

Columbia Law School

Scholarship Archive

Kernochan Center for Law, Media, and the Arts

Research Centers & Programs

2013

You Can't Go Home Again: The *Righthaven* Cases and Copyright Trolling on the Internet

Ian Polonsky
Columbia Law School

Follow this and additional works at: https://scholarship.law.columbia.edu/law_media_arts



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Ian Polonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 Colum. J. L. & Arts 71 (2013).

Available at: https://scholarship.law.columbia.edu/law_media_arts/48

This Article is brought to you for free and open access by the Research Centers & Programs at Scholarship Archive. It has been accepted for inclusion in Kernochan Center for Law, Media, and the Arts by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

You Can't Go Home Again: The *Righthaven* Cases and Copyright Trolling on the Internet

Ian Polonsky*

INTRODUCTION

In the Norwegian folktale *Three Billy Goats Gruff*, three goats seeking to get fat on the greener pastures of a distant hillside were stopped at the foot of a bridge by a “great ugly troll, with eyes as big as saucers, and a nose as long as a poker.”¹ The troll allowed the first two goats to pass when they assured him of a larger goat to come. Unfortunately, the troll bit off more than he could chew: the third goat was larger than the troll and not the least bit intimidated. The goat launched himself at the troll and smashed him to bits, providing safe passage for him and his smaller companions. The goats easily reached the field and ate heartily, but not without cost: they soon ate so much that they were “scarce able to walk home again; and if the fat hasn't fallen off them, why they're still fat.”²

This ancient folktale provides an apt metaphor for a group of recent copyright infringement cases. A copyright “troll” company called Righthaven became known as the first copyright troll when it filed infringement claims against websites and bloggers on behalf of newspaper publishers. At first Righthaven successfully overwhelmed its targets, which agreed to pay a small fee to make the lawsuit go away. Once the more formidable adversary of the Electronic Freedom Foundation entered the fray, however, Righthaven met a similar fate as that of its Norwegian predecessor. But like the goats which reached their goal only to pay the price of never being able to return home, the champions of a free Internet lost an opportunity to reaffirm the protections they so ardently seek.

Part I of this Note traces the ideological origins of Righthaven from trolling practices in a sister area of intellectual property law, patent law, to analogous practices in copyright. Part II examines the particular forms of trolling that Righthaven employed to protect newspaper articles and the court system's reaction to the company's practices. Part III argues that the Righthaven decisions may have won the battle against one copyright trolling campaign but leave unresolved important issues of jurisdiction, the scope of fair use exemptions to copyright law

* J.D. Candidate 2013, Columbia Law School. Many thanks to Professor Robert Clarida for his invaluable insights. Thanks also to David Ortenberg, Robert Bernstein, Bissie Bonner, Jack Browning and the staff of the Columbia Journal of Law & the Arts for all their hard work. Finally, a special thank you to my wife, Lee Polonsky, for her love and support throughout this process.

1. Peter Christen Absjrnsen & Jorgen Me, *The Three Billy-Goats Gruff*, in POPULAR TALES FROM THE NORSE 272 (George Webbe Dasent trans., Kessinger Publ'g 2004) (1859).

2. *Id.*

on the Internet and the future of the newspaper industry in an increasingly competitive digital marketplace. The *Righthaven* cases might have brought some much needed clarity to a host of important legal and policy questions, but the courts' swift and punitive rebuke of a particularly abusive troll amounted to a missed opportunity for development of the law. Ultimately, the failure of the judiciary to provide much needed guidance is two-fold: copyright holders and potential infringers are left with little guidance as to what forms of use of copyrighted material on the Internet are appropriate, and the rationale behind maintaining certain copyright enforcement regimes and decrying others is left to critical rather than judicial interpretation.

I. INTELLECTUAL PROPERTY TROLLS

A. PATENT TROLLS

To best appreciate characteristics and methods of copyright trolls, one must begin with their older siblings: patent trolls. The term patent troll first emerged from its metaphoric cave in *The Patent's Video* (1994), an educational introduction to the patent system.³ The narrator analogizes a patent to a "border" whereby a user would need the patent holder's permission to cross between two pieces of information.⁴ As the video notes, a broader patent (or larger border) increases the likelihood of other parties requesting permission to cross, but the specter of wider coverage provides an incentive for trolls to hide along the borders only to extract a fee from those who wish to cross.⁵ In other words, the troll is not interested in building or maintaining the bridges or even in making the trip across to bring pieces of information together; rather, it is interested in lurking in the shadows and reaping financial benefits from those who have little choice but to cross.

There is some debate over the origin of the term "patent troll," but there exist some general consensus as to the behavior it describes.⁶ The patent troll model works as follows: the troll seeks out opportunities to buy patents on the cheap,

3. See Labelleuve, *The Original Patent Troll*, YOUTUBE (Jan. 28, 2007), <http://www.youtube.com/watch?v=lOGozFzHkhs>.

4. *Id.*

5. *Id.*

6. Peter Detkin, former general counsel of Intel, typically receives credit for coining the term in the late 1990s. See Joff Wild, *The Real Inventors of the Term "Patent Troll" Revealed*, INTELL. ASSET MGMT. MAG., (Aug. 22, 2008), <http://www.iam-magazine.com/blog/detail.aspx?g=cff2afd3-c24e-42e5-aa68-a4b4e7524177>. In an ironic twist, Detkin now serves as managing director of Intellectual Ventures, considered one of the largest active patent trolls. See R.G., *Has the Enemy of Patent Trolls Become One?*, CIO INSIGHT (Dec. 12, 2005), <http://www.cioinsight.com/c/a/Trends/Has-the-Enemy-of-Patent-Trolls-Become-One/>.

Although patent trolling is not the focus of the present inquiry, it is worth noting that patent trolling has come to encompass a wide array of "unsavory" patent related behavior. See, e.g., Erik Sherman, *Patent Troll Auctions Free Passes from Lawsuits: Mobile in Its Sights*, CBS MONEY WATCH (Apr. 7, 2011, 5:05 PM), http://www.cbsnews.com/8301-505124_162-43449830/patent-troll-auctions-free-passes-from-lawsuits-mobile-in-its-sights/ (reporting on the auction by patent troll Round Rock Research of covenants not to sue, rather than the more traditional activity of selling the patents themselves).

often during bankruptcy auctions or from producers hoping to sell under-utilized patents to fund other research projects.⁷ With full patent ownership in hand, the troll seeks out third-party manufacturers and developers that are either using the patent without permission or that may need permission to use the patent for future projects. A troll then either threatens or files an infringement suit in the hopes of extracting a large settlement figure, to “make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”⁸ In other words, “patent troll” is a derogatory designation for certain nonpracticing entities (NPEs) that extract money from innovators without developing or using a new invention. Whether or not trolls contribute to the fundamental purpose of patent and copyright law is a highly contested issue. The Constitution empowers Congress to “promote the Progress of Science and useful Arts,” and it is unclear what progress a patent holder makes if she does not develop any new invention or improve upon an existing one.⁹ Patent trolls undoubtedly place stresses on the patent system: license fees extracted by trolls are disproportionate to the added value to the alleged infringer’s use of said patent.¹⁰ Furthermore, litigation and policing costs created by troll-brought infringement suits raise the costs of manufacturing.¹¹ Less clear, though, is whether all components of trolling are necessarily deleterious to the patent field.¹² First, it is little questioned that patent trolling is an effective mode of revenue generation.¹³

7. For bankruptcy auctions, see Michael Kanellos, *Patent Auctions: Lawyer’s Dream or Way of the Future?*, ZDNET (Mar. 3, 2006, 4:00 AM), http://web.archive.org/web/20070403015832/http://news.zdnet.com/2100-9595_22-6045371.html; Glenn G. Lammi, *Will a New Patent Troll Emerge from Nortel IP Auction?*, FORBES (Jun. 27, 2011, 11:03 AM), <http://www.forbes.com/sites/docket/2011/06/27/will-a-new-patent-troll-emerge-from-nortel-ip-auction>. For patent sale as a cash-generator, see Howard Mustoe, *Small Tech Companies Sell Patents to Raise Cash*, N.Y. TIMES (Jan. 4, 2009), http://www.nytimes.com/2009/01/14/business/worldbusiness/14iht-patent.4.19365587.html?_r=0; Gene Quinn, *Kodak Prepares to Sell 10% of Patent Portfolio to Stay Viable*, IP WATCHDOG (Nov. 5, 2011, 1:56 PM), <http://www.ipwatchdog.com/2011/11/05/kodak...to-sell...patent.../id=20232/>.

8. Alan Murray, *War on ‘Patent Trolls’ May be Wrong Battle*, WALL ST. J., Mar. 22, 2006, at A2. The pressure toward settlement under the threat of litigation is a pervasive phenomenon not confined to intellectual property. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

9. U.S. CONST. art. I, § 8, cl. 8; see also Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006). For more on the costs of patent trolls, see James Bessen et al., *The Private and Social Costs of Patent Trolls* (Boston U. Sch. Law, Working Paper No. 11-45, 2011), available at <http://www.groklaw.net/pdf3/BessenJFordJMeurerM091911.pdf>; Aimee Groth, *The Astronomical Cost of Patent Trolls: \$500 Billion*, BUS. INSIDER (Sept. 20, 2011), http://articles.businessinsider.com/2011-09-20/strategy/30179206_1_patent-reform-patent-system-patent-troll.

10. See Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J. L. SCI. & TECH. 1 (2007).

11. Kal Raustiala & Chris Sprigman, *How “Patent Trolling” Taxes Innovation*, FREAKONOMICS (Jul. 11, 2011, 2:01 PM), <http://www.freakonomics.com/2011/07/11/how-patent-trolling-taxes-innovation/>.

12. Sujitha Subramanian, *Patent Trolls in Thickets: Who Is Fishing Under the Bridge?*, 30 EUR. INTEL. PROP. REV. 5, 182–188 (2008) (U.K.) (examining the arguments in favor of patent trolling and arguing for a look beyond patent trolls to the underlying problems of the patent system more broadly).

13. See Barrie McKenna, Paul Waldie & Simon Avery, *Patently Absurd*, GLOBE & MAIL (Feb. 21, 2006), <http://www.theglobeandmail.com/incoming/patently-absurd/article1095310/?page=all>. This

Second, whereas nearly all entities deemed trolls are NPEs, one might not portray all NPEs such as universities and nonprofit research institutions as patent trolls.¹⁴ Third, the most effective patent trolls often amass an enormous catalog of patents in order to cover a wide array of potential development projects.¹⁵ Manufacturers often benefit from this amassing of patents via access to a one-stop shop rather than an endless series of individual gatekeepers each of which can singlehandedly bottleneck an entire project.¹⁶ Fourth, patent trolls create a secondary market for patents, which provides incentive for inventors to create patents and promotes core property theories of exchange and alienability.¹⁷

In the patent context, then, there is open debate over how best to handle the proliferation of trolling. Recent court cases have placed limitations on patent infringement litigation.¹⁸ Additionally, Congress' passage of the America Invents Act may further curb certain troll-like behavior.¹⁹ Ultimately, though, patent

can be boiled down to three key factors. First, patent filings often overlap with one another, providing a well armed patent troll ample opportunity to find an infringing or duplicative patent. Second, even a successful patent defense lawsuit can run upwards of \$1 million pretrial and \$2.8 million for a complete defense. Third, as non-producing entities (NPEs), patent trolls typically lack the incentive to cross-license potentially overlapping patents between producers so as to avoid crippling litigation costs. In other words, it is often much easier to settle a case for large figures, even though a defendant would likely win should the case ever go to court. See BRIAN T. YEH, CONG. RESEARCH SERV., AN OVERVIEW OF THE "PATENT TROLLS" DEBATE (2012), available at <http://www.fas.org/sgp/crs/misc/R42668.pdf>.

14. Mark A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 612 (2008) ("Universities . . . share some characteristics with trolls, at least if the term is broadly defined, but they are not trolls. . . . Instead of singling out bad actors, we should focus on the bad acts and the laws that make them possible.").

15. See Dennis Crouch & Jason Rantanen, *Intellectual Ventures: Revealing Investors*, PATENTLY-O (May 18, 2011, 12:25 PM), <http://www.patentlyo.com/patent/2011/05/intellectual-ventures-revealing-investors.html> ("Intellectual Ventures is important because they are now one of the Top-Five owners of US Patents. Although the company has played extensive games in an attempt to stifle the utility of the patent ownership recording system, it has been reported to hold at least 30,000 patents."); *Interview with Chief Judge Paul R. Michel on US Patent Reform*, INTELL. PROP. WATCH (Jul. 19, 2011, 10:17 PM), <http://www.ip-watch.org/weblog/2011/07/14/interview-with-chief-judge-paul-r-michel-on-us-patent-reform/>.

