand letter and proceeds to pursue litigation. Because the amended route was not taken, the copyright troll loses out to the innocent infringer.

Now consider the flip side where the photographer took the amended route. The photographer would be required to place a watermark on the photograph to offer more notice to the public, as seen in Figure 2.

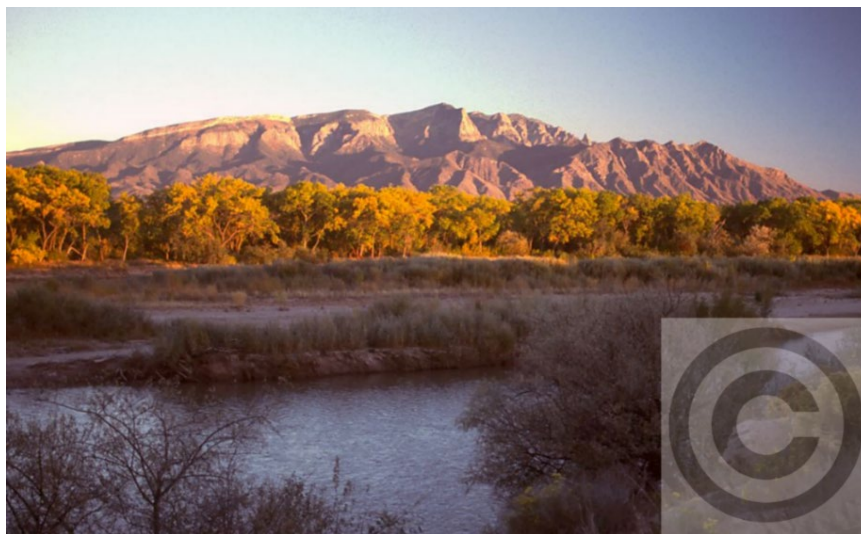


Figure 2: A scenic photograph of the Sandia Mountains and Rio Grande River with the watermark from the proposed amendment.

When the millennial comes along to find a picture of the Sandia Mountains, they will not likely use the photographer's photo without asking for permission. This is because the millennial would want to use the photograph without the copyright logo present. If the millennial chooses to use the photo regardless, then the photographer is free to demand their \$30,000 because they put the public on ample notice.

It is clear to see how innocent infringement is less likely to happen when authors take the amended route. Key to this amendment is that that the route is optional, meaning authors have the choice to implement the watermark. Any ordinary author that registers their work is not likely to bring frivolous lawsuits demanding the maximum statutory damages, so they are less likely to use the amended route. But copyright trolls who intend to bring frivolous lawsuits would be at a severe disadvantage in those lawsuits if they chose not to use the watermark; and if they chose to use the watermark, then there would be much less innocent infringement. The optional route amendment offers various solutions to the issues found between copyright trolls and innocent infringers. What is still needed is guidance to the District of New Mexico on how to deal with copyright trolls in the instances where cases make it that far.

C. Copyright troll guidance for New Mexico from other district courts

The lack in copyright troll cases heard in the District of New Mexico means that the Court has not developed any substantial binding law on the issue. With increased copyright registrations nationwide, it is likely that more disputes will make their way into the Court. Several parties nationwide have been known to use mass copyright litigation to pressure potential infringers into settling quickly for large values.⁸³ This can even be seen in New Mexico through the one case that has made it to the District of New Mexico—the *Harrington* case.⁸⁴ These national copyright trolls are exploiting the ease-of-access of the internet and social media to quickly settle cases and make a profit. With a high number of complaints leading to settlements, more cases are bound to find their way into court. By analyzing iconic cases from other federal district courts, the merits can be deciphered and patched together to provide the District of New Mexico with a smooth solution for crossing over a copyright troll’s bridge.

i. *An examination of the rationale from federal district courts in neighboring states and iconic cases from other federal district courts*

The first and most infamous case to provide insight into a court’s rationale when dealing with copyright trolls is *Malibu Media LLC v. Duncan*.⁸⁵ In this case, Malibu Media accused Duncan of downloading, copying, and distributing a complete copy of Malibu Media’s adult video films found on the internet.⁸⁶ Duncan moved to dismiss under FRCP Rule 12(b)(6) stating that “Malibu Media is an abusive and harassing litigant.”⁸⁷ The court noted that Malibu Media was a prolific litigant because it had filed “7,183 cases nationally from 2012 to 2018,” 5,982 infringement cases between 2012 and 2016, and “Malibu Media accounted for nearly 62 percent of all *John Doe* [copyright] cases filed during 2015 and 2016.”⁸⁸ The court even acknowledged that Malibu Media had a reputation for being a copyright troll.⁸⁹ Unfortunately, this case was not decided on the merits as the court could not properly address copyright trolls on a motion to dismiss.⁹⁰

