

COMMENT

I WANT TO BE A NON-PRODUCER: COPYRIGHT NON-PRACTICING ENTITIES AND THE GROUP REGISTRATION PROCESS FOR PHOTOGRAPHS

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Although this is unorthodox, the author's note is a salient place to demonstrate one of the points of this Comment. I had initially requested that the name be left blank, but I agree with the editors that explaining my thought process instead is more informative. If the *Administrative Law Review* had not provided my name, how would the general public determine who authored and owned this work? Additionally, if the law review had not indicated any copyright formalities, would that affect how the public believed it could use this work?

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INTRODUCTION

In the Academy Award-winning 1967 comedy, “The Producers,” protagonists Max Bialystock and Leo Bloom try to make a fortune by using shrewd business tactics to produce a guaranteed flop.¹ Copyright non-practicing entities (NPEs), organizations that threaten infringers to induce quick settlements, operate similarly when it comes to online photographs.² A digital photo that may have little real market value on its own can be shrewdly managed and transformed into a profitable work with the threat of infringement proceedings. This tactic causes problems for society and the economy, which become even more complicated with the introduction of the group registration process for photos headed by the United States Copyright Office.

The legal field is littered with examples of NPEs abusing loopholes in the current law. Notably, the Copyright Office currently does not require a list of all authors’ names in a group registration of photos³ or any type of formality, such as a notice of copyright and date.⁴ Other loopholes that aid NPEs include the ability to cite high statutory damages in threatening letters.⁵ Settlements deprive innocent infringers of the substantial and

1. *The Producers*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0063462/?ref=fn_al_tt_2 (last visited June 2, 2014).

2. Cf. Richard Chirgwin, *Copyright Troll Prenda Law Accused of Seeding Own Torrents*, THE REGISTER (June 6, 2013), http://www.theregister.co.uk/2013/06/06/forensics_reveal_more_on_prenda_laws_trolling_techniques/.

3. *Infra* Part II.D.

4. *Infra* note 161 (discussing the removal of formalities by the Berne Convention).

5. See *infra* Part III.C (discussing non-practicing entities’ (NPEs’) abuse of statutory damages).

procedural safeguards of a trial.

Righthaven LLC, a notorious NPE, filed a complaint against twenty-year-old blogger Brian Hill, claiming that Hill infringed one of the firm's copyrights when he reposted photos on his blog.⁶ Hill could either face an expensive and uncertain trial with damages potentially reaching \$150,000 if he is found guilty of willful infringement, or settle with Righthaven for \$6,000.⁷ NPEs do not always take this extreme damages approach, yet they use similar tactics to extract lower settlements.⁸ Another NPE named Copyright Enforcement Group sued a fan that posted a photo of Lindsey Lohan to a celebrity fan site.⁹ The same group went after bloggers who used unlicensed photos to decorate their blogs, demanding \$500 for each infringing photo.¹⁰

This Comment's thesis is not that the previously discussed actions do not constitute infringement—they do, with some exceptions.¹¹ But they are cases of “innocent infringement,”¹² in which the infringing party is usually unaware that what she is doing is illegal,¹³ or cases in which fair use, an exception to infringement, applies. Ignorance is no excuse to break the

6. Constance Boutsikaris, Comment, *The Rise of Copyright Trolls in a Digital Information Economy: New Litigation Business Strategies and Their Impact on Innovation*, 20 COMMLAW CONSPPECTUS 391, 391 (2012).

7. *Id.*

8. Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2012) (suggesting that smaller suits comprise an increasing segment of patent NPE suits).

9. Mike Masnick, *Copyright Trolls Now Going After Random Bloggers Who Reposted Photos*, TECHDIRT (July 11, 2013, 9:32 AM), <http://www.techdirt.com/articles/20130615/02094123486/copyright-trolls-now-going-after-random-bloggers-who-reposted-photos.shtml>; see also PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 179 (2011) [hereinafter RECLAIMING FAIR USE] (arguing there may be a fair use defense if the user has a “repurposing reason” for posting Lohan's photo on a fan site).

10. Houstonlawy3r, *CEG-TEK Is Now Your Friendly “Photo” Copyright Troll*, TORRENTLAWYER (June 13, 2013), <http://torrentlawyer.wordpress.com/2013/06/13/ceg-tek-akm-images-gsi-media-photo-image-copyright-trolls/>.

11. To prove infringement, the claimant must show (1) ownership of a valid copyright, here a photo, and (2) unauthorized copyright of constituent parts of the original photo. See *Masterfile Corp. v. Gale*, No. 2:09-cv-966, 2011 WL 4702862, at *1 (D. Utah Oct. 4, 2011) (citation omitted).

12. 17 U.S.C. § 907 (2012).

13. This is not to imply that all parties pursued by NPEs are entirely innocent or ignorant. See, e.g., Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U COLO. L. REV. 53, 83 (2014) (“Typically, the infringement is committed by those likely to think that copyright protection is much narrower in scope than it actually is and that a use is permissible if accompanied by any single factor cutting in favor of fair use.”).

law, but it would be Kafkaesque to leave the current legal system in place.¹⁴ A system that grants unbalanced power to entities that do nothing to further artistic or scientific progress is absurd, and the Copyright Office should take the necessary steps to ameliorate this situation. The issue is one of fundamental fairness: should innocent infringers pay such high damages for such insignificant infringements, and should NPEs be allowed to continue exploiting the current copyright system unimpeded?

NPEs obtain copyrights to works they did not create (hence the moniker “non-practicing”) and enforce these rights against infringers.¹⁵ At first glance, this practice does not appear problematic,¹⁶ but its praxis is more insidious than the mere enforcement of a right to sue. NPEs use the threat of a lawsuit to induce quick settlement awards without the safeguards of a trial. Because most of these claims never make it to court, there is a dearth of public record on NPE tactics.¹⁷ Thus, when discussing NPEs’ practices and how they take advantage of the group registration process for photos, it is necessary to speak somewhat speculatively and analogize the actions of NPEs in the patent forum.

The process of suing for infringement consists of several steps and is further complicated by the group copyright registration process, which is commonly used in the digital photography context.¹⁸ For any infringement proceeding, a work must first be registered with the Copyright Office.¹⁹

14. Peter Singer, *The Drowning Child and the Expanding Circle*, NEW INTERNATIONALIST (Apr. 1, 1997), <http://newint.org/features/1997/04/05/drowning/> (positing that not only do people have an ethical obligation to help others, they have an ethical obligation to pay to help others).