16. See MICHAEL HELLER, GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 49–78 (2008); James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189 (2006).

17. Andrew Beckerman-Rodau, *Patents Are Property: A Fundamental but Important Concept*, 4 J. BUS. & TECH. L. 87, 93 (2009). Beckerman-Rodau contends that an "inventor's lack of success often reflects an inability to raise adequate capital and a lack of marketing expertise" rather than a deficiency in the patent itself. *Id.* Non-NPEs may be better suited to handle the "business" aspects of patent use; absent property-based protection, fewer inventors will be willing to developing new patents. *Id.*

18. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (requiring the traditional reasonableness test for imposition of an injunction in a patent infringement lawsuit); *Walker Digital, LLC v. Microsoft Corp.*, No. CV 09-7514 PSG (PJWx), 2011 WL 61618, at *1 (C.D. Cal. Jan. 3, 2011) (holding no literal infringement by Microsoft of Walker Digital's word browsing technology).

19. Leahy-Smith America Invents Act, H.R.1249, 112th Cong. (2011). The patent act does not directly address the issue of patent trolls, and two changes to the previous law seem to point in opposite directions. On the one hand, trolls may face difficulty bringing cost effective suits that cover a wide number of infringements given the newly heightened joinder requirements of 35 U.S.C. § 299. See Dennis Crouch & Jason Rantanen, *Rush to Judgment: New Dis-Joinder Rules and Non-Practicing Entities*, PATENTLY-O (Sept. 20, 2011, 3:10 PM), <http://www.patentlyo.com/patent/2011/09/rush-to>

holders retain the right to sue for infringement regardless of how a patent is used, and patent trolling continues to be tolerated, if not openly embraced.²⁰

B. COPYRIGHT TROLLS

Copyright trolls are in some sense a conceptual outgrowth of patent trolls. As in patent, copyright holders may bring suit for alleged infringement seeking statutory damages.²¹ Both patent and copyright trolls utilize their respective intellectual property protections to extract license fees or infringement damages without any intention of utilizing the underlying right for other purposes.²² Copyright trolls closely follow the patent trolling formula: own or acquire a broad catalog of copyrights, seek out third parties that have infringed said copyrights, and threaten or file suit to induce settlement. Moreover, the financial incentives, while not as dramatic as in the patent context, remain potentially substantial.²³

The amassing and asserting rights to copyrighted material by nonauthors is by

judgment-new-dis-joinder-rules-and-non-practicing-entities.html. But the transition from a first-to-invent to first-to-file system in 35 U.S.C. § 102 may place added pressure on smaller patent developers who cannot afford to file as early in the process, thus making them more vulnerable to trolls seeking to purchase said patents inexpensively. See David S. Abrams & R. Polk Wagner, *Who Has Priority? An Empirical Exploration of the First to File Rule* (draft, 2011), available at http://www.law.depaul.edu/centers_institutes/ciplit/ipsc2011/pdf/Papers/AbramsD_Paper.pdf; Dana Rohrabacher, *Patent Reform Hurts "Little Guy,"* POLITICO (Apr. 22, 2011, 4:29 AM), <http://www.politico.com/news/stories/0411/53564.html>.

20. Despite its recent loss in its case with Microsoft, Walker Digital continues to file lawsuits against large technology companies in the hopes of extracting large sums, either by settlement or in court. See *Company Behind Priceline Sues Internet Heavies*, REUTERS (Apr. 12, 2011, 9:35 AM), <http://www.reuters.com/article/2011/04/12/us-walkerdigital-idUSTRE73B38Q20110412>.

21. 35 U.S.C. § 284 (2006); 17 U.S.C. § 504 (2006).

22. There are, of course, significant differences among copyright law, patent law and their respective trolls. Fundamentally, patent protects ideas and concepts themselves, whereas copyright seeks to protect the forms of their expression. One can infringe a copyright only if she had access and knowledge of the copyrighted work, whereas a patent protects the invention even where the third-party inventor was completely unaware of the previous discovery. See Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689 (2006) (arguing that technological change brought about in the digital era, and legislative efforts to grapple with said change such as the DMCA, has led to a widening gap between patent and copyright law).

23. See, e.g., *Corbis Is Awarded \$20M Judgment in the Template Monster Copyright Action*, PICTURE ARCHIVE COUNCIL AM. (Dec. 4, 2006), <http://www.pacoffice.org/membersOnly/updateArchive/u120406.html> (discussing *Corbis Corp. v. Lognikov*, 1:06-cv-21643 (S.D. Fla. 2006) (awarding a stock photo company nearly \$20 million damages award against an overseas website template company that used copyright protected images without permission)). Although one may distinguish this case from traditional copyright trolls in that the defendant here was a foreign copyright pirate, the case is worth noting for the sheer size of potential damages a successful copyright infringement case can garner. The 623 images Lognikov used without authorization would have cost less than \$1,500 to license, but the statute provided for \$30,000 per image and \$2,500 per use, allowing for upwards of \$109 million in damages. See Dan Heller, *Making Money from Your Stolen Images*, DAN HELLER'S PHOTOGRAPHY BUS. BLOG (Jun. 27, 2007), <http://danheller.blogspot.com/2007/06/making-money-from-your-stolen-images.html>; see also Ray Beckerman, *Ha Ha Ha Ha Ha. RIAA Paid Its Lawyers More than \$16,000,000 in 2008 to Recover Only \$391,000!!!*, RECORDING INDUSTRY V. THE PEOPLE (Jul. 13, 2010), <http://recordingindustryvspeople.blogspot.com/2010/07/ha-ha-ha-ha-ha-riaa-paid-its-lawyers.html>.

no means a new idea. In 1842, Harry Wall established the Authors, Composers and Artists' Copyright Office to collect fees for performances of musical works protected by British copyright.²⁴ The music publishing industry harshly criticized Wall, both for his business tactics and disreputable character.²⁵ Parliament passed an act removing the automatic statutory penalty for copyright infringement, instead giving the courts discretion to award damages, if any, for unauthorized performances.²⁶ Absent the availability of high statutory awards, Wall was left without a source of steady income.²⁷ Wall eventually died in prison for unrelated crimes, but his vision of broad copyright enforcement as revenue generator came to mainstream acceptance in the modern American licensing regime: the American Society of Composers, Authors and Publishers (ASCAP). ASCAP "protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works."²⁸ Since 1914, ASCAP has and continues to represent a very large copyright portfolio (over 420,000 artists), extracting a small fee from each third-party use—from barrooms to school fundraisers.²⁹

In stark contrast to ASCAP and its century-long respected enterprise, other contemporary entities have faced stronger rebuke and been cast—perhaps inappropriately—as copyright trolls.³⁰ For instance, copyright infringement suits in the realm of peer-to-peer (P2P) file sharing have been a prime focus of the anti-copyright troll movement.³¹ A P2P file sharing action involves the copyright holder alleging infringement for the unauthorized distribution of protected content directly from one computer to another. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, the Supreme Court held the provider and marketer of P2P file sharing software accountable for third-party copyright infringement utilizing said program.³² Subsequent to *Grokster*, copyright holders in independent and

24. Isabella Alexander, *The Birth of the Performing Right in Britain*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 321, 339–46 (Ronan Deazley et al. eds., 2010).

25. *Id.* at 339. Wall was imprisoned in 1860 for "obtaining property under false pretense." *Id.*

26. *Id.* at 343.

27. *Id.* at 344.

28. ASCAP, <http://www.ascap.com/about/> (last visited Dec. 21, 2011).

29. For more on ASCAP, see Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?*, 13 J. INTELL. PROP. L. 405 (2006); Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/Trips and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 95 (2000); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996).

30. The term "copyright troll" first began to appear on the Internet in the mid-2000s, mostly to describe a certain breed of copyright enforcers. See Caroline Horton Rockafellow, *Copyright Trolls—A Different Embodiment of the Patent Troll?*, WRAL TECH WIRE (Nov. 22, 2006), http://wraltechwire.com/business/tech_wire/biotech/story/1167243/ ("The term 'Copyright Troll' has begun to appear in online publications and blogs, and it may not be long before it becomes part of the mainstream conversation.").

31. See generally FIGHT COPYRIGHT TROLLS, <http://fightcopyrighttrolls.com> (last visited Dec. 21, 2011).

32. 545 U.S. 913, 919 (2005) ("We hold 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."); see also Jacqueline

pornographic films initiated lawsuits seeking statutory damages for infringing distributions of their protected material.³³ The plaintiff in one action, the Adult Copyright Company (ACC), sought to join over 22,000 alleged file sharers across a host of pornographic titles, a volume-based litigation strategy in keeping with the traditional troll model.³⁴ This approach was undermined in form, if not substance, when the court required ACC to bring each infringement case separately, creating a significant financial burden.³⁵ But the parties bringing such actions are typically the creators of the allegedly infringed works, not trolls in the guise of nonproducing patent entities or Harry Wall.³⁶

That courts in these cases relied upon procedural rather than substantive grounds to rebuke troll-like activity may be simply a matter of threshold litigation requirements. On the other hand, the avoidance of difficult questions such as the appropriate scope of copyright enforcement on the Internet suggests a normative judgment about *who* can access such enforcement mechanisms. Why are those like the ACC who seek to enforce copyright protection in the realm of P2P file sharing resoundingly derided as opportunistic trolls, whereas ASCAP, despite its unseemly origins, continues to avoid reprobation? Are the enforcement mechanisms significantly different? Should certain forms of distribution—that is, public performance versus Internet-based file sharing—warrant stronger copyright protection? Or is it simply a matter of character (i.e., anti-establishment criminals such as Wall, pornographers seeking statutory damages and independent film producers versus a member-owned league of mainstream musicians)? An analysis of the rise and fall of Righthaven suggests some possible explanations.

C. Charlesworth, *The Moral of the Story: What Grokster Has to Teach About the DMCA*, 2011 STAN. TECH. L. REV. 6 (2011); Kristine Grigorian, *MGM v. Grokster: Adopting Patent Law's Active Inducement Doctrine and Shifting the Focus to Actions of Alleged Indirect Infringers*, 2 J. BUS. & TECH. L. 127 (2007); Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184 (2006).

33. Fred von Lohmann, *New Lawsuits Against Movie Downloaders*, ELECTRONIC FRONTIER FOUND. (Mar. 30, 2010), <https://www EFF.ORG/deeplinks/2010/03/50-000-i-new-i-lawsuits-against-movie-downloaders> (“We’re creating a revenue stream and monetizing the equivalent of an alternative distribution channel.”); *see also Copyright Troll Gives Up in Porn-Downloading Case*, ELECTRONIC FRONTIER FOUND. (Feb. 1, 2011), <https://www EFF.ORG/press/archives/2011/01/31> (“When adult film companies launch these cases, there is the added pressure of embarrassment associated with pornography, which can convince those ensnared in the suits to quickly pay what’s demanded of them, whether or not they have legitimate defenses. That’s why it’s so important to make sure the process is fair.”).

34. *See, e.g.*, Nate Anderson, *Judge Kills Massive P2P Porn Lawsuit, Kneecaps Copyright Troll*, ARS TECHNICA (Dec. 17, 2010, 10:04 AM), <http://arstechnica.com/tech-policy/news/2010/12/judge-kills-massive-p2p-porn-lawsuit-kneecaps-copyright-troll.ars>.

35. *Id.* (“If [ACC] wants to proceed against all these people, [it] can do so individually and pay the \$350 per case filing fee. (For the cases severed yesterday, this would amount to \$1.8 million in filing fees alone.”).

36. *See, e.g.*, Sarah Jacobsson Purewal, *“Hurt Locker” Lawsuit Targets 24,583 BitTorrent Users*, PC WORLD (May 24, 2011, 8:07 AM), http://www.pcworld.com/article/228519/hurt_locker_lawsuit_targets_24583_bittorrent_users.html (describing lawsuit brought against BitTorrent users by the legitimate producers of the Academy Award winning film).

II. THE *RIGHTHAVEN* CASES

A. NEWSPAPERS GET “MAD AS HELL”

Righthaven, LLC has emerged as the first organization to bring copyright trolling to the newspaper industry.³⁷ The company first was announced through a “manifesto” published by the *Las Vegas Review-Journal (LVR-J)* entitled *Copyright Theft: We’re Not Taking It Anymore*.³⁸ The president of *LVR-J*’s parent company Stephens Media referred to Righthaven as a “technology company . . . whose only job is to protect copyrighted content.”³⁹ In an arrangement Righthaven described as a “grubstake” (a deal in which someone would lend funds or materials to a mining prospector in exchange for a share of any profits from excavation), the coventure between Stephens Media and Las Vegas attorney Steve Gibson would have Righthaven enforce *LVR-J* copyrights and share the profits from successful lawsuits and settlements with Stephens Media.⁴⁰

Righthaven rewrote the rules for how to enforce newspaper copyrights. Rather than concern itself with the entire world of alleged infringement, Righthaven focused exclusively on Internet-based misappropriations.⁴¹ Typically, when a newspaper discovered unauthorized use of its material, it would ask for the content to be removed and replaced with a link to the newspaper’s own website.⁴² Should its request go unheeded, the paper would likely send a Digital Millennium Copyright Act (DMCA) takedown notice to encourage compliance.⁴³ Even when

37. Steve Green, *Legal Attack Dog Sicked on Websites Accused of Violating R-J Copyrights*, LAS VEGAS SUN (Aug. 4, 2010, 2:00 AM), <http://www.lasvegassun.com/news/2010/aug/04/unlikely-targets-emerging-war-media-content/> (“Righthaven lawsuits . . . [are] a waste of judicial resources.”).