Malibu Media was notorious for bringing copyright troll cases and the Southern District of Texas was not the only place where a federal district court took action against Malibu Media. In *Malibu Media, LLC v. Doe*, the District of Colorado made an attempt to put Malibu Media, and consequently copyright trolls, to rest.⁹¹

83. See *Copyright Trolls*, EFF, <https://www.eff.org/issues/copyright-trolls> [<https://perma.cc/3QUM-ZVTL>] (discussing several groups that “have begun to experiment with using mass copyright litigation to extract settlements from individuals. These copyright trolls try to grow businesses out of suing Internet users—their tactics include targeting large groups of anonymous ‘Doe defendants’ to improperly minimize their court costs and exploiting the massive damages in copyright law in order to pressure defendants into settling quickly.”).

84. No. 1:22-cv-00063-KWR-JHR, 2022 WL 1567094 (D.N.M. May 18, 2022).

85. No. 4:19-cv-02314, 2020 WL 567105 (S.D. Tex. Feb. 4, 2020).

86. See *id.* at *1.

87. *Id.* at *2.

88. *Id.* at *3.

89. See *id.*

90. See *id.* at *4, *6.

91. No. 13-cv-01523-WYD-MEH, 2013 WL 4510363 (D. Colo. Aug. 26, 2013).

In the Colorado case, like other Malibu Media cases, an unnamed defendant copied one of Malibu Media's adult films without its permission and Malibu Media came after them through mass infringement actions.⁹² Differently to the theme of these cases, the District of Colorado found that Malibu Media was not a copyright troll but "rather an actual producer of adult films."⁹³ The District of Colorado acknowledged that Malibu Media was entitled to bring suit by nature of the Constitution, but ultimately found that the unnamed defendant did not produce enough evidence of innocent infringement.⁹⁴ This resulted in the District of Colorado allowing Malibu Media to have access to the unnamed defendant's IP address.⁹⁵

The result of this case, and many others around the nation, is expected and not out of the ordinary simply because an unnamed defendant cannot produce evidence of their innocent infringement without revealing their identity. Malibu Media's tactic in these cases is to persuade the court into revealing the defendant's identity through their IP address, which is a string of characters that uniquely identifies each computer over a network, provided by the defendant's internet service provider.⁹⁶ The common trend that follows is settlement between Malibu Media and the defendant who has had their identity revealed to Malibu Media. Most defendants do not pursue any further litigation because of the fear of embarrassment and decreased reputation due to the copyrighted subject matter being adult films.

One federal district court really sunk their teeth into stopping Malibu Media in the 2015 case *Malibu Media, LLC v. Doe*, decided by the Southern District of New York.⁹⁷ The facts are the same as the other Malibu Media cases with unlawful copying of an adult film, but the difference in this case is that the Southern District of New York elected to deny Malibu Media access to the defendant's IP address.⁹⁸ The court acknowledged Malibu Media's business tactic of "aggressively suing for infringement" and then seeking "quick, out-of-court settlements which, because they are hidden, raise serious questions about misuse of court procedure."⁹⁹ The court reasoned that Malibu Media's strategy was "clearly calculated to embarrass defendants."¹⁰⁰ Because revealing the IP address only identifies the person paying for Internet access, the unlawful copying could come from any person within a household or business with Internet access.¹⁰¹ Therefore, courts should carefully and strictly offer assistance to copyright trolls only when there is clear evidence that the infringement was not innocent.¹⁰²

92. *Id.* at *1, *3.

93. *Id.* at *3.

94. *Id.* at *3-4.

95. *See id.* at *4.

96. *See id.* at *1.

97. No. 15 Civ. 4369(AKH), 2015 WL 4092417 (S.D.N.Y. July 6, 2015).

98. *See id.* at *6.

99. *Id.* at *3.

100. *Id.* at *4.

101. *Id.* at *4-5.

102. *See id.* at *6.