15. *Infra* Part III.B. An NPE is commonly, if not derogatively, referred to as a “copyright troll,” an adaptation of the phrase “patent troll,” which is an NPE that litigates patents abusively. See Caroline Horton Rockafellow, *Copyright Trolls—A Different Embodiment Of The Patent Troll?*, iP FRONTLINE (Nov. 23, 2006), <http://www.ipfrontline.com/depts/article.aspx?id=13469&deptid=3> (noting that patent trolls have a more extensive and often more publicized history than copyright trolls). Despite the varying differences between copyrights, patents, and their respective administrative bodies and procedures, it is illustrative to draw parallels between both entities.

16. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 421–23 (2003) (discussing the importance of managing intellectual property rights and not just incentivizing creators).

17. Jonathan Bailey, *The Stock Photo Industry’s Massive Copyright Campaign*, PLAGIARISM TODAY (July 21, 2010), <http://www.plagiarismtoday.com/2010/07/21/the-stock-photo-industrys-massive-copyright-campaign/>.

18. See Allen Murabayashi, *Electronic Copyright Registration for Photographers*, PHOTOSHELTERBLOG (May 19, 2009), <http://blog.photoshelter.com/2009/05/electronic-copyright-registrat/> (describing how to use the United States Copyright Office’s electronic filing system for groups of photos).

19. At what point a work is considered properly registered is a contentious issue amongst the courts, but for this Comment, it is assumed that all works are properly

Registration of photographs individually would be financially and administratively burdensome, both for the author and for the Copyright Office, especially when portfolios can number in the hundreds. Realizing this, the Copyright Office allows for group registration of photos.²⁰ The author of the copyright may later relinquish the rights to his or her registered portfolio, sometimes to an NPE.²¹ An entity that has only been granted the copyrights of a photo temporarily, with the sole purpose of registering it as a group to save on registration fees, is a valid claimant and can pursue infringers.²²

The photos eventually find their way onto the Internet, where unsuspecting bloggers can easily search, find, and repost these photos to their personal blogs. Usually, these photos are not clearly marked as copyright protected, making it difficult for the infringing party to know if the photo is protected, the duration of its protection, or who owns it.²³

Regardless, once the blogger reposts the photos, she has generally

registered with the Copyright Office. *See generally* 17 U.S.C. § 701(a) (2012) (explaining the general role and procedures of the Copyright Office). Matthew J. Astle, *Help! I've Been Infringed and I Can't Sue!: New Approaches to Copyright Registration*, 41 U. MEM. L. REV. 449, 452 (2011) (noting the unsavory consequences produced by the current circuit split); *see* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16 [B][3] (2013) (discussing the Registration Approach and the Application Approach, ultimately favoring the Application Approach for being more efficient); *see also* William Patry, *Yes Virginia, There is a 411(a)*, THE PATRY COPYRIGHT BLOG (Nov. 30, 2007), <http://williampatry.blogspot.com/2007/11/yes-virginia-there-is-411a.html> (advocating that the Registration Approach conforms most to the plain-meaning of the statute and thus reflects Congress's intent); Thomas M. Landrigan, *Application or Registration?: Confusion Regarding the Copyright Act's Prerequisite to Copyright Infringement Lawsuits*, 44 IND. L. REV. 581, 599–603 (2011) (suggesting that the law currently supports the Registration Approach, and, if rights holders want to switch to the debatably more beneficial Application Approach, Congress should amend the statute to reflect this).

20. 37 C.F.R. § 202.3(b)(2) (2013).

21. *See* Lemley & Melamed, *supra* note 8, at 2122; *see also* 37 C.F.R. § 202.3(a)(3)(i)–(ii) (defining a claimant who may sue for infringement as either the author or any entity that has obtained the rights from the author); *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972–73 (D. Nev. 2011) (holding that Righthaven's "Strategic Alliance Agreement" with a copyright owner to enforce online news articles was a valid method of establishing a claimant, though the language of this particular agreement did not grant Righthaven the ability to sue). *See generally* 37 C.F.R. § 202.3(a)(3)(ii) n.1. *Democratic Underground*, 791 F. Supp. 2d at 973 ("[A] copyright owner cannot assign a bare right to sue").

22. 37 C.F.R. § 202.3(a)(3)(ii) n.1; *see also* *Bean v. McDougal Littell*, 669 F. Supp. 2d 1031, 1035–36 (D. Ariz. 2008) (describing a plaintiff who was the author of a work but not a named claimant, while noting that the entity did not have the ability to "reproduce, adapt, publicize, perform, or display" the photo).

23. *Infra* Part II.C.

infringed,²⁴ and the NPE may sue her for anywhere between \$200 and \$150,000 in statutory damages.²⁵ Yet instead of asking the infringer to remove the offending photo,²⁶ or actually suing the infringer, the NPE will alert the infringer of the potential damages, usually citing the highest possible statutory award, and scaring the infringer into settling for a few thousand dollars.²⁷ These letters are sent to thousands of infringers, and the “scattershot” approach can prove to be very lucrative, with most parties settling out of court.²⁸ Thus, a series of cheap photos, if its copyrights are managed and enforced shrewdly, can turn out to be very profitable,²⁹ even if the photos themselves contained little intrinsic value.³⁰

24. THE DEPT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECON. 12 (2013) [hereinafter THE TASK FORCE], available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (determining that the definition of a copy is not limited to “permanent” physical copies” and the statutory definition of “fixed” has been updated to reflect the digital environment) (citing 17 U.S.C. § 101 (2006) (defining “fixed” as something “sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

25. 17 U.S.C. § 504(c)(2) (2012); see *infra* Part III.C; THE TASK FORCE, *supra* note 24, at 51 n.272 (noting statutory damages normally range from \$750 to \$30,000 per work, as provided under 17 U.S.C. § 504(c)).

26. 17 U.S.C. § 502(a) (granting courts the ability to issue temporary or final injunctions against infringers); see also *Masterfile Corp. v. Accounting Sys. Tech., Inc.*, No. 6:10-cv-259-Orl-28GJK, 2010 WL 5174506, at *3 (M.D. Fla. Oct. 1, 2010) (internal citation omitted) (holding a court has the ability to grant a preliminary injunction if the moving party shows: (1) a substantial likelihood of success on the merits; (2) that an irreparable injury will occur if the injunction is not granted; (3) that the moving party’s damage would be higher without the injunction than the non-moving party’s damage if the injunction were granted; and (4) that the injunction does not threaten the public’s interest). Copyright infringement carries a presumption of irreparable harm and a permanent injunction requires satisfaction of all these elements, except that it must show an “actual success on the merits” instead of a “likelihood of success.” *Id.* (citing *Amoco Prod. Co v. Vill. Of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

27. Cf. Lemley & Melamed, *supra* note 8, at 2126 (describing the various strategies employed by NPEs to induce settlements).