38. Sherman Frederick, *Copyright Theft: We’re Not Taking It Anymore*, LAS VEGAS REV.-J. (May 28, 2010, 2:40 PM), http://www.lvrj.com/blogs/sherm/Copyright_theft_Were_not_taking_it_anymore.html?ref=164. This title presumably emerges from a famous line in the film *Network* (1976), in which disgruntled (if not deranged) newscaster Howard Beale (Peter Finch) proclaims: “I don’t have to tell you things are bad. Everybody knows things are bad. It’s a depression. Everybody’s out of work or scared of losing their job. . . . So I want you to get up now. I want all of you to get up out of your chairs. I want you to get up right now and go to the window. Open it, and stick your head out, and yell, ‘I’M AS MAD AS HELL, AND I’M NOT GOING TO TAKE THIS ANYMORE!’”

39. Frederick, *supra* note 38.

40. David Kravets, *Newspaper Chain’s New Business Plan: Copyright Suits*, WIRED (Jul. 22, 2010, 3:29 PM) [hereinafter Kravets, *Newspaper Chain’s New Business Plan*], <http://www.wired.com/threatlevel/2010/07/copyright-trolling-for-dollars/>.

41. From a practical standpoint, this makes a good deal of sense: rather than having to employ individuals nationwide to track instances of alleged infringement, a simple Google Alert for the newspaper’s name, the author or keywords would turn up far-flung uses in an instant. See Jonathan Bailey, *Tips for Using Google Alerts*, PLAGIARISM TODAY (Nov. 7, 2005), <http://www.plagiarismtoday.com/2005/11/07/tips-for-using-google-alerts/> (“[Google Alerts] enables Webmasters, even those with large volumes of content, to search for new instances of their work daily and be notified when copies of their material, both legal and illegal ones, are posted online.”).

42. *Is it “Fair” to Link to News Articles?*, NAT’L L. REV. (Dec. 15, 2010), <http://www.natlawreview.com/article/it-fair-to-link-to-news-articles> (“Righthaven then sues the blog owner, without sending a standard ‘cease and desist’ letter, for copyright infringement.”).

43. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). For discussion of the distinct treatment of user-generated and Web-hosted content under the DMCA, see Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*,

notice proved ineffective, the high costs of litigation—both financial and public relations-wise—have led to few cases being brought.⁴⁴

Righthaven, by contrast, took a far more aggressive stance. Shortly after discovering an unauthorized use of newspaper content on websites and blogs “ranging from those that report marijuana news to sports betting sites,” Righthaven immediately filed papers in court seeking upwards of \$75,000 in statutory damages.⁴⁵ Such a wide-net campaign was certainly not new. Several years prior to the emergence of Righthaven, the Recording Industry of America (RIAA) took a similar stance when enforcing copyright against any and all infringers during its anti-file-sharing campaign; however, the scorched earth policy of suing all users garnered significant negative publicity, badly damaging the image of otherwise legitimate copyright holders seeking to protect against infringement.⁴⁶ In seeming ignorance of the lessons of recent history, Righthaven brazenly sued the smallest of website operations.⁴⁷ To make matters worse, Righthaven sought remedy above and beyond damages for unauthorized use, requesting seizure of the infringing website’s domain name, as well. Though domain name seizure was an unprecedented remedy (and one that at least one court would later reject), even a remote possibility of losing one’s website significantly raised the stakes for the Righthaven defendants that chose not to settle quickly.⁴⁸

24 BERKELEY TECH. L.J. 363 (2009).

44. A rare example of a non-Righthaven newspaper claim being brought is *The Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

45. Frederick, *supra* note 38.

46. See Derek Evers, *RIAA Wins \$8K Default Settlement Against Chronically Ill Teen*, FADER (Dec. 5, 2008, 7:25 PM), <http://www.thefader.com/2008/12/05/riaa-wins-8k-default-settlement-against-chronically-ill-teen/#ixzz1hGkPVFqS>; Robert Scott Lawrence, *The RIAA Will Sue Your Grandma, WHO IS YOUR LAWYER?* (May 28, 2010), <http://www.whoisyourlawyer.com/sue-grandma/>. Following this bad publicity, RIAA infringement suits dropped significantly beginning in 2009. See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

47. See *Righthaven, LLC v. JAMA*, 2:10-CV-1322 JCM LRL, 2011 WL 1541613, at *1 (D. Nev. Apr. 22, 2011) (alleging infringement by the Center for Intercultural Organizing, an Oregon-based nonprofit “dedicated to helping immigrants become aware of immigration-related issues in the United States”); *Righthaven LLC v. Hill*, No. 1:11-CV-00211-JLK, 2011 WL 4018105, at *1 (D. Colo. January 27, 2011) (alleging infringement by the blog of Mr. Hill, “who suffers from autism and diabetes and lives on disability checks with his mother,” Dan Frosch, *Enforcing Copyrights Online, For a Profit*, N.Y. TIMES (May 2, 2011), http://www.nytimes.com/2011/05/03/business/media/03righthaven.html?_r=1&pagewanted=all); Complaint and Demand for Jury Trial, *Righthaven LLC v. Wong*, No. 10-cv-00856 (D. Nev. June 4, 2010) (alleging infringement on the site “City Feline Blog,” written from the perspective of a cat); see also Eric E. Johnson, *Purr-loined Story Gets Cat Blog Sued*, BLOG L. BLOG (June 8, 2010, 9:18 AM), <http://bloglawblog.com/blog/?p=408>.

48. See Richard Esguerra, *Righthaven’s Brand of Copyright Trolling*, ELECTRONIC FRONTIER FOUND. (Sept. 2, 2010), <https://www.eff.org/deeplinks/2010/09/righthavens-own-brand-copyright-trolling> (“Effectively asking for control of all of a website’s existing and future content—instead of only targeting the allegedly infringing material—is an overreaching remedy for a single copyright infringement not validated by copyright law or any legal precedent. This also indicates that the attorneys are willing to make overreaching claims in order to scare defendants into a fast settlement.”). In *Righthaven, LLC v. DiBiase*, the court dismissed the domain name seizure request as a remedy outside those prescribed by Congress. No. 2:10-CV-01343-RLH, 2011 WL 1458778, at *2 (D. Nev. Apr. 15, 2011). But as Esguerra notes, much of the damage lies in the threat. Esguerra, *supra*.

The initial reaction to Righthaven in certain circles was overwhelmingly critical. The blogosphere thrives on open and free exchange of information on the Internet; when Righthaven set its sights on this vocal interest group the negative response came immediately.⁴⁹ *Wired* magazine described Righthaven as “borrowing a page from the patent trolls,” and a wave of name-calling—from “McDonald’s coffee cases of copyright litigation” to “thugster stooge”—followed.⁵⁰ In addition, several sites described how to circumvent Righthaven’s efforts to snag copyright infringers.⁵¹ Nevertheless, Righthaven maintained its approach throughout the summer of 2010, and it brought on additional newspaper clients from Arkansas to Colorado.⁵²

B. THE RISE AND FALL OF RIGHTHAVEN

1. Initial Success

Righthaven’s “sue to settle” campaign was initially quite successful. Of the 276 cases Righthaven filed, over half settled almost immediately after claims were brought, totaling approximately \$352,500 in awards.⁵³ Of the approximately twelve Righthaven cases that reached district court rulings prior to June 2011, only

49. An unbiased assessment of the “public response” to Righthaven suffers from the scarcity of critical opinion outside interest groups such as independent bloggers and tech-focused industry types.

50. Green, *supra* note 37; Eric E. Johnson, *Righthaven’s Innovation? Stooping Lower*, BLOG L. BLOG (Aug. 10, 2010, 11:32 PM), <http://bloglawblog.com/blog/?p=940>; Kravets, *Newspaper Chain’s New Business Plan*, *supra* note 40.

51. See Clayton Cramer, *How to Make Sure You Don’t Accidentally Visit Organizations that Don’t Want You*, CLAYTON CRAMER’S BLOG (Aug. 18, 2010, 7:55 PM), <http://claytoncramer.blogspot.com/2010/08/how-to-make-you-dont-accidental-visit.html> (providing instructions to install a web-browser application to block all Stephens Media-owned websites); Ryan Gile, *Avoiding the Wrath of Righthaven*, LAS VEGAS TRADEMARK ATT’Y (Aug. 6, 2010, 6:03 AM), <http://www.vegastrademarkattorney.com/2010/08/avoiding-wrath-of-righthaven.html> (“While there is nothing clearly outlined on the RJ’s own website, Mark Hinueber, the Vice President and General Counsel for Stephens Media, recently provided some guidance for third parties regarding how to properly cite review journal articles.”); David Kravets, *The \$105 Fix That Could Protect You From Copyright-Troll Lawsuits*, WIRED (Oct. 27, 2010, 1:54 PM), <http://www.wired.com/threatlevel/2010/10/dmca-righthaven-loophole/> (“‘The DMCA is a good deterrent from being sued,’ says Kurt Opsahl, a staff attorney with the Electronic Frontier Foundation, ‘Complying with conditions of eligibility for the safe harbor is a good thing to do. It probably will prevent somebody from suing you in the first place.’ . . . If you run a U.S. blog or a community site that accepts user content, you can register a DMCA agent by downloading this form (.pdf) and sending \$105 and the form to Copyright RRP, Box 71537, Washington, D.C., 20024.”).

52. *Denver Post Working with Vegas Firm to Sue Alleged Infringers*, L. WK. COLO. (Dec. 10, 2010), <http://www.lawweekonline.com/2010/12/denver-post-working-with-vegas-firm-to-sue-alleged-infringers/>; Wendy Davis, *Report: Arkansas Democrat-Gazette Owner Taps Righthaven for Copyright Enforcement*, DAILY ONLINE EXAMINER (Aug. 31, 2010, 7:00 PM), <http://www.mediapost.com/publications/article/134780/>.

53. RIGHTHAVEN LAWSUITS, <http://www.righthavenlawsuits.com/index.html> (last updated Oct. 25, 2012). Righthaven Lawsuits provides a thorough index of cases filed and articles posted involving Righthaven. The site calculates the \$352,500 figure based upon an “educated guesstimate of an average of \$2,500 settled per case.” *Id.*

two were dismissed.⁵⁴ Two of the surviving cases involved miscellaneous procedural issues.⁵⁵ Others overcame jurisdictional attacks: in *Righthaven, LLC v. Majorwager.com*, the court held personal jurisdiction over Righthaven because “it is common knowledge that the [LVR-J] is published and distributed in Las Vegas, NV,” the unlicensed use “arose from the local publication of the article in the state of Nevada,” and exercise of jurisdiction, despite some hardship to out-of-state defendants, was reasonable.⁵⁶ Courts also held that Righthaven had standing to bring its cases. In keeping with the Ninth Circuit’s prior holding that assignees of both the copyright to a work and any accrued infringement actions could bring a claim for infringements that occurred preassignment, Stephens Media had granted Righthaven both a right to sue and the “exclusive copyright assignment itself.”⁵⁷

Finally, four cases looked past the jurisdictional requirements to delve, however briefly, into substantive analysis.⁵⁸ Here courts looked to whether the use of newspaper content by third-party websites, while admittedly unauthorized, was nevertheless protected. While two of these cases found the defendant’s use to be fair,⁵⁹ the court in one instance declined to grant a fair use defense at the summary judgment stage, finding the majority of fair use analysis factors to contain “disputed issue[s] of material fact that [are] more properly resolved at trial.”⁶⁰ In one additional case, *Righthaven, LLC v. DiBiase*, the court did not rule on the merits of the case, but it rejected Righthaven’s request for transfer of the defendant’s domain name as beyond the scope of remedies authorized by Congress.⁶¹ Courts thus addressed the substantive merits of Righthaven’s

54. See *Righthaven, LLC v. JAMA*, No. 2:10-CV-1322 JCM LRL, 2011 WL 1541613, at *5 (D. Nev. Apr. 22, 2011) (finding non-profit center’s Web posting of an LVR-J article in its entirety protected as fair use); *Righthaven LLC v. Realty One Group, Inc.*, No. 2:10-CV-1036-LRH-PAL, 2010 WL 4115413, at *3 (D. Nev. Oct. 19, 2010) (finding blog posting of a LVR-J article excerpt protected as fair use).