Malibu Media has had varied success across different federal district courts nationwide.¹⁰³ The important concept to keep in mind from the series of Malibu Media cases is that copyright trolls tend to lose if the defendants can produce enough evidence of their infringement to be found innocent. Furthermore, defendants in the Malibu Media cases are more likely to settle quickly because they do not want to be sued for watching adult films.

In 2020, the District of Colorado made further efforts to tame copyright trolls in *Mondragon v. Nostrak LLC*.¹⁰⁴ In this case, Nostrak posted images on a company Instagram page that were allegedly taken from Mondragon without their permission.¹⁰⁵ The District of Colorado court deemed Nostrak to be an innocent infringer because it did not receive the photographs directly from Mondragon and immediately removed the images upon accusation.¹⁰⁶ Yet Mondragon continued to pursue statutory damages up to \$150,000 per each copyrighted work.¹⁰⁷ Nostrak went on to accuse Mondragon of being a copyright troll and moved to dismiss the case for being “frivolous.”¹⁰⁸ The District of Colorado concluded that not enough evidence was presented to dismiss the case and it would have been sufficient evidence for Nostrak to provide proof that Mondragon had “committed discovery misconduct, ignored court orders, or done anything else sanctionable under Rule 11.”¹⁰⁹ Consequently, they chose not to address the issue of copyright trolls because a motion to dismiss was filed and denied.

The key takeaway from *Mondragon v. Nostrak LLC* is that Nostrak would have succeeded, as an innocent infringer, against Mondragon, a copyright troll, if it did not move to dismiss the case. The District of Colorado acknowledged that Mondragon’s lawsuit was frivolous and that Nostrak infringed innocently, but Nostrak did not succeed because of a failure to provide authority for a motion to dismiss. It is likely that Nostrak would have succeeded if it did not move to dismiss.

Another iconic case that helps define the reaches of copyright trolls is *Oppenheimer v. Scarafile*.¹¹⁰ In this case, Oppenheimer took photos of the South Carolina coastline and made them available for sale or licensing on their website.¹¹¹ Scarafile found and used two of these photos unwittingly without Oppenheimer’s permission.¹¹² The court laid out that copyright trolls are not represented solely by the number of lawsuits filed, but rather this in combination with a copyright owner that is more focused on the business of litigation than selling their actual work.¹¹³ The court denied motions for summary judgment filed by both parties because there

103. See, e.g., *Malibu Media, LLC v. Doe*, 319 F.R.D. 299 (E.D. Cal. 2016) (discussing that Malibu Media is usually coined to be a copyright troll but are still considered to win the lawsuits because they determine the IP address of unnamed defendants who likely settle after to avoid embarrassment).

104. No. 19-cv-01437-CMA-NRN, 2020 WL 607069 (D. Colo. Feb. 7, 2020).

105. *Id.* at *1.

106. *Id.* at *2.

107. *Id.* at *1.

108. *Id.* at *2–3.

109. *Id.* at *3.

110. No. 2:19-cv-3590, 2022 WL 2704875, at *4 (D.S.C. July 12, 2022).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *4.

were genuine disputes of material fact as to “whether Plaintiff [was] more focused on the business of litigation than licensing or selling his work, and whether Plaintiff employ[ed] abusive litigation tactics.”¹¹⁴ The court said that Oppenheimer could be a copyright troll because he derived “a large majority of his income from copyright litigation.”¹¹⁵ The court also discussed that statutory damages were available for each infringed work,¹¹⁶ meaning that if Oppenheimer was successful he could have been awarded \$150,000 for each of the two photos used by Scarafile. Again, we see a case where a copyright troll was acknowledged to exist by the court, but the case was not decided on the merits because of procedural issues.

The cases cited above were chosen for their close proximity to the District of New Mexico and for the iconic status among the courts in handling copyright trolls. Upon close examination of the court’s rationale in each, common threads begin to emerge that can be used to provide guidance to the District of New Mexico.

iii. The District of New Mexico should handle copyright troll cases by taking the most effective solutions from other federal district courts

Nestled within each of the cases chosen in the previous analysis section are trends and patterns that are representative of the best methods for district courts to handle copyright trolls. Piecing them together can help lead the District of New Mexico onto stable ground on the other side of the bridge to handle copyright troll infringement lawsuits in the future. Only one copyright troll case has been decided in the District of New Mexico, so it is best for the court to build precedent by beginning with the foundation presented by this case. Then, the court can take the important and beneficial aspects from the other district court cases to build the remainder of the District of New Mexico’s copyright troll mitigation strategy. This combination will effectively lay out a strategy for the court to deal with copyright trolls in the future.