28. See *Copyright Trolls*, CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, https://www.cippic.ca/en/FAQ/Copyright_Trolls (last visited June 4, 2014) (containing examples of letters sent by NPEs).

29. Joe Mullin, *Prenda’s Massive Trolling Take Revealed: \$1.9 Million in 2012*, ARS TECHNICA (Oct. 18, 2013, 4:07 PM), <http://arstechnica.com/tech-policy/2013/10/prenda-massive-trolling-take-revealed-at-least-1-9-million-in-2012/> (noting Prenda Law made at least \$1.9 million in 2012 alone). The NPE is accused of creating a “honeypot” in which it uploaded its own copyrighted material to Pirate Bay, a torrent website, to induce users to infringe its protected works. *Id.*

30. While this rationale may be particularly true for photos, its mechanics extend to other media. “The Hurt Locker,” despite receiving the Academy Award for Best Picture, had a weak box office showing. *The Hurt Locker*, INTERNET MOVIE DATABASE,

The issue here is essentially threefold. First, the Internet has made it remarkably easy for the public to innocently infringe upon copyrighted photos. Second, the current state of group registration of photographs at the Copyright Office makes it difficult for the public to ascertain the copyright information of photos found online. Finally, NPEs obtain massive portfolios of registered photos and threaten infringers with statutory damages to induce quick settlements, depriving defendants of substantive and procedural legal safeguards.

Part I of this Comment details how the proliferation of digitization and the Internet has shaped the group registration process at the Copyright Office. Part II describes the group registration process, its benefits, and drawbacks. Part III explains the problems posed by NPEs in greater depth, and how they exploit the current copyright system. Part IV proposes administrative solutions to these problems. These solutions consist of increasing public awareness campaigns to alert people to the issues of copyright infringement on the Internet in conjunction with mandatory digital registration, metadata indexing of photos, and a reverse image search engine to ensure users have the proper resources to determine if a photo is protected in order to avoid NPEs' traps.

<http://www.imdb.com/title/tt0887912/> (last visited June 4, 2014) (costing an estimated \$15 million to produce, but only grossing \$15.7 million); see also James DeBrynn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 79–81 (2012) (arguing the copyright owner hired an NPE to campaign against infringers pirating the film from file sharing and peer-to-peer websites, ostensibly to make up for its low revenue); Mick Masnick, *US Copyright Group, Hurt Locker Producers Sue Dead Man & Others Unlikely To Have Infringed*, TECHDIRT (Aug. 29, 2011), <https://www.techdirt.com/articles/20110828/22523115718/us-copyright-group-hurt-locker-producers-sue-dead-man-others-unlikely-to-have-infringed.shtml> (suing 24,583 defendants for infringement based on IP addresses, but some letters were returned to sender because recipients were deceased; IP addresses are “flimsy evidence”). More recently, Voltage Pictures, which owns “The Hurt Locker,” began suing mass infringers of “Dallas Buyers Club.” Mike Masnick, *Voltage Pictures Abuses Trademark Law to Go After Dallas Buyers Club Downloaders*, TECHDIRT (Apr. 28, 2014, 1:01 PM), <http://www.techdirt.com/articles/20140426/07294427037/voltage-pictures-abuses-trademark-law-to-go-after-dallas-buyers-club-downloaders.shtml> [hereinafter Masnick, *Voltage Pictures*] (noting that Voltage Pictures is “one of the few non-porn film entities to really embrace copyright trolling”). Prenda Law had a similar motivation, although sanctions, including paying defendant’s legal fees, have since caused the firm to dissolve. Erin Fuchs, *America’s Most Notorious ‘Porn Trolling Collective’ Has Imploded*, BUSINESS INSIDER (Aug. 6, 2013, 12:18 PM), <http://www.businessinsider.com/prenda-law-dissolves-after-sanctions-2013-8> (quoting one Prenda Law attorney as remarking “[w]hen I read about myself on the Internet, I think, ‘Who is this jerk?’”).

I. THE RISE OF THE INTERNET AND ITS EFFECTS ON COPYRIGHTS

A. *High Fidelity to the Law: Technology's Influence on Copyright*

The Internet has become an omnipresent creature in American lives.³¹ Moreover, the Internet has become ambulatory with the increasing popularity of mobile Internet devices such as smartphones and tablets.³² The proliferation of the Internet has had profound effects not just on the lives and interactions of everyday people, but on copyright law as well.³³

Past copying technologies, specifically those in the audio industry, were expensive and did not reproduce fidelitous copies, making it more cost effective for the public to simply buy the licensed media rather than copying it.³⁴ This changed with the introduction of Sony's Digital Audio Tape, which was capable of "lossless serial copying," the ability to copy a work multiple times without noticeably degrading the copy's quality.³⁵ The content industry's swift lobbying resulted in the Audio Home Recording Act of 1992 (AHRA),³⁶ banning the importation of Sony's product and other copyright circumventing devices.³⁷ The AHRA quickly became

31. As of January 2014, an estimated 87% of American adults use the Internet. *Internet User Demographics (Adults)*, Pew Internet & Am. Life Project, PEW RES. CENTER, <http://www.pewinternet.org/data-trend/internet-use/latest-stats/> (last visited June 4, 2014). The numbers are even more staggering with American youth, where as of January 2014, 95% of teenagers use the Internet. *Internet User Demographics (Teens)*, Pew Internet & Am. Life Project, PEW RES. CENTER, <http://www.pewinternet.org/data-trend/teens/internet-user-demographics/> (last visited June 4, 2014). In the United States alone there are approximately 31 million bloggers. John Rampton, *Blogging Stats 2012 (Infographic)*, BLOGGING.ORG (July 13, 2012), <http://blogging.org/blog/blogging-stats-2012-infographic/>.

32. As of January 2014, an estimated 58% of American adults have a smartphone, and 42% of adults own a tablet computer. *Mobile Technology Fact Sheet*, Pew Internet & Am. Life Project, PEW RES. CENTER, <http://pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited June 4, 2014). As of May 2013, 63% of American adults who owned a cell phone use it to access the Internet, which is nearly twice as high as reports just three years ago. *Id.*

33. THE TASK FORCE, *supra* note 24, at 1, 37 (noting that many legal and technological updates are still in the process of being interpreted by the courts); see BILL D. HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* 38–39 (2013) (discussing the rise of the Internet's popularity in 1994 when tens of millions of households connected to the Internet).

34. HERMAN, *supra* note 33, at 29.

35. *Id.* at 30–31 (emphasis omitted).

36. Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001–10 (2006)).