55. *Righthaven LLC v. Democratic Underground, LLC*, 2:10-CV-1356-RLH-GWF, 2011 WL 1457743, at *3 (D. Nev. Apr. 14, 2011) (granting defendant’s request to unseal documents); *Righthaven LLC v. Klerks*, No. 2:10-CV-00741-GMN-LRL, 2010 WL 3724897, at *5 (D. Nev. Sept. 17, 2010) (granting defendant’s motion to set aside default judgment).

56. *Righthaven, LLC v. Majorwager.com, Inc.*, No. 2:10-CV-00484-GMN, 2010 WL 4386499, at *3–4 (D. Nev. Oct. 28, 2010) (internal citation omitted); see also *Righthaven, LLC v. Vote for the Worst, LLC*, 2:10-CV-01045-KJD, 2011 WL 1304463 (D. Nev. Mar. 30, 2011); *Righthaven, LLC v. Mostofi*, 2:10-CV-01066-KJD-GWF, 2011 WL 1098971 (D. Nev. Mar. 22, 2011); *Righthaven, LLC v. S. Coast Partners, Inc.*, 2:10-CV-01062-LRH-LRL, 2011 WL 534046 (D. Nev. Feb. 8, 2011); *Righthaven, LLC v. Indus. Wind Action Corp.*, No. 2:10-CV-00601-RLH-PAL, 2010 WL 3829411 (D. Nev. Sept. 24, 2010); *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, No. 2:10-CV-0636-RLH-RJJ, 2010 WL 3522372 (D. Nev. Sept. 2, 2010).

57. *Shezad Malik*, 2010 WL 3522372, at *2 (citing *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 889 (9th Cir. 2005)); see also *Vote for the Worst*, 2011 WL 1304463, at *1–2; *Majorwager.com*, 2010 WL 4386499, at *1–2. For more on *Silvers*, see *infra* Part II(B)(2)(a).

58. *Righthaven LLC v. Choudhry*, 2:10-CV-2155 JCM PAL, 2011 WL 1743839 (D. Nev. May 3, 2011), *reconsideration denied*, 2:10-CV-2155 JCM PAL, 2011 WL 2976800 (D. Nev. July 21, 2011); *JAMA*, 2011 WL 1541613; *Righthaven, LLC v. DiBiase*, 2:10-CV-01343-RLH, 2011 WL 1458778 (D. Nev. Apr. 15, 2011); *Realty One Group, Inc.*, 2010 WL 4115413.

59. *JAMA*, 2011 WL 1541613; *Realty One Group, Inc.*, 2010 WL 4115413.

60. *Choudhry*, 2011 WL 1743839, at *4.

61. *DiBiase*, 2011 WL 1458778, at *2 (“Congress has never expressly granted plaintiffs in copyright infringement cases the right to seize control over the defendant’s website domain.”).

individual cases, and had begun to define the contours of what constituted a viable claim and what remedies might be available.

2. *Democratic Underground*: Beginning of the End

Any hope of merits-based, case-by-case analysis ended with *Righthaven LLC v. Democratic Underground, LLC*.⁶² Righthaven sued Democratic Underground (DU), a progressive website host of “discussion forums,” which had posted an excerpt from an *LVR-J* article on the Tea Party and Nevada senatorial candidate Sharron Angle.⁶³ DU brought on the Electronic Frontier Foundation (EFF), “an influential freedom of speech and online privacy advocate,” to help defend the case.⁶⁴ Undeterred by Righthaven’s bullying tactics, DU went on the offensive, referring to the troll as a “sham representative” seeking to “extract nuisance settlements.”⁶⁵ In response, Righthaven sought to dismiss the suit voluntarily, on condition that it would not be responsible for any counterclaim for attorney’s fees.⁶⁶ DU opposed Righthaven’s condition, and it instead sought summary judgment on the merits.⁶⁷

On June 14, 2011, the U.S. District Court for the District of Nevada issued a summary judgment ruling, not on any substantive examination of the alleged infringement at issue but on the procedural ground of subject matter jurisdiction. The early cases’ discussion of subject matter jurisdiction addressed whether previously accrued causes of action were assignable, not validity of the copyright assignment itself.⁶⁸ *Democratic Underground* marked a fundamental shift into substantive consideration of who held standing to bring suit through a direct

62. 791 F. Supp. 2d 968 (D. Nev. 2011).

63. *Democratic Underground*, 791 F. Supp. 2d at 971; *About Democratic Underground*, DEMOCRATIC UNDERGROUND, <http://www.democraticunderground.com/about.html> (last visited Dec. 26, 2011).

64. Steve Green, *Defendants Fight Back Against Righthaven Copyright Lawsuits*, LAS VEGAS SUN (Sept. 20, 2010, 1:50 AM), <http://www.lasvegassun.com/news/2010/sep/20/defendants-fight-back-against-righthaven-copyright/>.

65. Answer of Defendants Democratic Underground, LLC and David Allen and Counterclaim of Counterclaimant Democratic Underground, LLC at 6, *Democratic Underground*, 791 F. Supp. 2d (No. 2:10-CV-01356-RLH-RJJ).

66. Plaintiff/Counterdefendant’s Motion for Voluntary Dismissal of Counterclaim and [Proposed] Order of Dismissal at 3, *Democratic Underground*, 791 F. Supp. 2d 968 (No. 2:10-cv-01356-RLH-RHH), available at https://www.eff.org/files/filenode/righthaven_v_dem/Plaintiff_VoluntaryDismissal.pdf. While perhaps surprising in light of its previous tactics, Righthaven might have backed down here for having met its match.

67. Consolidated Brief in Opposition to Plaintiff’s Motion for Voluntary Dismissal to the Extent it Seeks to Foreclose Award of Attorney’s Fees, and in Support of Cross-motion for Summary Judgment at 17–23, *Democratic Underground*, 791 F. Supp.2d 968 (No. 2:10-cv-01356-RLH(RJJ)), available at https://www.eff.org/files/filenode/righthaven_v_dem/PlfMSJ.pdf.

68. See *Righthaven, LLC v. Dr. Shezad Malik Law Firm P.C.*, No. 2:10-cv-0636-RLH-RJJ, 2010 WL 3522372, at *2 (D. Nev. Sept. 2, 2010) (citing *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 889 (9th Cir. 2005)); see also *Righthaven, LLC v. Majorwager.com, Inc.*, No. 2:10-cv-00484-GMN-LRL, 2010 WL 4386499, at *1–2 (D. Nev. Oct. 28, 2010); *Righthaven, LLC v. Vote for the Worst, LLC*, No. 2:10-CV-01045-KJD-GWF, 2011 WL 1304463, at *1–2 (D. Nev. Mar. 30, 2011). For a detailed discussion of *Silvers* and its impact on the *Righthaven* cases, see *infra* Part II(B)(2)(a).

examination of the arrangement between Righthaven and the *LVR-J*. Subject matter jurisdiction proved pivotal to the *Righthaven* cases, for the court's finding that Righthaven lacked standing to bring suit for copyright infringement effectively halted Righthaven in its tracks.⁶⁹ It is important, then, to understand existing precedent on the issue that determined the ultimate result.

a. The State of Copyright Standing Prior to Democratic Underground

The *Democratic Underground* court based its decision on the Ninth Circuit's decision in *Silvers v. Sony Pictures Entertainment, Inc.*⁷⁰ There, the writer of an original made-for-TV screenplay did not hold the copyright (her script was a "work-for-hire" and thus the copyright was in the name of the production company), but she was assigned the right to sue a motion picture production company for infringing her script in a subsequent film production.⁷¹ In response to the writer's infringement complaint, the motion picture company moved to dismiss for lack of standing "in the absence of some legal or beneficial ownership in the underlying copyright" by the writer.⁷² The *Silvers* court held that a "bare assignment of an accrued cause of action is impermissible" under the Copyright Act, wherein an assignee must possess some additional right to maintain a claim.⁷³ Copyright, the court noted, "is a creature of statute," whereby Congress establishes the parameters of authors' protection.⁷⁴ The court looked to section 501(b) of the 1976 Copyright Act, in which "the legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement."⁷⁵ The 1976 Act lists six types of exclusive rights in section 106, none of which includes an assignment of the right to sue for an accrued cause of action;⁷⁶ under the doctrine of *expressio unius est exclusio alterius*, reasoned the court, a potential plaintiff must possess one of these "exclusive rights" to maintain a claim for copyright infringement.⁷⁷

The *Silvers* court recognized that section 501(b) did not explicitly address the ability of non-exclusive rights holders to bring an infringement claim, so it instead looked to the legislative history, analogous intellectual property treatment in the patent law context and other circuit decisions to support its interpretation. According to the court's reading of the legislative history, the mention of "owners of particular right" who may sue, and "other owners" who must be notified, absent any notice requirement for nonowners, "suggests that Congress did not envision their existence, or that the right to sue was a right severable from ownership of one

69. *Righthaven, LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 976 (D. Nev. 2011).

70. 402 F.3d 881 (9th Cir. 2005).

71. *Id.* at 883.

72. *Id.*

73. *Id.* at 890.

74. *Id.* at 883.

75. *Id.* at 884 (internal citation omitted).

76. 17 U.S.C. § 106 (2006).

77. 402 F.3d at 885.

of the authorized exclusive rights.”⁷⁸ Additionally, the court drew a comparison between copyright and patent law; in *Crown Die & Tool Co. v. Nye Tool & Machine Works*, the Supreme Court required that the assignee of a right to sue for patent infringement must also have ownership of the patent itself.⁷⁹ Patent rights, like copyright, are “created by the act of Congress,” and Congress has provided no such right to sue absent ownership of the patent.⁸⁰ Buttressed by the “historic kinship between patent law and copyright law,” the *Silvers* court used the same reasoning as the Supreme Court in *Crown Die*.⁸¹ Finally, the court looked to existing precedent beyond the Ninth Circuit. In *Prather v. Neva Paperbacks, Inc.*, the Fifth Circuit held that assigning the author of a work the right to sue was enough to meet the standing requirement.⁸² The *Silvers* court distinguished this decision on two grounds: first, *Prather* was decided under the 1909 Act, which, unlike the 1976 Act, did not define “proprietor” or “exclusive rights” necessary to sue for infringement; second, *Neva Paperbacks* included an assignment of the copyright with the assigned right to sue for accrued infringements, thus not addressing the situation of *Silvers* in which the possessor of the accrued cause of action and the exclusive copyright holder “are two different people.”⁸³ Instead, *Silvers* adopted the Second Circuit’s reasoning in *Eden Toys, Inc. v. Florelee Undergarment Co.*, which barred those who do not hold an exclusive right in a copyright from suing for infringement.⁸⁴ There was some question as to whether or not *Eden Toys* involved an accrued or potential future cause of action, but a subsequent Second Circuit holding made clear that accrued causes of action were acceptable, so long as an exclusive right in the copyright was transferred as well.⁸⁵ Thus, the *Silvers* court dismissed the suit for lack of standing.⁸⁶

The decision in *Silvers* has been met with harsh criticism, both on the bench and in academic circles.⁸⁷ These arguments can be broken down into five categories.

First, critics contend that the *Silvers* majority misinterpreted the terms of section 501(b) the statute. As noted above, the majority in *Silvers* relied upon the mention of “exclusive rights holders” in section 501(b) to preclude any party that does not fit within one of the exclusive rights specified in section 106.⁸⁸ But section 501(b) also contains a durational limitation—a right to “institute an action for any infringement of that particular right committed *while he or she is the owner of it*”—

78. *Id.* at 886 (internal citations omitted).

79. 261 U.S. 24, 26, 33–35 (1923).

80. *Silvers*, 402 F.3d at 887–88 (citing *Crown Die*, 261 U.S. at 40).

81. *Id.* at 887, 888.

82. 410 F.2d 698, 699 (5th Cir. 1969).

83. *Silvers*, 402 F.3d at 899.

84. 697 F.2d 27, 32 n.3 (2d Cir. 1982) (“We do not believe that the Copyright Act permits holders of rights under copyrights to choose third parties to bring suits on their behalf. While F.R. Civ. P. 17(a) ordinarily permits the real party in interest to ratify a suit brought by another party, the Copyright Law is quite specific in stating that only the ‘owner of an exclusive right under a copyright’ may bring suit.”).

85. See *ABKCO Music, Inc. v. Harrissongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991).

86. *Silvers*, 402 F.3d at 890.

87. The en banc decision in *Silvers* came down 7-4, with two separate dissenting opinions from Circuit Judge Berzon and Circuit Judge Bea. See *id.* at 890–95, 895–911.