What happened in *Harrington v. 360 ABQ, LLC* is that 360 ABQ alleged in counterclaims that Mr. Harrington used “abusive litigation tactics and threats, including demanding settlements well in excess of the damages.”¹¹⁷ The court referenced the Malibu Media cases and acknowledged the existence of copyright trolls nationwide.¹¹⁸ But the court declined to decide whether Mr. Harrington was a copyright troll because Mr. Harrington moved to strike 360 ABQ’s allegations and the District Court only denied this motion.¹¹⁹ No legal decision was rendered about allowing or stopping copyright trolls in courts. Importantly though, this case was not decided on the merits because of motions by one party to dismiss the case. This is precisely one of the trends we see in other district court cases.

The two main trends found in the mentioned district court cases are that (1) copyright troll cases are not decided on the merits when one party motions to dismiss

114. *Id.*

115. *Id.* at *10.

116. *Id.* at *4–5.

117. *Harrington v. 360 ABQ, LLC*, No. 1:22-cv-00063-KWR-JHR, 2022 WL 1567094, at *3 (D.N.M. May 18, 2022).

118. *See id.*

119. *See id.* at *3–4 (this decision was rendered May 18, 2022, and further motions are likely to be brought).

the case or some other procedural issue arises; and (2) courts find copyright trolls to be in the wrong when the infringer can produce enough evidence of their innocence. This means that the District of New Mexico needs to adopt these standards to alleviate the abuse caused by copyright trolls.

First, since most copyright troll cases are not decided on the merits because of one party motioning to dismiss the case, the District of New Mexico needs to make it clear that further litigation will result in a determination on a copyright troll's status. As seen in the *Mondragon*, *Oppenheimer*, and *Malibu Media* (Southern District of Texas) cases, the courts mention that there was potentially enough evidence for them to find the plaintiff to be a copyright troll, but the courts were not allowed to make a decision on that merit under a procedural issue. The courts emphasize that they were barred from deciding the issue of copyright trolls solely because of the motion to dismiss and summary judgment. These courts further gestured that no damages were allowed if a plaintiff was found to be a copyright troll. These cases ultimately led to no further litigation and likely some sort of settlement—meaning the copyright troll won. An emphasis by the District Court and encouragement from the judges for the defendants to pursue further litigation even after motions to dismiss are denied is likely to lead to success for an innocent infringer, and if not, then at least a lesser settlement value from the District Court scaring copyright trolls.

Furthermore, in both the *Mondragon* and *Malibu Media* (Southern District of Texas) cases, although the court did not decide the plaintiffs' status as a copyright troll, the court still elected to mention facts and details that described the abusive litigation tactics employed by the defendants. In *Mondragon*, the court discussed the plaintiff's counsel, Mr. Liebowitz, and his history of being known as a copyright troll.¹²⁰ The court cited to other cases discussing sanctions to Mr. Liebowitz from failures to follow court rules and from filing hundreds of copyright infringement cases with attempts to win quick settlements.¹²¹ After pointing out all of these facts, the court still declined to make any legal determination about the plaintiff as a

120. *Mondragon v. Nostrak LLC*, No. 19-cv-01437-CMA-NRN, 2020 WL 607069, at *2 (D. Colo. Feb. 7, 2020).