37. 17 U.S.C. § 1008 ("No action may be brought under this title alleging infringement

irrelevant, however, with unfavorable court rulings that limited the scope of the AHRA,³⁸ and with new technologies, notably the Internet, which radically shifted the focus of the copyright discourse.³⁹ The AHRA represents the first time copyright law attempted to shape product design.⁴⁰ This tension between technological design and law has become increasingly commonplace today, particularly with encryption and digital rights management devices.⁴¹

The Internet profoundly disrupted this delicate balance with the economics of copying, as the public could now duplicate and share content⁴² at practically no cost while maintaining most of the work's qualitative integrity.⁴³ By 1995, Congress passed The Digital Performance Right in Sound Recording Act (DPRA),⁴⁴ protecting artists' public broadcasting rights in the digital forum,⁴⁵ and then the Digital Millennium Copyright Act in 1998 (DMCA),⁴⁶ which bolstered circumvention protection laws⁴⁷ and insulated Internet service providers (ISPs) from liability for their users' infringing acts.⁴⁸

of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.”).

38. HERMAN, *supra* note 33, at 32–34. Computer companies ensured the Audio Home Recording Act (AHRA) did not regulate general-purpose computers, software, or blank computer media such as floppy disks or hard drives. *Id.* at 34 (citing Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999) (holding the AHRA does not apply to MP3 players)).

39. *See generally* HERMAN, *supra* note 33, at 3.

40. *Id.* at 36.

41. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 148–53 (2004) (discussing how eBook digital rights management is more akin to copyright owners exerting “control” rather than permission).

42. THE TASK FORCE, *supra* note 24, at 1 (citing “new methods of mass infringement.”).

43. LESSIG, *supra* note 41, at 33 (discussing the history of photography's technology, the favorable legal climate, and the rise of amateur photographers as lowering “[t]he barrier to expression”). For example, an MP3, a compressed audio file, greatly reduces the size of the file, which allows for faster transmission and greater storage capacity. Marshall Brain, *How MP3 Files Work*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/mp31.htm> (last visited June 8, 2014). This compression comes at a cost: the quality of the audio is slightly reduced. *Id.*

44. Pub. L. No. 104-39, 109 Stat. 336 (1995).

45. THE TASK FORCE, *supra* note 24, at 10.

46. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

47. WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1988, Pub. L. No. 105-304, 112 Stat. 2860.

48. 17 U.S.C. § 512 (2012). Internet service providers do not have absolute protection; they must reasonably comply with content owners' takedown notices. *Id.* § 512(c)(1)(A)(ii)

Congress, the content industry, and the Copyright Office were ultimately prudent in trying to adjust the laws to keep up with the Internet.⁴⁹ Currently, copyright-related industries account for over 5.1 million jobs, a 46.3% growth between 1990 and 2011, outperforming other intellectual property related industries as well as non-intellectual property industries.⁵⁰ Yet infringement issues persisted on the Internet despite the DMCA, and piracy became part of the national debate.⁵¹ To this day, piracy dominates the digital copyright discourse, and the issue of NPEs has only recently received some media attention.⁵² The Department of Commerce's Internet Policy Task Force (Task Force) filed its July 2013 report that focused mainly on online piracy, and only mentions NPEs once in a footnote.⁵³ Before exploring the issues posed by copyright NPEs, it is necessary to understand the economics of the Internet and its effects on copyright law.

(requiring providers act expeditiously to remove notices once obtaining knowledge). Some commentators uphold the Digital Millennium Copyright Act's (DMCA's) "safe harbor provision" as the shield that helped catalyze the "Web 2.0," attributing the rise of many popular websites such as Google and YouTube to the protections created by the DMCA. David Kravets, *10 Years Later, Misunderstood DMCA is the Law that Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <http://www.wired.com/threatlevel/2008/10/ten-years-later/>.

49. HERMAN, *supra* note 33, at 39 (quoting those in favor of a strong copyright regime, "[A]s copying costs approach zero, intellectual property rights must approach perfect control.").

50. ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, *INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS* 39–42 (2012).

51. The peer-to-peer explosion ignited with Napster in 1999, causing the Recording Industry Association of America (RIAA) to respond with infringement suits against 35,000 people between 2003 and 2008. HERMAN, *supra* note 33, at 58–59. These suits largely settled out of court for sums in the low thousands. THE TASK FORCE, *supra* note 24, at 47. The RIAA abandoned its campaign mainly due to financial reasons: over five years, it spent \$90 million in legal fees, yet only recovered \$2.5 million. DeBriyn, *supra* note 30, at 84–85.

52. See generally THE TASK FORCE, *supra* note 24 (discussing the prevalence of piracy on the Internet).

53. See *id.* at 47 n.243 (noting the pornography industry's recent trend of pursuing settlements in the low thousands and the courts' belief that some of the NPEs' tactics may be "abusive and improper"); see, e.g., Mike Masnick, *Copyright Troll Perfect 10 Loses Once Again, Setting More Good Precedents for Copyright Law*, TECHDIRT (Jan. 30, 2014, 3:38 AM), <https://www.techdirt.com/articles/20140129/15542726041/perfect-10-loses-once-again-setting-more-good-precedents-copyright-law.shtml> (noting Perfect 10, a porn NPE, has lost most of the cases it has litigated but still profits from settlements). See generally Amy Rosen, *The Big Lawsuits Keep on Coming: An Analysis of Extortive Pornographic "Trolling Lawsuits" and Preventive Approaches*, 95 J. PAT. & TRADEMARK OFF. SOC'Y 165, 166 (2013) (discussing the prevalence of NPE tactics in the online porn industry).

B. Basic Economics of Intellectual Property

Economics and intellectual property are intimately linked.⁵⁴ Understanding the basic concepts and the economic circumstances created by the Internet helps explain how NPEs operate and how they take advantage of the current legal regime. Intellectual property has distinctive characteristics that distinguish it from physical property.⁵⁵ Intellectual property is an intangible public good, which has two unique elements: (1) it is non-rivalrous, meaning one party's enjoyment of a work does not interfere with another party's capacity to enjoy the same work, and; (2) it is non-excludable, since once the public knows about the work, the knowledge of that work is no longer restricted.⁵⁶ However, a public good