88. *Id.* at 885.

that is not so strictly upheld, for parties may acquire accrued causes of action for infringement that occurred prior to ownership of the copyright.⁸⁹ If the durational limitation is not so strictly held, Judge Berzon argued in dissent, neither should the language regarding a holder of an exclusive right.⁹⁰

Second, both the dissenting opinions and academic critics argue that the *Silvers* court either mischaracterized or ignored the policy goals of the Constitution and 1976 Act; namely, the 1976 Act sought to provide for greater divisibility and free alienability of copyright, which the *Silvers* majority unjustifiably circumscribes.⁹¹

Third, the dissenting judges felt that the “kinship” analogy between copyright law and patent law was significantly overstated.⁹² As critics further contend, although both rights emerge from the same constitutional provision, the treatment of divisibility, standing, and the scope and forms of protection that copyright and patent provide contain significant enough differences that the court overstated the relevance of a patent case such as *Crown & Die to Silvers*.⁹³

89. 17 U.S.C. § 501(b) (2006).

90. See *Silvers*, 402 F.3d at 891 (Berzon, J., dissenting) (arguing that the ability to transfer an accrued cause of action “cannot be squared with a literal reading of section 501(b),” which includes a durational limitation of entitlement to sue, suggests that the language of 501(b) neither determines the durational nor the exclusive right limitation); see also *id.* at 898 (Bea, J., dissenting) (citing to a portion of the legislative history omitted by the majority opinion for the proposition that the 1976 Act was an “enlargement of infringement action rights” to include owners of exclusive rights in addition to the pre-existing and continuing right of the “proprietor” of the original copyright to bring an action under the 1909 Copyright Act). In other words, the court’s interpretation of section 501(b), if logically extended, would lead to “absurd results.” *Id.* at 901 (Bea, J., dissenting); Wenjie Li, *Standing to Sue in Another’s Shoes: Can an Assignee of an Accrued Copyright Infringement Claim with No Other Interest in the Copyright Itself Sue for the Infringement?*, 28 PACE L. REV. 73, 87 (2007); Heather Sanborn, *Assigning Infringement Claims: Silvers v. Sony Pictures*, 59 ME. L. REV. 439, 453–54 (2007).

91. See *Silvers*, 402 F.3d at 893–94 (Berzon, J., dissenting) (internal citations omitted) (using “policy-based analyses” similar to those applied to other federal statutes such as ERISA to find the assignment of an accrued claim to the creator of the work to not violate Constitutional and statutory copyright principles of protecting creators of works and the “need for free alienability and divisibility of copyright”); *id.* at 905 (Bea, J., dissenting) (“[T]he notion that an aftermarket in accrued causes of action for copyright infringement is to be prohibited is at best passé and at worst an unwarranted restraint on alienation.”); *id.* at 907 (Bea, J., dissenting) (“Nor indeed is there a reasoned policy consideration given for prohibiting suit upon an accrued cause of action for infringement.”); see also Sanborn, *supra* note 90, at 456 (“[F]ree assignability of infringement claims would likely increase the value of the copyrighted works.”); Karen A. Skretkovicz, *Unauthorized Annexing of an Artist’s World: An Argument for Creator-Assignee Standing to Sue for Copyright Infringement*, 30 SEATTLE U. L. REV. 437, 467–71 (2007) (“Allowing a Creator-Assignee Standing to Sue Advances Constitutional Goals”).

92. See *Silvers*, 402 F.3d at 894–95 (Berzon, J., dissenting) (“The differences between copyright and patent law, and between the nature of the assignment in *Crown Die* and this case, are significant enough to warrant a different result.”); *id.* at 905 (Bea, C.J., dissenting) (internal citations omitted) (drawing distinction between patent and copyright law along different treatments of divisibility, different regulatory mechanisms to prevent fraud, and previous court decisions to “exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other”).

93. See Alice Haemmerli, *Why Doctrine Matters: Patent and Copyright Licensing and the Meaning of Ownership in Federal Context*, 30 COLUM. J.L. & ARTS 1, 4 (2006) (arguing that longstanding confusion between copyright and patent licenses and the ability to transfer ownership is “becoming dysfunctional in view of the significance of the economic activity that intellectual property licensing represents”); Li, *supra* note 90, at 90–93 (noting the significant differences between patent and copyright with respect to standing, particularly treatments of divisibility and the lower risk of copyright invalidation than patent invalidation through the litigation process).

Fourth, Judge Bea felt that the court misinterpreted extra-jurisdictional precedent: the Fifth Circuit's *Prather* decision involved a licensee, not an exclusive rights holder, due to the limitation on divisibility under the 1909 Act that was no longer present under the 1976 Act, while the plaintiff's ownership of an exclusive copyright in the Second Circuit's *Eden Toys* was not determinative of standing but merely "coincidental" to the accrued cause of action.⁹⁴

Fifth, Heather Sanborn notes that the exclusive focus on the statutory language improperly displaced relevant common law influences, such as alienability of choses, given the statutory uncertainty of the 1976 Act and indeterminate judicial opinions on the matter of copyright standing.⁹⁵

By way of summary, the *Silvers* court could have instead adopted the *Prather* reasoning, recognized assigned causes of action as sufficient to bring a copyright infringement claim, or at least provided an exception to original creators who, for one reason or another, lacked copyright in and to their work at the time of the alleged infringement.

b. Application of Silvers in Democratic Underground

Regardless of *Silvers*' shortcomings, the U.S. District Court for the District of Nevada had little choice but to apply its approach to the question of Righthaven's standing. In postmotion briefings in *Democratic Underground*, Righthaven for the first time disclosed the Strategic Alliance Agreement ("SAA"), an agreement Stephens Media and Righthaven entered into on January 18, 2010—prior to any assignment of individual accrued copyright infringement cases—that "explains the rights and responsibilities of each party, and limits and defines future copyright assignments between them."⁹⁶ The key language appears in Section 7.2 of the SAA, whereby:

Despite any such Copyright Assignment, Stephens Media shall retain (and is hereby granted by Righthaven) an exclusive license to Exploit the Stephens Media Assigned

94. See *Silvers*, 402 F.3d at 907 (Bea, J., dissenting) (arguing that *Prather* stood for the proposition that the assignment of an accrued right to sue was proper whether involving "the proprietor or not," and in any event *Prather* was not an exclusive rights holder but a licensee, as the 1909 Act did not allow for the division of copyright between author and publisher); *id.* at 909 (Bea, J., dissenting) (arguing *Eden Toys* only limits a third party from suing where exclusive holder chooses not to sue); *id.* at 911 (Bea, J., dissenting) ("[O]wnership of both the copyright and the accrued causes of action was merely *coincident*—not *required*—for ABKCO to have standing to sue.")

95. See Sanborn, *supra* note 90, at 452 ("An assertion that common law never applies in a copyright context also proves far too much."); Bryanne J. Schmitt, *Is an Accrued Cause of Action for Copyright Infringement More Like a Kidney or a Contract?*, 25 CARDOZO ARTS & ENT. L.J. 417, 422, 454–60 (2007) (arguing that neither statutory language nor case law answers the standing question, and courts should instead look to "alienability of choses in action at common law" as discussed in the legislative history of 1976 Act; the determining factor, in other words, should be whether the work is inherently personal in nature, and where this is not the case, the divisibility of copyright law supports standing where there is transfer of enforcement rights to an accrued infringement absent any additional, exclusive rights in and to the copyright).

96. *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972 (D. Nev. 2011).

Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery. To the extent that Righthaven's maintenance of rights to pursue infringers of the Stephens Media Assigned Copyrights in any manner would be deemed to diminish Stephens Media's right to Exploit the Stephens Media Assigned Copyrights, Righthaven hereby granted an exclusive right to Stephens Media to the greatest extent permitted by law so that Stephens Media shall have unfettered and exclusive ability to Exploit the Stephens Media Assigned Copyrights. Righthaven shall have no Obligation to protect or enforce a Work of Stephens Media that is not Stephens Media Assigned Copyrights.⁹⁷

Stephens Media, in other words, only granted rights to a portion of sums recovered under the infringement actions. Although the individual transfers of accrued causes of action appeared to include a transfer of the underlying copyright, the overarching SAA explicitly retained all such exclusive rights to the newspaper entity. Absent more than the right to sue for accrued causes of action, Righthaven lacked standing to bring a claim of copyright infringement in violation of the 1976 Copyright Act. Consequently, the court granted summary judgment in favor of DU.⁹⁸

3. Righthaven's Decline and New Jurisdictional Analysis

Democratic Underground ushered in a wave of Righthaven dismissals for lack of standing.⁹⁹ The SAA effectively put a halt to all other legal considerations, and nearly all of the subsequent court decisions took up the *Democratic Underground* reasoning.¹⁰⁰ Righthaven made efforts to amend the SAA to overcome the

97. Strategic Alliance Agreement at 4, *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011), available at <http://www.scribd.com/doc/53175589/Strategic-Alliance-Agreement-Between-Righthaven-and-Stephens-Media>; see also *id.* at 2 (retaining Stephens Media's right of veto power over any infringement action that Righthaven wishes to pursue).

98. Righthaven's lack of standing led to dismissal of its suits but also afforded it protection from counterclaims of declaratory judgment of noninfringement. See *Righthaven LLC v. Barham*, 2:10-CV-02150-RLH PAL, 2011 WL 2473602 (D. Nev. June 22, 2011); *Righthaven LLC v. DiBiase*, 2:10-CV-01343-RLH PAL, 2011 WL 2473531 (D. Nev. June 22, 2011). For such actions to proceed, Righthaven defendants joined Stephens Media to the cases. See, e.g., *Righthaven LLC v. Democratic Underground, LLC*, 2:10-CV-01356-RLH GWF, 2011 WL 3705060 (D. Nev. Aug. 24, 2011).

99. Steve Green, *Sixth Judge Rules Against Righthaven*, VEGAS INC (Nov. 6, 2011, 10:50 AM), <http://www.vegasinc.com/news/2011/nov/06/sixth-judge-rules-against-righthaven/>.

100. See *Righthaven LLC v. Newsblaze LLC*, 2:11-CV-720-RCJ-GWF, 2011 WL 5373785 (D. Nev. Nov. 4, 2011); *Righthaven LLC v. Inform Techs., Inc.*, 2:11-CV-00053-KJD LRL, 2011 WL 4904431 (D. Nev. Oct. 14, 2011); *Righthaven LLC v. Hyatt*, 2:10-CV-01736-KJD RJJ, 2011 WL 3652532 (D. Nev. Aug. 19, 2011); *Righthaven LLC v. Mostofi*, 2:10-CV-1066-KJD-GWF, 2011 WL 2746315 (D. Nev. July 13, 2011); *Barham*, 2011 WL 2473602; *DiBiase*, 2011 WL 2473531; *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1144-47 (D. Nev. 2011). Some exceptions to lack of standing-based dismissal involved a ruling issued so close to *Democratic Underground* so as not to have been aware of or considered the SAA, or ruled on secondary motions or unrelated grounds. See *Democratic Underground*, 2011 WL 3705060 (denying Righthaven the ability to intervene in the countersuit against Stephen's Media for inability to show that Righthaven would represent Stephens Media's interest); *Righthaven LLC v. Choudhry*, 2:10-CV-2155 JCM (PAL), 2011 WL 2976800 (D. Nev. July 21, 2011) (reconsidering previous holdings on inline copying and volition); *Righthaven LLC v. Va. Citizens Def.*

procedural hurdle, but these efforts failed to reverse the course on any of the open proceedings.¹⁰¹

Even where the Ninth Circuit jurisdictional precedent was not binding, other courts found Righthaven lacked standing to pursue an infringement claim. Rather than simply apply the *Silvers* test, however, the U.S. District Court for the District of Colorado developed yet *another* interpretation of standing that brought further uncertainty to an already muddled terrain. In *Righthaven LLC v. Wolf*, Righthaven sued Leland Wolf, blogger and owner of the It Makes Sense Blog, for reposting a photograph originally published in the *Denver Post*.¹⁰² The *Wolf* court recognized that the decision in *Silvers* was perhaps “persuasive authority” but not binding precedent on the Tenth Circuit; as such, it provided its own analysis of the copyright statute.¹⁰³ The court readily admitted the “divisibility” of copyright made explicit by the 1976 Act but found divisibility was not without limits: “the free assignment of the right to sue for infringement, as permitted by the Fifth Circuit in *Prather* and advocated by Judge Bea in his dissent in *Silvers*, skews the delicate balance that underlies federal copyright law.”¹⁰⁴ Like the holding in *Silvers*, the court found that one assigned a “bare right to sue for infringement has no interest in the legal dissemination of the copyrighted material.”¹⁰⁵ The court recognized the policy implications of this interpretation: a party that only gains benefit from bringing infringement claims “necessarily limits public access to the copyrighted work.”¹⁰⁶

However, the *Wolf* court found the *Silvers* court’s interpretation of section 501(b) to be lacking as well. Rather than focus solely on the scope of the word “exclusive,” the *Wolf* court looked to the two categories of owners entitled to bring an infringement suit: legal owners *and* beneficial owners.¹⁰⁷ Legal owners were defined as in *Silvers*, limited to those holding an exclusive right as per section 106. But beneficial owners, described as “parties who stand to benefit from the legal dissemination of copyrighted material,” the court noted, have standing to sue as well.¹⁰⁸

According to the court, Righthaven possessed neither a legal nor beneficial

League, Inc., 2:10-CV-01683-GMN, 2011 WL 2550627 (D. Nev. June 23, 2011) (denying the motion to dismiss in absence of SAA discussion).