121. *Id.* at *2 (“Mr. King also accuses Plaintiff’s counsel, Mr. Liebowitz, of being a ‘copyright troll’ and quotes extensively from courts in other federal districts that have criticized or sanctioned Mr. Liebowitz for his litigation conduct in similar copyright cases. For example, Mr. Liebowitz was recently held in contempt of court by the United States District Court for the Southern District of New York. *See Berger v. Imagina Consulting, Inc.*, Case No. 7:18-CV-08956-CS, (S.D.N.Y. Nov. 13, 2019) (Minute Entry for proceedings held before Judge Cathy Seibel where the court declined to vacate the findings of contempt based on failure to produce death certificate and failure to pay contempt sanctions, finding that Mr. Liebowitz willfully lied to the court and willfully failed to comply with lawful court orders). Other courts have sanctioned Mr. Liebowitz for his failure to follow basic courtroom procedures and rules, including for suing in locations where there was obviously no personal jurisdiction over the defendant. And another judge in the Southern District of New York, the Honorable Denise Cote, has publicly branded Mr. Liebowitz a ‘copyright troll’ for his firm’s practice of filing hundreds of cases asserting claims of copyright infringement allegedly ‘focused on obtaining quick settlements priced just low enough that it is less expensive for the defendant to pay the troll than defend the claim.’ *McDermott v. Monday Monday, LLC*, No. 17-CV-9230-DLC, 2018 WL 5312903 at *2 (S.D.N.Y. Oct. 26, 2018) (citing numerous cases where lawsuits filed by Mr. Liebowitz have been dismissed, settled, or otherwise disposed of before any merits-based litigation).”).

copyright troll because they denied the motion to dismiss.¹²² Similarly in *Malibu Media*, the court explicitly laid out statistics such as Malibu Media filing 7,183 cases in six years, 5,982 infringement actions in four years, and Malibu Media accounting for 62% of all John Doe copyright cases between 2015 and 2016.¹²³ Even after considering these statistics, the court elected to not discuss the merits of Malibu Media being an actual copyright troll because of the motion to dismiss. The court choosing to discuss facts behind the plaintiff being a copyright troll without making a legal determination places a copyright troll stamp on these plaintiffs that effectively degrades their reputation and dissuades them from engaging in abusive tactics in the future.

Second, the District of New Mexico needs to consider all evidence of infringement to determine whether the defendant's usage was actually innocent. This is a twofold determination: (1) the District Court needs to put strict consideration into the evidence and (2) the defendants need to put further effort into providing proper evidence for the court to consider. This is effectively depicted in the *Mondragon* case where the defendant offered ample evidence of their innocence such as obtaining the photographs indirectly from the plaintiff and taking the photos down immediately upon notice of the infringement action. The court had explained that the defendant would have succeeded on innocent infringement if they had not moved to dismiss; suggesting that proof of innocent infringement is enough to defeat a copyright troll. Even more so, Malibu Media's success as a copyright troll is based on the fact that the defendants in their cases have been unable to procure sufficient evidence of their infringement being innocent due to the embarrassment factor.

Therefore, the solution for the District of New Mexico lies in combining the court's ability to point out copyright troll tactics even when there is a motion to dismiss and further applying a strict review for evidence of innocent infringement when there is potential that the plaintiff could be a copyright troll. This synthesis of key elements from other federal district courts can serve to provide the District of New Mexico with a method of dealing with copyright trolls temporarily as any statutory amendments await and long term if the problem persists.

CONCLUSION

As technology continues to grow and advance to better the world, it is imperative that copyright law follows suit. With the younger generations finding new ways to express their ideas, thoughts, and developments, it is inevitable that further modicum of creativity will evolve into forms we cannot yet fathom. To cope with this evolution, the Copyright Act of 1976 needs to be amended to tie up loose ends and fill holes that unethical individuals take advantage of. But amending the Copyright Act to deal with copyright trolls is only the beginning. Copyright trolls are just the first wave of creative individuals who utilize advancements in technology to take advantage of outdated law. It is likely that a different breed of copyright troll will develop in the future. There is no telling how technology will advance, so it is important that copyright law is updated as regularly as possible to keep up.

122. *See id.* at *3.

123. *Malibu Media LLC v. Duncan*, No. 4:19-cv-02314, 2020 WL 567105, at *3 (S.D. Tex. Feb. 4, 2020).

Not only does copyright law need to be updated, but the federal district courts need to begin putting their foot down. Federal district courts have acknowledged the unethical behavior undertaken by copyright trolls and have gone out of their way to label such individuals but have done little to nothing to curb their tactics. Only a small number of copyright troll cases make it to the courts due to the business strategy of encouraging settlements. This means that the few cases that do make it to the courts are the worst of their kind. The courts being lenient and allowing trolls to exist, despite labeling them, offers a green light to copyright trolls to continue their practices. Without any substantial ruling, the copyright troll era is bound to continue and only worsen.

The water under the bridge needs to be lightened through copyright law amendment and court decisions. Copyright trolls are only getting started and without speedy resolution to this issue, the water under the bridge will only get darker.