54. See Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 3 n.1 (2003); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1074–76 (1997) (discussing the economic effects of varying copyright rules on creators and improvers of copyrighted material). Yet Professor Samuelson points out that as of the time of her article, economics has had little impact on copyright's policymaking process. *Id.* at 4. One of several reasons why economic analysis has not had as strong an impact on policymakers as may be expected is that many copyright professionals are not conversant in economics and have backgrounds in subjects that are "more inclined to embrace a romantic conception about art and literature." *Id.* at 6. While other administrative agencies like the Department of Justice's Antitrust Division, Federal Trade Commission, and Federal Communication Commission have economic advisors, the Copyright Office, as well as the Patent and Trademark Office, do not. *Id.* at 6–7. See generally NIVA ELKIN-KOREN & ELI M. SALZBERGER, *THE LAW AND ECONOMICS OF INTELLECTUAL PROPERTY IN THE DIGITAL AGE: THE LIMITS OF ANALYSIS* 57 (2013) (explaining that the incentive model of intellectual property dominates the discourse). But incentives are not the final word in the economics of copyright. According to open-source advocate Eric Raymond, "You cannot motivate the best people with money. Money is just a way to keep score. The best people in any field are motivated by passion." *Id.* at 70–71, 124–27 (noting that some scholars are shifting to a property model of intellectual property in response to empirical research's inability to determine the optimal duration of a work's monopoly). Former head of the Motion Picture Association of America (MPAA), Jack Valanti, is famous for trying to interject a property-based model for copyright, but Professor Lessig counters that this model has no reasonable connection to copyright's constitutional purpose. LESSIG, *supra* note 41, at 118. See also RECLAIMING FAIR USE, *supra* note 9, at 81–82 (discussing how the court's holding in *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), reinvigorated fair use and shifted the law and economics focus that had dominated copyright in the 1980s and the 1990s).

55. A useful way of thinking about intellectual property is to take a business, subtract all its physical assets, and the resulting difference—what remains—is that business's intellectual property. See ALEXANDER I. POLOTORAK & PAUL J. LERNER, *ESSENTIALS OF INTELLECTUAL PROPERTY: LAW, ECONOMICS, AND STRATEGY* xxvi (2d ed. 2011).

56. See ELKIN-KOREN & SALZBERGER, *supra* note 54, at 59–61 (citing "[t]he marginal costs of exclusion are often greater than the marginal costs of provision"). For example, two people from opposite sides of the world can both look at an online photo at the same time without interfering with the other's enjoyment, and once the photo is online, the website

sets up a free rider problem.⁵⁷ In the intellectual property context, a free rider is an entity that capitalizes on a work, but does not contribute to the creation of the work.⁵⁸ An NPE is a type of free rider.⁵⁹

Transaction and administrative costs determine how users interact with intellectual property online. A transaction cost is the cost incurred by a party when making any kind of exchange. It is a broad concept that includes all types of communications such as advertising a photo or negotiating a licensing agreement. An administrative cost is a subset of transaction costs that mainly pertains to the maintenance and management of a work. In the case of a digital photo, this includes the cost of copying the photo, maintaining the website that hosts the photo, and the legal fees associated with protecting the photo (e.g., registration fees, discovery costs, filing suit).

C. *Economics of the Internet and Digitization*

As reflected in the various laws addressing copyright, perhaps the greatest issue raised by the Internet is its unparalleled ability to lower transaction costs.⁶⁰ It costs users very little time, effort, and money to log on to the Internet and search websites, especially when compared to more traditional analogue methods such as thumbing through books at a library. In principle, the only initial cost for Internet access is a device with Internet capabilities and a subscription to an ISP. Moreover, the cost of digitally copying something from a webpage is substantially low: a simple copy and paste.

Digital cameras have also lowered the transaction costs of taking photos, making it easier and more affordable to shoot more photos over a shorter period of time.⁶¹ Thus the low cost of taking photos, registering groups of

does not prevent people from viewing that photo. This example presumes a free Internet, and does not take into consideration screening users' IP addresses to restrict access.

57. *Id.* at 59 (describing how non-excludability occurs when the cost of exclusion is so high that it would be inefficient to exclude others).

58. *Id.*

59. *Infra* Part III.A.

60. ELKIN-KOREN & SALZBERGER, *supra* note 54, at 142. The Coase Theorem states that if transaction costs are zero, the most efficient solution to an issue can be achieved without government intervention. The theorem implicates a preclusion of actions by the Copyright Office. See generally R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 2-6 (1960) (The Pricing System with Liability for Damage). Despite the Internet greatly diminishing these costs, it has not eradicated them, so this does not rule out agency intervention.

61. See Shannon E. Trebbe, *Enhancing Copyright Protection for Amateur Photographers: A Proposed Business Model*, 52 ARIZ. L. REV. 97, 101 (2010). There are two reductions in costs: creative and developmental. LANDES & POSNER, *supra* note 16, at 50. For digital photos,

photos (only thirty-five dollars),⁶² and uploading photos to the Internet has dramatically increased the public's access to these photos.⁶³ Yet greater access to photos online means greater access to copyright-protected photos, and NPEs have taken advantage of users' sudden proximity with such photos to ensnare them with infringement claims. NPEs particularly benefit from issues caused by the Copyright Office's group registration process.

II. THE GROUP REGISTRATION PROCESS AT THE COPYRIGHT OFFICE

A. *The Purpose of Group Registration*

A claimant may register his works with the Copyright Office for several reasons, particularly to provide the Copyright Office with a copy of the work so that the claimant can prove ownership of the work and sue for infringement.⁶⁴ A secondary purpose is to provide notice to others that the registered work is protected and not in the public domain.⁶⁵ The Copyright Office decided to allow group registration of photos in an effort to help ease the claimants' administrative burden when registering masses of works.⁶⁶ This procedure helped ease the administrative burden on the Copyright Office as well.⁶⁷

the creative cost is the time and effort the creator expends shooting photos and the developmental cost is the time and effort the creator's publisher expends uploading the photos to the Internet. *Cf. id.* (relating reductions to publishing).

62. 37 C.F.R. § 201.3(c)(1)-(2) (2013).

63. Reflecting this phenomenon, Facebook, which houses the largest cache of digital photos online, updated its protocols to allow all 845 million of its users to upload an unlimited amount of photos. Form S-1, Registration Statement: Facebook, Inc., 1, 82 (2012), <http://www.sec.gov/Archives/edgar/data/1326801/000119312512235588/d287954ds1a.htm> (uploading more than 250 million photos per day in 2011). Facebook stores more than 100 petabytes of photos and videos combined. *Id.* at 90.

64. 17 U.S.C. § 411(a) (2012) (registering a work with the Copyright Office is a necessary condition for infringement proceedings).

65. Trebbe, *supra* note 61, at 102 (citing H.R. REP. NO. 94-1476, at 154 (1976)) ("Although Congress has given latitude to the Copyright Office to adjust the registration requirements for practical purposes, the registration and accompanying deposit must ultimately 'serve the purpose of identification.'").

66. H.R. REP. NO. 94-1476, at 153.

67. *U.S. Copyright Office Forms*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/forms/> (last visited Apr. 21, 2014) (noting that electronic registrations are processed faster).