101. See, e.g., *Mostofi*, 2011 WL 2746315, at *3 (“Here, Plaintiff and Stephens Media attempt to impermissibly amend the facts to manufacture standing. Therefore, the Court shall not consider the amended language of the SAA, but the actual assignment and language of the SAA as it existed at the time the complaint was filed.”); *Hoehn*, 792 F. Supp. 2d at 1147 (“Even assuming that the May 9, 2011 Clarification can change the jurisdictional facts as they existed at the time of the filing of the suit, it still does not correct the deficiencies with respect to lack of standing.”).

102. 813 F. Supp. 2d 1265, 1267 (D. Colo. 2011). For Righthaven’s relationship with the *Denver Post*, see *supra* note 52.

103. 813 F. Supp. 2d at 1269.

104. *Id.* at 1270.

105. *Id.*

106. *Id.*

107. *Id.* at 1271–72.

108. *Id.* at 1272.

interest in the allegedly infringed photograph.¹⁰⁹ The legal interest remained with Media News Group (owner of the *Denver Post*) as it had retained exploitative rights in and to the copyrighted works. Righthaven's sole economic interest in bringing suit for infringement was held not to be a beneficial interest, either.¹¹⁰ The court offered no discussion or rationale for its denial of a beneficial interest, but the divergence from both the *Silvers* court and one of its dissenting opinions is quite clear: even an exception to the standing rule for original creators of a copyrighted work, as argued for by the dissenting Judge Berzon in *Silvers*, would be of little use to a nonauthoring entity such as Righthaven.¹¹¹

4. The End of Righthaven

Righthaven brought its final case in court on May 6, 2011—prior to the *Democratic Underground* ruling—but its eventual downfall came several months later as courts began not only to dismiss suits it had brought but also to levy penalties against the company.¹¹² In *Democratic Underground*, the court suggested that Righthaven's initial failure to disclose the SAA, and the underlying pecuniary interest that Stephens Media continued to hold in the infringement actions pursued by Righthaven, might constitute a “flagrant misrepresentation” subject to court sanctions.¹¹³ Two courts considered the issue more thoroughly but declined to award attorney's fees to defendants.¹¹⁴ Other courts, however, granted attorney's fees ranging from a modest \$3,815,¹¹⁵ to over \$100,000,¹¹⁶ and in one case imposed a fine of \$5,000 for misleading the court.¹¹⁷ Unwilling to go down

109. *Id.* at 1273.

110. *Id.*

111. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 891–92, 894 (9th Cir. 2005) (Berzon, J., dissenting) (“Contrary to the majority's strict statutory approach, the question of valid assignment “is appropriate for the development of interstitial federal common law [to ensure] harmony with the overall purposes of the [Copyright Act] . . . *Silvers*, as the creator, is the person for whom the copyright system is designed to provide incentives for more creations.”).

112. Complaint, *Righthaven LLC v. Bob Sieber*, No. 11-00729 (D. Nev. May 6, 2011). The only complaint filed subsequent to *Bob Sieber* was an amended complaint to *Righthaven LLC v. Dean Mostofi*, Case No. 11-cv-01160 (D. Nev. July 13, 2011). See RIGHTHAVEN LAWSUITS, *supra* note 53.

113. *Righthaven, LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d, 968, 978–79; see also David Kravets, *Nevada Judge Threatens Sanctions for Copyright Troll*, WIRED (Jun. 14, 2011, 6:43 PM), <http://www.wired.com/threatlevel/2011/06/copyright-troll-sanctions/>.

114. *Righthaven LLC v. Hill*, 1:11-CV-00211-JLK, 2011 WL 4018105, at *4 (D. Colo. Sept. 9, 2011); *Righthaven, LLC v. Leon*, 2:10-CV-01672-GMN, 2011 WL 2693538, at *1 (D. Nev. July 11, 2011).

115. See *Righthaven, LLC v. Leon*, 2:10-CV-01672-GMN, 2011 WL 2633118, at *2 (D. Nev. July 5, 2011).

116. *Righthaven LLC v. DiBiase*, 2:10-CV-01343-RLH, 2011 WL 5101938, at *1 (D. Nev. Oct. 26, 2011) (awarding attorney's fees of \$116,718 on Ninth Circuit precedent that a defendant can recover attorney's fees where case dismissed for plaintiff's lack of standing from not owning the copyright at issue (citing *Maljack Productions v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir. 1996))).

117. See Steve Green, *Judge: Righthaven Masquerading as a Company*, VEGAS INC (Jul. 14, 2011, 10:18 AM), <http://www.vegasinc.com/news/2011/jul/14/judge-fines-righthaven-5000-misleading-court-over/> (noting fine of Righthaven attorney Shawn Mangano for not disclosing that Stephens Media shares in Righthaven lawsuit recovery amounts).

without a fight, Righthaven initially filed a number of appeals.¹¹⁸ But the mounting cost of imposed legal fees and sanctions left Righthaven in disarray; it missed key filing deadlines in several of its appeals cases and had its remaining assets seized by court marshals.¹¹⁹ In a fitting end for an entity that once sought to seize the websites of alleged infringers, Righthaven sold its own website at auction in early 2012 for a mere \$3,300.¹²⁰

III. BEYOND RIGHTHAVEN: MORE PROBLEMS THAN ANSWERS

With its rapid ascendancy and abrupt demise, Righthaven in one sense is little more than a failed experiment by a newspaper publisher to take a stand against competing news sources on the Internet and attempt to raise revenues through statutory damages campaigns. More broadly, though, the impact of the *Righthaven* decisions goes beyond the elimination of a single troll, and carries implications for the future of copyright protection on the Internet.

The Ninth Circuit precedent of *Silvers* made it difficult to maintain a cause of action absent possession of one of section 106's specified exclusive rights. The U.S. District Court for the District of Colorado's explication of beneficial owners in *Wolf*, for its part, took a broader conception of which right holders could bring copyright infringement cases. It nevertheless stopped short of endorsing troll-like entities such as Righthaven that benefited only from large statutory infringement remedies and not from the legal dissemination of copyrighted material from more proportionate licensing fees. And in keeping with the initial wave of harsh criticism Righthaven faced when it began its enforcement campaign, open-Internet supporters took great satisfaction in its downfall.¹²¹

But much like the billy goats that were too fat to return home after their victory over the bridge troll, the websites, bloggers and free-Internet foundations that easily disposed of Righthaven may have won the battle at a significant cost. This section highlights three key issues for which the *Righthaven* cases provided a rare opportunity for substantive clarification, but instead either compounded the

118. See Steve Green, *Righthaven Offers New Argument in Bid to Revive Lawsuit*, VEGAS INC (Nov. 30, 2011, 1:12 PM) [hereinafter Green, *Righthaven Offers New Argument*], <http://www.vegasinc.com/news/2011/nov/30/righthaven-offers-new-argument-bid-revive-lawsuit/>.

119. Mike Masnick, *Righthaven Loses Track of Its Many Cases; Discovers Four Days Late that It Missed Deadline in Appeal*, TECHDIRT (Nov. 1, 2011, 3:16 AM), <http://www.techdirt.com/articles/20111101/02044916578/righthaven-loses-track-its-many-cases-discovers-four-days-late-that-it-missed-deadline-appeal.shtml>. For missed deadlines, see Steve Green, *Righthaven Misses Deadlines, Again Faces Asset Seizure Threat*, VEGAS INC (Oct. 29, 2011, 11:36 AM), <http://www.vegasinc.com/news/2011/oct/29/righthaven-misses-deadlines-again-faces-asset-seizure/>. For seizure of assets, see Steve Green, *Marshals Execute Against Righthaven Bank Account*, VEGAS INC (Nov. 10, 2011, 8:23 PM), <http://www.vegasinc.com/news/2011/nov/10/marshals-execute-against-righthaven-bank-account/>.

120. See Juston Massoud, *Righthaven Website Sells for a Measly \$3,300*, MYCE (Jan. 7, 2010, 1:00 PM), <http://www.myce.com/news/righthaven-website-sells-for-a-measly-3300-56893/>.

121. See, e.g., Donald Douglas, *Beating Righthaven*, AM. POWER (Nov. 3, 2011, 7:00 AM), <http://americanpowerblog.blogspot.com/2011/11/beating-righthaven.html>; *Righthaven. Buh-buy*, TEA PARTY PERRYSBURG (Dec. 24, 2011, 7:48 AM), <http://teapartyatperrysburg.blogspot.com/2011/12/righthaven-buh-buy.html> ("We've commented (carefully) about Righthaven before but no comment is quite so on point and satisfying as typing an obituary.").

preexistent uncertainty or left crucial matters unexplored. First, circuits remain sharply divided over the qualifications for standing to bring a copyright infringement suit, generating legal uncertainty that leaves parties uncertain of their ability to enforce their property rights. Second, the failure of the *Righthaven* courts to rule on the merits of the alleged infringement activities precluded discussion of the boundaries of copyright protection on the Internet: specifically, what can and cannot be done with newspaper content by its copyright holders as well as third-party readers and users. As those few cases that engaged in substantive analysis of the fair use doctrine underscore, it is crucial to build a body of credible case law subject to judicial review in order to address an ever-more important arena for copyrighted material. Third, the *Righthaven* cases compounded the problems of a newspaper industry struggling in a new media environment without providing any alternative road to protecting a vital public interest. These significant casualties in the emerging debate over copyright trolling signal the importance of engaging critically those cases that may have seemingly straightforward legal answers but can lead to regrettable outcomes.

A. FURTHER DESTABILIZED STANDING FOR COPYRIGHT INFRINGEMENT SUITS

Righthaven's initial plan to represent a wide swath of publications across the country may have deepened a circuit split in a number of circuits that have yet to address standing requirements in copyright cases. This might have helped explain the limits of the 1976 Act's promotion of divisibility, the relative benefits of protection of legitimate creators and the economic opportunities brought about by secondary markets for intellectual property. The forceful condemnation from the post-*Democratic Underground* decisions, though, burdened Righthaven with crippling legal fees and sanctions, preventing it from maintaining any appeals that could have raised the standing issue above the district court level.¹²²

Furthermore, the jurisdictional roadblock placed before Righthaven could prove less difficult to overcome for future, analogous copyright enforcement operations. As leading trademark litigator Ron Coleman notes, Righthaven "overlawyered" the arrangement with media companies and could have simply bought the copyright to the stories outright for next to nothing:

[T]hey were, after all, economically worthless to anyone but Righthaven. There were plenty of ways to send money back to the original copyright holders without the complex reversions, reservations and really complicated stuff they ended up having to

122. On the other hand, Righthaven may never have seriously maintained the standing issue even if it had more ample resources to continue its operations. As the court in *Wolf* noted, Righthaven conceded that the *Silvers* standard should apply in the District of Colorado, arguing instead that the Copyright Assignment Agreement (a later iteration of the initial SSA) should not impact the grant of copyright to Righthaven of the accrued cause of action, or in the alternative, that the "license back" provision retained by the *Denver Post* "only vitiates claims for present or future infringement." *Righthaven v. Wolf*, F. Supp. 2d 1265, 1268 (D. Colo. 2011). The dire financial straits effectively led to the dismantling of Righthaven, therein preventing the defunct entity from mounting any legitimate appeal its unfavorable opinions.

cough up and which got all those judges in Nevada so sore.¹²³

In effect, a future copyright troll could better replicate the patent troll formula to reach a pre-*Democratic Underground* state in which the relative merits of each case of alleged infringement would be considered, generating enough uncertainty to induce early settlement. By Coleman's logic, standing does little to disrupt the financial incentives of copyright enforcement in the shadow of potential litigation. For example, there is some indication that, at least in international circles, newspaper-based copyright holders are willing to pursue Righthaven-like infringement claims where there is no question of standing.¹²⁴

What remains to be seen, however, is whether U.S.-based newspaper companies would be willing to test the waters of copyright enforcement so thoroughly sullied by Righthaven. Now that there exist three judicial tests of standing post-*Righthaven*, each possessing its own problems (i.e., critical rejection of the Ninth Circuit's *Silvers* test, vague contours of the U.S. District Court for the District of Colorado's *Wolf* test and the outdated statutory scheme of the Fifth Circuit's *Prather* test), is it really as clear how to transfer necessary exclusive copyrights to a future Righthaven to achieve standing while still funneling money back to the newspaper company as Coleman suggests? Is news content so "economically worthless" to newsmakers for them to freely assign exclusive rights to third-party enforcers? As new distribution mechanisms continue to emerge from evolving technology, it seems too risky for publishers to forgo enough rights to meet an ill-defined standing threshold.

For their part, the *Righthaven* cases prevented such exploration before it had a chance to begin. Arguably the best approach to avoid standing hurdles would be for news companies to create in-house copyright enforcement departments. However, the significant investment of time and resources to execute such a program would require more certainty as to what kind of claims might be worth pursuing. Righthaven's dismissals on jurisdictional grounds precluded most considerations of the permissible uses of newspaper content on the Internet. And as discussed below, in those few instances in which the courts engaged in substantive analysis, the parameters of fair use remain barely comprehensible.

B. ADDED CONFUSION TO FAIR USE ON THE INTERNET

As noted above, Righthaven's efforts to enforce newspaper copyrights did not encompass all forms of unauthorized use but focused exclusively on Internet-based appropriation. The Internet allows for a diffuse and pervasive dissemination of

123. Ron Coleman, *What "Beating Righthaven" Means*, LIKELIHOOD CONFUSION (Nov. 3, 2011), <http://www.likelihoodofconfusion.com/what-beating-righthaven-means/>.

124. See, e.g., Jitesh Pillai, *Yahoo Slammed with Copyright Infringement Lawsuit by Singapore's Media Company*, EBRANDZ (Nov. 28, 2011, 12:11 AM), <http://news.ebrandz.com/yahoo/2011/4962-yahoo-slammed-with-copyright-infringement-lawsuit-by-singapores-media-company-.html> ("Asian media group Singapore Press Holdings, which holds a near monopoly of newspaper publishing in the city-state, last Wednesday said it is suing Yahoo! for copyright infringement, accusing the US Internet giant of reproducing content from its stable of newspapers without obtaining permission.").

creative content, making easy targets for Righthaven suits that would have been much harder to track down in nondigital instances of unauthorized use.¹²⁵ Prior cases engaging questions of fair use generally involved indexical copying by Web-aggregators and search engines.¹²⁶ The *Righthaven* cases, by contrast, offered a rare opportunity to examine the parameters of fair use on the Internet involving the appropriation of copyrighted work by individuals whose own website entries and blog postings may warrant copyright protection.¹²⁷ In particular, three of the *Righthaven* cases raise an array of important issues for news content on the Internet.¹²⁸

1. *Righthaven v. Realty One*

In May of 2010, Michael Nelson posted an excerpt from an *LVR-J* article entitled, “Program may level housing sale odds” on his website covering home

125. Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, January 1, 2012, at AR8 (“[T]oday’s flow of creative expression, riding a tide of billions of instantly accessible digital images and clips, is rapidly becoming so free and recycling so reflexive that it is hard to imagine it being slowed, much less stanchied, whatever happens in court.”).

126. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (finding search engine “operator’s display of thumbnail images of copyright owner’s photographs was fair use”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (holding search engine operator’s use of thumbnails was a fair use); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006) (finding Web-cache of author’s copyrighted short story was protected by fair use); *Ticketmaster Corp. v. Tickets.com, Inc.*, CV997654HLHVBKX, 2003 WL 21406289, at *6 (C.D. Cal. Mar. 7, 2003) (linking to a third-party website protected by fair use); Keiyana Fordham, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 942 (2010); Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797 (2010); Brian Link, *Drawing a Line in Alternate Universes: Exposing the Inadequacies of the Current Four-Factor Fair Use Test Through Chanslash*, 33 T. JEFFERSON L. REV. 139, 142 (2010) (“In order to provide authors of copyrighted “literary works” a more equal footing when combating infringers in the Internet age, this Note suggests that courts take into consideration a fifth “moral rights” factor when determining infringement under the fair use doctrine.”); Sean O’Reilly, *Nominative Fair Use and Internet Aggregators: Copyright and Trademark Challenges Posed by Bots, Web Crawlers and Screen-Scraping Technologies*, 19 LOY. CONSUMER L. REV. 273 (2007).

127. One of the few previous such cases involved the inverse of what occurred with Righthaven. In *Religious Technology Center v. Lerma*, the court found the *Washington Post*’s excerpting of content posted on the Church of Scientology website in its newspaper to be protected by fair use. 908 F. Supp. 1353, 1358 (E.D. Va. 1995). However, in *Religious Technology Center v. Lerma*, the Church of Scientology found vindication where the reposting of complete works by the church on third-party websites was held to be beyond any fair use exemption from infringement. CIV.A No. 95-1107-A, 1996 WL 633131, at *1 (E.D. Va. Oct. 4, 1996); see also *Veck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 800 (5th Cir. 2002) (holding the reprinting of building codes on a third-party website to not constitute copyright infringement as municipal law was not copyrightable); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (requiring copyright holders to consider fair use exemption before issuing a DMCA takedown notice); Joseph M. Miller, *Fair Use Through the Lenz of § 512(c) of the DMCA: A Preemptive Defense to a Premature Remedy?*, 95 IOWA L. REV. 1697, 1711 (2010).

128. The only other decision that includes substantial discussion of a fair use defense, *Righthaven LLC v. Choudhry*, held enough issues of material fact present to decline a grant of summary judgment in either direction on the fair use question. 2:10-CV-2155 JCM PAL, 2011 WL 1743839, at *5 (D. Nev. May 3, 2011).

ownership in the Las Vegas area.¹²⁹ Righthaven brought suit for infringement for unauthorized publication of portions of the copyrighted article; Nelson contended that he had a fair use defense. In its four-factor fair use analysis, the court found the purpose and character of the use—“to create business for [Defendant Nelson] as a duly licensed realtor operating in that market”—to disfavor fair use, whereas the other factors pointed in the opposite direction: the portion excerpted contained “factual news reporting” rather than “reporter commentary”; the use involved only “the first eight sentences of a thirty sentence article”; and, the lack of any commentary in the excerpted passage “does not satisfy a reader’s desire to view and read the article in its entirety . . . and thereby does not dilute the market for the copyrighted work.”¹³⁰ Here, the court addressed the complex commercial nature of Web-based content, in which the display of “free” information may not belie an underlying commercial opportunity.

Moreover, the copyrighted work under discussion leaned more toward factual information than creative expression, suggesting that actions to enforce newspaper copyrights generally, rather than the particular bad faith tactics of a troll such as Righthaven, make a fair use argument particularly compelling. Perhaps this signals a motivating force in the *Righthaven* cases that distinguishes Righthaven from a licensing organization such as ASCAP not in terms of the actors, but the type of content that each seeks to protect under copyright. The fair use analysis thus opens up an opportunity for public policy considerations that look beyond the alleged act of infringement to the foundational concern with the nature and purpose of copyright protection, a discussion that may have blossomed either in the court room or in the critical literature if the *Righthaven* cases had had an opportunity to develop a substantial body of case law.

2. *Righthaven v. JAMA*

In *JAMA*, a nonprofit committed to “a multi-racial, multicultural movement for immigrant and refugee rights” posted a copyright-protected *LVR-J* article on its website.¹³¹ Unlike the use of an excerpt in *Realty One*, the alleged infringement here involved the use of an entire *LVR-J* article. Additionally, the alleged infringing website was more strictly not-for-profit than the arguably commercial impetus behind Nelson’s “information blog” in *Realty One*. As in most fair use analyses, it is difficult if not impossible to discern which factor (if any) determines the outcome, but the court in *JAMA* reached the same finding—i.e., that the alleged infringement constituted fair use—as did the court in *Realty One*.¹³² The court’s reasoning on the issue of transformation is of particular interest:

[Defendant’s] use of the article is transformative. Although the former owner, the

129. *Righthaven LLC v. Realty One Group, Inc.*, No. 2:10-CV-1036-LRH-PAL, 2010 WL 4115413, at *1 (D. Nev. Oct. 19, 2010).

130. *Id.* at *2.

131. *Righthaven, LLC v. JAMA*, No. 2:10-CV-1322 JCM (LRL), 2011 WL 1541613, at *1 (D. Nev. 2011).

132. *Id.* at *5.

LVR-J, used the article for news reporting, the court focuses on the current copyright owner's use, which, at this juncture, has been shown to be nothing more than litigation-driven. Accordingly, [Defendant's] use of the article to educate the public is transformative and does not constitute a substitution of the plaintiff's use.¹³³

Similarly, by emphasizing that “Righthaven cannot claim the *LVR-J*'s market as its own and is not operating as a traditional newspaper,” again a court looks to the plaintiff bringing suit, and not the use itself, in conducting a fair use analysis.¹³⁴ Usually, the determination of transformation involves examination of the actual use and whether it weighs for or against a finding of fair use.¹³⁵ Here, however, the court seemed to suggest that the plaintiff's use—rather than whatever potential transformation the defendant made—should determine this factor of fair use analysis.¹³⁶ This may be understandable from one sense of policy perspective; after all, JAMA is a nonprofit organization that provides assistance to minority immigrants and refugees, whereas Righthaven's stake in the case is limited to litigation-driven profits. But an analysis that looks at the plaintiff bringing suit rather than the use in question moves away from the generally accepted notion of “use” in fair use analysis and toward a legal analysis divorced from the actual works that copyright aims to cover.

3. *Righthaven v. Hoehn*

In November 2010, Wayne Hoehn posted an *LVR-J* article entitled, *Public Employee Pensions. We Can't Afford Them*, on the sports-betting website madjacksports.com.¹³⁷ Hoehn had never been employed by Mad Jack Sports but rather posted the article in the public comment section of the website.¹³⁸ As was the case in *JAMA*, Hoehn reprinted an entire copyright protected *LVR-J* article, but the court nevertheless found his use to be protected.¹³⁹ The court placed special emphasis on the noncommercial purpose and character of the use, as Hoehn posted the article “to foster discussion in a specific interactive website forum . . . consistent with comment, for which 17 U.S.C. § 107 provides fair use protection.”¹⁴⁰ Such a broad understanding of “comment” opens up the possibility of fair use exemptions for nearly all blog-based activity, for what blog could not be described as a “comment”? Furthermore, the court's analysis of the nature of the work significantly curtails the scope of copyright protection for newspaper-based content. Despite acknowledging that the article in question was an original

133. *Id.* at *2.

134. *Id.* at *5.

135. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citations omitted) (“The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . .”).

136. *JAMA*, 2011 WL 1541613, at *5.

137. *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1141 (D. Nev. 2011).

138. *Id.*

139. *Id.*

140. *Id.* at 1149.

editorial published by the *LVR-J*, a piece more closely associated with creative commentary than the reportage of *Realty One* and *JAMA*, the court broke down the editorial into its component paragraphs to find that the creative elements “are not enough to consider the Work a ‘purely creative work.’”¹⁴¹

This line of reasoning adds little to fair use analysis. It is a well established copyright principle that only content that meets the creative requirements of copyright warrants copyright protection, and those portions that are merely factual do not gain access to said protections.¹⁴² In other words, to find that a work is not “purely creative” does not preclude some amount of copyright protection (insofar as the “creative elements” are concerned).¹⁴³ The nature of a given work is not so black and white, and where the entire copyrighted work has been reproduced, it seems illogical to hold that the nature of a work containing creative elements so clearly favors a finding of fair use. A newspaper editorial may be distinct from a piece of narrative fiction or song lyrics, but such an absolutist conception of creativity leaves little room for newspapers to protect valid copyrights, on the Internet or elsewhere.

* * *

These few cases that engaged in a substantive fair use analysis reveal the promise of a fuller substantive engagement that never came to fruition. Each court reached its conclusions on different, and in some cases nontraditional grounds, adding just enough material to an already hotly contested doctrine to do more harm than good. That the court in *Hoehn* felt compelled to conduct a four-factor test in what essentially amounts to dicta reflects the willingness of courts to engage the difficult questions, if only Righthaven could have survived long enough to respond.¹⁴⁴ Before its financial woes prevented any of its appeals from going forward, Righthaven indicated a desire to weigh in on these fair use analyses. While mounting an appeal to the wholesale copying in cases such as *JAMA* and *Hoehn*, Righthaven conceded that a partial excerpting of a news article by a third-party blogger amounted to a fair use.¹⁴⁵ Absent any categorical judicial holding on

141. *Id.*

142. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344–45 (1991) (internal citation omitted) (“[F]acts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas or the facts he narrates.’”).

143. *Id.* at 348 (internal citation omitted) (“Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression.”).