B. *The Process of Group Registration*

The copyright initially vests in the creator of the photograph.⁶⁸ Thus, in order to register a work as a group, all the photos must be compiled into a single portfolio. The photos in this portfolio do not necessarily have to be from the same shoot or even the same date; the group of photos may consist of any series of photos taken within the same calendar year and by the same photographer.⁶⁹ Although the Copyright Office previously accepted massive registrations, some numbering in the hundreds of thousands,⁷⁰ it has since limited the registration to a maximum of 750 photos.⁷¹

A registrant can file a group registration under one form and one filing fee if all the photos are taken by the same photographer, published within the same calendar year, and claimed by the same copyright claimant.⁷² To register more than 750 photos, the claimant can use Form VA and still pay one filing fee as long as she identifies the date of publication for each photograph deposited with the application.⁷³

The Copyright Office implemented an electronic registration system for published photos to ease its administrative burden.⁷⁴ Electronic registration

68. See 17 U.S.C. § 201(a).

69. 37 C.F.R. §§ 202.3(b)(10)(i)–(xi) (2013).

70. With the advent of digital photography and group registration, the Copyright Office did not anticipate receiving registrations containing thousands of photographs. 1 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING, AND THE ARTS* § 102.50 (3d. ed. 2013). There were several instances in which the Copyright Office received registrations ranging from 1,090 to 2,423 pages of continuation sheets, forms in which the registering party can include photos in addition to the initial registration. *Id.*; see 37 C.F.R. § 202.3(b)(3) (explaining continuation sheets are only used for non-electronic applications). As a result, the Copyright Office decided to cap continuation sheets at fifty pages. LINDEY & LANDAU, *supra* at § 102.50. However, Lindey and Landau note that this practice may change with the advent of new technologies that will lower the time and costs of processing group registrations. *Id.*

71. LINDEY & LANDAU, *supra* note 70.

72. 37 C.F.R. § 202.3(b)(10)(i)–(xi). There is some flexibility in satisfying these requirements, and the courts may not automatically invalidate a group registration if errors contained in the application are immaterial. See *Cipes v. Mikasa, Inc.*, 346 F. Supp. 2d 371, 373–74 (D Mass. 2004) (citing *Data General Corp. v. Grunman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (challenging the validity of copyright protection for several photos in a group registration)).

73. *U.S. Copyright Office Forms*, FL-124, U.S. COPYRIGHT OFFICE (2012), available at <http://www.copyright.gov/fls/fl124.html> (last visited May 4, 2014).

74. Registration of Claims of Copyrights, 76 Fed. Reg. 4072, 4072 (Jan. 24, 2011). Group registration of photos was initially implemented in response to photographers' growing concerns of costs and greater access to legal remedies. Registration of Claims to Copyright, Group Registration of Photographs, 65 Fed. Reg. 26,162, 26,163 (May 5, 2000). The Copyright Office had previously proposed a mandatory digital application of all group

has greatly benefited photo-hosting websites, allowing them to register entire caches of photos that have been added to the site's database within the last three months.⁷⁵ The Copyright Office previously required a thumbnail of each image being registered in the group, but this requirement proved too burdensome and thus was abandoned.⁷⁶

At any time, a copyright owner may transfer her rights, in whole or in part, to a third party.⁷⁷ Thus NPEs have the ability to acquire these portfolios through contract, purchase, or other types of agreements. At no point in its acquisition has the NPE contributed to the registration or the work aesthetically or financially.

C. Notice and the Group Registration Process

Registering a work to give public notice of copyright is often overlooked in the literature on NPEs. The Copyright Office makes all registrations after 1978 publicly available in physical and online forms.⁷⁸ Eighty percent of all registrations are filed electronically, and those that are not filed electronically are digitally converted and made available on the Copyright Office's online catalogue, which contains 20 million registered works.⁷⁹ Despite the availability of electronic files, high administrative costs impose a substantial limitation on the Copyright Office's ability to give the public full notice of registered files.⁸⁰ Not all registered works are available online, and information about a work's protection is limited to what was made available at the time of its registration.⁸¹ The shortcomings that result from the flaws in the current copyright law and group registration process make the Internet a ripe environment for NPEs to seek out and exploit unsuspecting victims. Finally, notice to the public is further hampered by the Copyright Office's longstanding practice of not requiring the names of each individual author in a group registration.

registrations, but this recommendation has not yet been adopted. *See* Registration of Claims to Copyright, Group Registration Options, 73 Fed. Reg. 23,390, 23,392 (Apr. 30, 2008). This Comment posits that the Copyright Office should make digital registration mandatory. *Infra* Part IV.C.1.

75. Registration of Claims of Copyrights, 76 Fed. Reg. at 4073.

76. Trebbe, *supra* note 61, at 102.

77. 17 U.S.C. § 201(d)(1)–(2) (2012); 37 C.F.R. § 201.4(a)(2) (2013).

78. THE TASK FORCE, *supra* 24, at 90; 17 U.S.C. § 707(a) (The Copyright Office “shall compile and publish at periodic intervals catalogs of all copyright registrations”).

79. THE TASK FORCE, *supra* 24, at 90. These numbers represent all works, not just photographs.

80. *Id.*

81. *Id.* The Copyright Office is aware of the notice procedure's shortcomings, and is currently investigating ways to increase quality and dissemination of information through websites and blogs. *Id.* at 91.

D. The Alaska Stock Loophole

Recently, the United States Court of Appeals for the Ninth Circuit ruled on a case involving the group registration of photographs, *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*⁸² The issue, *inter alia*, was whether copyright protection for individual photographs could be granted for a group registration even when only three of the authors' names were listed on the application.⁸³ The defendant argued that the statute "unambiguously" requires all the names of authors in the constituent work and that the "purpose" of registration was to archive a public record of "what specific works . . . are registered."⁸⁴

The plaintiff, a stock photo company that made the group registrations, countered that it had relied on the longstanding practice of the Copyright Office, which for over three decades has maintained that not all authors in a group registration need be listed.⁸⁵ The practice that the plaintiff relied on came from a trade association that corresponded with the Copyright Office.⁸⁶ The letter says that it is sufficient to list three individual photographers "followed by the phrase 'and x [number] others,' and naming the agency as owner of the copyrights was 'acceptable when the accompanying deposit copies are catalogs consisting of photographs.'"⁸⁷ In addition to this "deference argument," the plaintiff also made the "pragmatic argument" that listing each individual author in many instances of collective works, such as newspapers and magazines, would be "unduly burdensome" for applicants.⁸⁸

The Ninth Circuit hedged when applying *Chevron* deference to the Copyright Office's longstanding practice: it ultimately found the practice—not requiring a list of each individual author in a group registration—valid, but it found that the pragmatic argument prevailed independent of the deference argument, though still finding the deference argument persuasive.⁸⁹ It joins the jurisprudence of several other Circuits that have

82. 747 F.3d 673 (9th Cir. 2014).

83. *Id.* at 679 (noting the ambiguity in the statutory language "*shall* include . . . the name . . . of the author or authors" in § 409(2) (emphasis added)).

84. *Id.* at 680–81.

85. *Id.* at 677.

86. *Id.* at 676.

87. *Id.* at 676.

88. *Id.* at 678.

89. *Id.* at 679–80, 685 ("*Chevron* and its progeny articulate several reasons for deferring to administrative interpretation While these considerations counsel in favor of deference in this case, an even stronger reason does as well."); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

also held that the statute does not require registrants to list all authors' names in a group registration.⁹⁰

III. SPRINGTIME FOR NPEs: A FAVORABLE TECHNOLOGICAL AND ECONOMIC CLIMATE⁹¹

A. *The Problem with NPEs*

NPEs use flawed and outdated laws to conduct activities that ultimately have deleterious effects on creativity and the economy. The constitutional purpose of copyright law is to incentivize creativity.⁹² When an entity uses the law to protect or even promote extra-constitutional interests, particularly financial interests, in copyrights that do not further and even stymie creativity, there is reason for concern. NPEs suffer from two main faults: (1) they do not create anything of artistic or social value;⁹³ and (2) they take advantage of loopholes in the law to induce quick settlements from vulnerable people who are ignorant of their legal options, essentially to make a quick buck.⁹⁴ Thus the damages that an NPE sues for are not intended to make it or those it represents “whole,” but instead serve as the firm’s primary source of income.⁹⁵

90. *Id.* at 683 (mentioning *Metro Reg'l Info Sys, Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591 (4th Cir. 2013); *Szabo v. Errisson*, 68 F.3d 940 (5th Cir. 1995); *Morris v. Bus. Concepts, Inc.*, 259 F.3d 65, 71–72 (2d Cir. 2001)).

91. Godwin’s Law states that the longer an Internet discussion persists, the greater the probability of someone being compared to Hitler. *Definition of Godwin’s Law in English*, OXFORD DICTIONARIES, http://oxforddictionaries.com/us/definition/american_english/Godwin's-law (last visited April 21, 2014).

92. U.S. CONST. art. I, § 8, cl. 8 (delegating power to Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* and *Inventors* the exclusive Right to their respective Writings and Discoveries”) (emphasis added). This sentiment has not faded over the years. See H.R. REP. NO. 94-1476, at 154 (1976); THE TASK FORCE, *supra* note 24, at i (quoting Secretary of Commerce Penny Pritzker saying, “copyright law gives creators incentives to produce new works and distribute them to the public”).

93. Some commentators believe that NPEs can serve a social purpose by helping small businesses enforce damages that would otherwise be too expensive to pursue. See generally Lemley & Melamed, *supra* note 8 (noting that NPEs may serve some worthwhile purpose, but can also act abusively).

94. There is no ethical issue with hiring a third party to protect a work’s copyright from infringement, especially if the creator lacks the specialization to present an effective claim. See Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961, 1024 (2005) (discussing the role patents play in the software industry).

95. DeBriyn, *supra* note 30, at 108. DeBriyn’s definition of an NPE may be too narrow, and making settlements as a primary source of income an essential qualification is not

An NPE's arsenal mainly consists of threatening letters citing high and often unrealistic statutory damages that scare infringers into quick settlements.⁹⁶ Statutory damages reward litigation of preexisting copyrights; they do not create incentives for new copyrights.⁹⁷ Besides not incentivizing artistic progress, NPEs harm the economy.

In economics, a non-productive entity that only amasses income through extractive methods is referred to as a rent-seeking institution, in which a rent is "pure profit."⁹⁸ The rent-seeking institution only has to pay for the initial expenditure—in the case of NPEs, the copyright of a work.⁹⁹ After an NPE pays the cost to obtain a work, aided by a favorable copyright system, that NPE can exercise its right to prosecute this work against infringers over and over again to amass greater profits. These actions are extractive, a mere shifting of wealth like from a tenant to a landlord. Placing innocent infringers in a similar type of relationship with NPEs, in the absence of an actual service or contract, is problematic. Nobel Prize-winning economist Joseph Stiglitz, while discussing the Supreme Court's

necessary. Indeed, it is easy to imagine a firm whose primary source of income comes from legitimate endeavors, but supplements it with NPE-like settlements. See, e.g., DeBriyn, *supra* note 30 and accompanying text (explaining how "The Hurt Locker," a culturally impactful work, also outsourced its copyright management to an NPE); see also *Malibu Media, LLC v. John Does 1, 6, 13, 14, 950 F. Supp. 2d 779, 780–81 (E.D. Pa. 2013)* (holding that the plaintiff was not an NPE because it was an "actual producer" rather than a passive conduit). There is no one definition of a "copyright non-practicing entity," but the general consensus stresses the two elements mentioned above. See Mann, *supra* note 94, at 1023 ("[A]ny effort to design a suitable definition of the term 'troll' is likely to lend credence to the view that the status as a troll is in the eye of the beholder."). When comparing patent and copyright NPEs, it is important to note that patent law does not provide statutory damages as a remedy. See 35 U.S.C. § 281 (2012).

96. The United States is an anomaly in allowing plaintiffs to elect to recover statutory damages at any time before a final judgment is made. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009). The courts have little guidance on how to appropriately determine statutory damages. *Id.* Lessig calls the dilemma between deciding between statutory damages and a high settlement a "mafia-like choice." See LESSIG, *supra* note 41, at 52.

97. DeBriyn, *supra* note 30, at 86 (citing Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943, 953 (2008)).

98. LANDES & POSNER, *supra* note 16, at 17. The authors' use of the word "pure" should not be taken literally. Along with the initial cost of obtaining the copyright, an NPE has other expenses, including administrative costs for monitoring the Internet for infringing photos as well as transaction and labor costs for sending letters and court fees for the rare cases that end up being litigated. See generally *infra* Part III.B. (explaining how NPEs are able to minimize expenses).

99. See also LANDES & POSNER, *supra* note 16, at 17. If the right to the work is simply assigned to the NPE, then, besides the transaction costs, which would be marginal, such a transaction would be almost free.

ruling in *Association for Molecular Pathology v. Myriad Genetics, Inc.*,¹⁰⁰ also addressed the larger economic issues caused by rent-seeking institutions: “some of the most iniquitous aspects of inequality creation within our economic system are a result of ‘rent-seeking’: profits, and inequality, generated by manipulating social or political conditions to get a larger share of the economic pie, rather than increasing the size of that pie.”¹⁰¹ The loopholes that NPEs take advantage of harm the larger economy by sapping judicial resources and costing media organizations and individuals thousands of dollars in legal fees, all as a result of the unequal bargaining position between the NPE and the infringer.¹⁰² In many cases, NPEs are not trying to assert a right or protect the integrity of the infringed work. For example, Righthaven did not send takedown notices, as it can under the DMCA, but skipped right to threatening infringers with lawsuits.¹⁰³ The predominant motive for NPEs is to make a profit, regardless of the merits of its claims.