144. Righthaven opposed summary judgment proceedings given the early stage of the litigation, but the court nevertheless held that Righthaven had shown no reason to conduct discovery in opposition to summary judgment. *See Hoehn*, 792 F. Supp. 2d at 1148.

145. Sheri Qualters, *Righthaven Affiliate Concedes that Brief Web Excerpt Is Fair Use*, NAT'L L. J. (Nov. 23, 2011), available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1321804570307&Righthaven_Affiliate_Concedes_That_Brief_Web_Excerpt_is_Fair_Use (“The latest chapter in the

the issue, it is difficult to discern whether Righthaven felt that this was the correct interpretation of fair use or just whether it had little choice but to abandon its weaker (if still potentially winnable) cases in order to survive, in light of the jurisdictional difficulties and mounting sanctions. Partial excerption arguably falls closer to fair use than wholesale reproduction, but the curtailed *Righthaven* cases never had a chance to define where the ultimate dividing line should fall.¹⁴⁶

From this perspective, the limited and questionable interpretation of the fair use doctrine might demonstrate the greatest lost opportunity from the short-lived *Righthaven* cases. Righthaven brought 276 individual infringement cases, each with a distinct set of factual circumstances along each of the fair use factors. If even a tenth of these cases reached a judicial determination on the merits rather than merely jurisdictional grounds, a significant amount of crucial common law on the issue could have emerged. Even as Righthaven entered its death throes, nonnewspaper media entities recognized the importance of developing doctrine in this arena, with the RIAA hinting at filing a brief in support of Righthaven.¹⁴⁷ Particularly for the Internet, where more information is made available for a wider range of uses than ever before, the lack of clear indicators of what use is fair provides little guidance to both future content users and copyright enforcers.¹⁴⁸

C. NEW CHALLENGES FOR STRUGGLING NEWS MEDIA

Given Righthaven's unsavory practices and the sympathetic defendants against which it brought suit in its enforcement campaign, it is easy to forget that the clients whom the "troll" hopes to represent are not untouchable media tycoons of a Hearstian era but overseers of a dying newspaper industry. There is a great deal of discussion over whether the cause of newspaper decline can be attributed to the

Nevada federal court saga launched by aggressive copyright plaintiff Righthaven LLC is a concession by its affiliate, *Las Vegas Review-Journal* publisher Stephens Media, that a brief news article excerpt in an online forum is not copyright infringement.”).

146. For example, Righthaven's contention that reputational benefits from blogging might undermine *Hoehn's* finding that the activity is noncommercial never had a chance to get off the ground. See Green, *Righthaven Offers New Argument*, *supra* note 118 (“They can profit without paying any price, Righthaven says, by lifting stories from newspaper websites to enhance their own standing in the online world.”).

147. Steve Green, *Book, Record Industries Attack Righthaven Fair Use Ruling*, VEGAS INC. (Dec. 5, 2011, 9:26 PM), <http://www.vegasinc.com/news/2011/dec/05/book-record-industries-attack-righthaven-fair-use/> (“If Righthaven can't somehow revive its standing to sue over newspaper content copyright violations, it won't be filing new lawsuits and there won't be any more fair use controversies to be resolved.”); Mike Masnick, *RIAA Really Planning To Join Righthaven Fight*, TECHDIRT (Dec. 5, 2011, 9:59 AM), <http://www.techdirt.com/articles/20111205/05001716972/riaa-really-planning-to-join-righthaven-fight.shtml> (“RIAA and the Association of American Publishers (AAP) is planning to try to join the [*Hoehn*] case, arguing that the issue of standing (i.e., the fact that Righthaven doesn't have the copyrights in question) should preclude the court from even considering the fair use question.”).

148. But see David L. Amkraut, *The Seven Deadly Myths of Internet Copyright*, WEBNET77, <http://webnet77.com/webstuff/copyright.html> <http://webnet77.com/webstuff/copyright.html> (last visited Jan. 13, 2012); *contra* CHRISTOPHER ALAN JENNINGS, CONG. RESEARCH SERV., FAIR USE ON THE INTERNET (2002), available at <http://www.fas.org/irp/crs/RL31423.pdf> (“[I]t appears that the new digital environment has not caused the courts to abandon or significantly deviate from traditional fair use analysis. Courts appear to be applying the fair use factors in a technologically neutral manner.”).

Internet alone or if other factors are in play.¹⁴⁹ There is little question, however, that newspapers are going out of business or losing considerable readership in an era where more and more content is available online, free of charge. As the *LVR-J* manifesto made clear, frustrated and helpless newspapers felt that they had little choice but to explore all potential revenue streams, even if it meant creating an outside legal enforcement agent and going after relatively innocuous blog posters.

Whereas the particular form of copyright trolling taken up by Righthaven was resoundingly denounced, the case law provides few answers as to what alternative mechanisms of copyright enforcement on the Internet will strike a balance between protection and profits. In February 2011, newswire service the Associated Press announced the establishment of News Licensing Group, a clearinghouse for newspaper content in the mold of ASCAP.¹⁵⁰ It remains to be seen if such a project, launched in January 2012, will convince Internet posters to pay for information they have long used for free.¹⁵¹ Even with a licensing mechanism in place, as in the United Kingdom, legal disputes over what constitutes a use that requires a license remain an open and highly contested issue.¹⁵² Alternatively, one former Righthaven client under new leadership finds promise for thriving newspapers in a free, more open Internet.¹⁵³ Whether such a utopian vision will win over skeptics while statutory damages are still on the table remains to be seen.

Finally, the *Righthaven* cases may signal a lost opportunity to explore a separate form of protection for the newspaper industry: the hot news doctrine.¹⁵⁴ Given the

149. See, e.g., Jeff Jarvis, *Is the Internet Killing the Newspaper?*, BIG THINK (May 8, 2008), <http://bigthink.com/ideas/1263>; Peter Preston, *We Thought the Internet Was Killing Print. But It Isn't*, OBSERVER (Oct. 16, 2010), <http://www.guardian.co.uk/media/2010/oct/17/newspaper-abcs-websites-internet-news>; *Who Killed the Newspaper?*, ECONOMIST (Aug. 24, 2006), available at <http://www.economist.com/node/7830218>.

150. Russell Adams, *AP to Launch News Licensing Group*, WSJ DIGITS (Feb. 3, 2011, 4:48 PM), <http://blogs.wsj.com/digits/2011/02/03/ap-to-launch-news-licensing-group/>.

151. Rick Edmonds, *AP, 28 News Orgs Launch NewsRight to Collect Licensing Fees from Aggregators*, POYNTER (Jan. 5, 2012, 3:24 PM), <http://www.poynter.org/latest-news/business-news/the-biz-blog/157817/ap-28-news-orgs-launch-newsright-to-collect-licensing-fees-from-aggregators/>.

152. See, e.g., *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2011] EWCA Civ 890 (U.K.), available at <http://www.judiciary.gov.uk/media/judgments/2011/newspaper-licensing-agency-ltd-others-v-meltwater-holding-bv-others> (holding headlines may benefit from copyright protection as a “free-standing original literary work”); Shireen Smith, *Linking and Copyright following Meltwater v. Newspaper Licensing Agency*, AZRIGHTS (Mar. 14, 2011), <http://ip-brands.com/blog/2011/03/linking-and-copyright-following-meltwater-v-newspaper-licensing-agency/>.

153. John Paxton, *WAN IFRA International Newsroom Summit: How the Crowd Saved Our Company*, DIGITAL FIRST (Jun 8, 2011, 3:32 PM), https://jxpaton.wordpress.com/2011/06/08/wan_ifra/ (“Instead of pay walls, we see greater value creation in the open sharing of our content. Our approach is to treat content like an API – available to any who want it” (quoted in Rainey Reitman & Kurt Opsahl, *From the Ashes of Righthaven, the Promising Future of Digital Media*, ELECTRONIC FRONTIER FOUND. (Sept. 12, 2011), <https://www.eff.org/deeplinks/2011/09/ashes-righthaven-promising-future-digital-media>)).

154. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); Lauren M. Gregory, Comment, *Hot off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the “Hot News” Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577 (2011); Amy E. Jensen, Comment, *When News Doesn't Want to Be Free: Rethinking “Hot News” to Help Counter Free Riding on Newspaper Content Online*, 60 EMORY

significant controversy generated by the trolling, perhaps Righthaven-like companies could pursue similar protection of news content such as the hot news doctrine without relying upon copyright, long an uneasy bedfellow for information heavy (as opposed to original and creative) news content.¹⁵⁵

IV. CONCLUSION

Copyright trolling in the model of Righthaven is but the latest in a long line of enforcement schemes designed to extract value from intellectual property by any means necessary. The combination of staggering statutory damages, exorbitant litigation costs, and the ease with which parties can track unauthorized uses often proves too enticing an option for faltering industries hoping to survive in an uncertain technological future.

The *Righthaven* cases unquestionably destroyed Righthaven, removing one individual troll from the copyright enforcement business. Less certain are the prospects of future enforcement mechanisms for copyright holders seeking to emulate the patent trolls and of the businesses that rely on the profitability of their intellectual property to survive. Copyright trolling behavior continues to proliferate, and newspaper companies continue to falter.

Crucially, it is difficult to find any resolution to the question of standing for copyright infringement claims. The U.S. District Court for the District of Nevada applied existing precedent developed in *Silvers*, a test that has been met with much critical opposition. The U.S. District Court for the District of Colorado in *Wolf* established yet another criterion for evaluating standing without developing its rationale, particularly with respect to beneficial ownership. Moreover, the *Wolf* court left unresolved whether the less restrictive interpretation of the Fifth Circuit in *Prather*, while decided under the 1909 Act, might nevertheless better comport with the 1976 Act's more expansive consideration of divisibility and alienability to protect authors and provide financial opportunities to copyright holders. Without any funds to contest even the Colorado court's *Wolf* decision, Righthaven could not obtain appellate review, which might have brought some much needed court analysis to this underdeveloped area of the law. Whether the SAA between Stephens Media and Righthaven was simply "over-lawyered" or whether there existed a more fundamental deficiency in this type of arrangement remains an open question. Going forward, newspapers can know neither what options will meet

L.J. 537 (2010); Daniel S. Park, Comment, *The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369 (2010); Eric P. Schmidt, Comment, *Hot News Misappropriation in the Internet Age*, 9 J. TELECOMM. & HIGH TECH. L. 313 (2011).

155. Recent court developments, particularly in the Second Circuit's ruling in *Theflyonthewall.com*, suggest that the hot news doctrine is an increasingly difficult protection to maintain and that it might have been of little assistance to Righthaven. Furthermore, an *NBA v. Motorola* preemption analysis would likely have found copyright to be the governing law in this instance. On the other hand, the sister court ruling would of course not have been binding on the Righthaven cases, nor would a newspaper company face some of the public perception difficulties that an investment bank seeking to hide market data from the generally public had to face.

jurisdictional requirements nor what potentially valuable rights they must give up in the process.

Even if newspaper companies were in a financial position to avoid jurisdictional problems altogether by creating in-house copyright enforcement mechanisms, the continued uncertainty regarding the substantive viability of Righthaven-like claims makes such investments highly unlikely. In particular, the *Righthaven* decisions did not limit reprobation to the question of standing, but they also added further confusion to the notoriously murky realm of fair use analysis. Especially where the lack of standing precluded the suit from moving forward, courts engaged in less-than-thorough fair use analyses which at times lacked even internal coherence. One might dismiss these discussions as mere dicta, but the general scarcity of case law on analogous Internet uses may give these opinions more legitimacy and authority than they deserve, all the while failing to articulate guidelines as to what is and is not likely to be held a fair use.

Newspaper companies, then, are left with little direction in how to move forward. There exist preliminary efforts to enact alternative compulsory licensing mechanisms, but foreign-based developments suggest that even this form of copyright protection carries with it legal complications. Meanwhile, the once viable hot news doctrine continues to erode, further curtailing the ability of newspapers to survive intrusions upon its content on the Internet.

There may, however, be one silver lining to the *Righthaven* cases beyond simply getting rid of Righthaven. For all of the questions about standing, fair use and the fate of newspapers left unresolved by the *Righthaven* cases, the swift condemnation of trolling in the copyright arena perhaps signals an alternative approach to the tacit acceptance of said practices in the patent arena. Copyright trolls are barred from the gates of copyright enforcement, while other forms of rights divisibility remain acceptable, perhaps reflecting a relevant critique of how other property systems treat value. What both patent trolls and copyright license mechanisms such as ASCAP share—and what Righthaven and other copyright trolls lack—is potential value generated by the use, rather than mere exchange, of intellectual property. More than any bad faith behavior or poor legal structuring, Righthaven's fatal flaw may simply have been its lack of interest in *dissemination* of the copyrighted works it sought to protect. From this perspective, perhaps the important standing question is not who may sue, but why.