B. How NPEs Operate

Besides the motion picture industry, stock image NPEs have been some of the most aggressive copyright enforcers.¹⁰⁴ All of the activities of bloggers and other Internet users take place online, including the actual copying and reposting of an infringing photo. Thus, NPEs conduct the majority of their research online, which affords them advantages that help lower the transaction and administrative costs needed to conduct their activities.

First, an Internet user finds a copyrighted photo, usually from an image search engine,¹⁰⁵ and then reposts it to his or her blog. When an infringing

100. 133 S. Ct. 2107 (2013) (concerning the patentability of natural deoxyribonucleic acid (DNA) sequences and manmade DNA sequences).

101. Joseph E. Stiglitz, *How Intellectual Property Reinforces Inequality*, N.Y. TIMES, (July 14, 2013, 9:04 PM) <http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality>.

102. Boutsikaris, *supra* note 6, at 408–09.

103. Order at 2, *Righthaven, LLC v. Democratic Underground, LLC*, No. 2:10-cd-1356-RLH-GWF (D. Nev. Apr. 14, 2011), ECF No. 94 (stating that Righthaven “attempted to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar”).

104. *See Copyright Trolls*, *supra* note 28.

105. Recent surveys indicate that a significant portion of Internet search results are dictated by the first page produced by the search engine. THE TASK FORCE, *supra* note 24, at 70. Many popular search engines contain links to protected works. *Id.* Realizing this, some major search engines are starting to address this issue, albeit in a piecemeal manner. *Id.* For example, “Google now excludes certain queries related to copyright infringement from its Autocomplete function.” *Id.* at 70–71.

photo is reposted to a blog, it becomes much easier for an NPE to find it than if the photo was in a physical publication. This is because an NPE can scan the Internet using “web crawlers” or even track the history of a photo’s reposting, all from the convenience of a single computer.¹⁰⁶

Once it finds a potential infringer, an NPE does not know the party’s identity, only the web address where the offending photo is located or perhaps the poster’s IP address. Usually this means the NPE would have to subpoena the website’s ISP for records on the user’s identity.¹⁰⁷ While subpoenaing the provider may seem expensive, especially if the NPE has to prepare and send multiple subpoenas for each individual infringer’s identity, NPEs can save time and money by simply filing a single complaint with the ISP for all parties’ identities.¹⁰⁸ Thus the identities of many infringers can be ascertained with relative ease. Yet an NPE may be able to circumvent this John Doe procedure altogether if the blogger has posted her real name or other identifying information on her blog.¹⁰⁹ Once an NPE uncovers the infringers’ identities, it reuses the same letter template to threaten all the parties.¹¹⁰ This further reduces the firm’s transaction and administrative costs, allowing them to send thousands of threatening letters quickly and inexpensively.¹¹¹

The NPEs use a “scattershot” approach, sending as many threatening letters to as many infringers as they can find under the same violation.¹¹² The purpose of these letters is not to deter infringement, but extract easy rents from quick settlements.¹¹³ The high statutory damages cited are often

106. Jonathan Bailey, *Photography’s Growing Plagiarism Problem*, PLAGIARISMTODAY (Oct. 14, 2013), <http://www.plagiarismtoday.com/2013/10/14/photographys-growing-plagiarism-problem/> (discussing the various Internet services photographers and, by extension, NPEs can use to track other peoples’ use of a protected photo, including Google Image Search, Plaghunter, and TinEye).

107. DeBriyn, *supra* note 30, at 95.

108. *Id.* (noting Voltage, an NPE, used a common complaint, saving \$1.75 million in filing costs).

109. Bailey, *supra* note 17 (describing the John Doe procedure). *But see* Mike Masnick, *Siemens Goes Copyright Troll, Files Infringement Lawsuit against 100 John Does*, TECHDIRT (Mar. 26, 2014), <https://www.techdirt.com/articles/20140326/07453126687/siemens-goes-copyright-troll-files-infringement-lawsuit-against-100-john-does.shtml> (noting courts are increasingly rejecting IP addresses as sufficient for subpoenas and rejecting mass Doe suits, noting that it is improper to lump all Doe claims together).

110. DeBriyn, *supra* note 30, at 95.

111. *Id.*

112. *Id.*

113. *Id.* at 81 n.12 (citing Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 17 (2006)). Other organizations that threatened and prosecuted for infringement, like the RIAA and the MPAA made their campaigns into spectacles so that the public would know it was serious about its attack on file sharing, while websites like

beyond the means of infringers, who are more comfortable paying the settlement premium rather than risking uncertainty in court.¹¹⁴

The letter-writing tactic also deprives infringers of certain procedural and substantive safeguards. Procedurally, the objective of the threatening letters is to settle claims before they are litigated, so it is difficult for infringers to maintain an equal bargaining position. The settlement amounts are craftily designed to be slightly less than the cost of hiring an effective defense attorney,¹¹⁵ so most defendants forgo seeking legal counsel and just pay the settlement amount.¹¹⁶ Combined with the uncertainty of a trial, the infringer's ignorance of the law, the high cost of fighting in a distant and unfamiliar forum,¹¹⁷ and the risk of being embarrassed,¹¹⁸ it is entirely rational for the infringer to pay the settlement premium, regardless of its merits, instead of mounting a defense. Because NPEs demand a settlement that costs less than a lawyer, infringers miss the opportunity to mount valid defenses, which allows NPEs to collect windfall settlements from claims that may have been thrown out in court. United States district courts are increasingly recognizing that fair use protects some of these

Getty Images, the world's largest photo service, have released very little, if any press, on their operations. Bailey, *supra* note 17; see also Tim Cushing, *Economist Explain How Copyright Just Isn't Working*, TECHDIRT (Apr. 25, 2014, 7:44 AM), <http://www.techdirt.com/articles/20140421/16305526982/economist-explains-how-copyright-just-isnt-working.shtml> (explaining how intellectual property law favors content bundlers like Getty Images and Corbis). Yet recently, Getty Images decided to change its policies and make all its photos available for free use without a watermark. Russell Brandon, *The World's Largest Photo Service Just Made Its Pictures Free to Use*, THE VERGE (Mar. 5, 2014, 5:58 PM), <http://www.theverge.com/2014/3/5/5475202/getty-images-made-its-pictures-free-to-use> (hosting 100 years worth of photos).

114. DeBriyn, *supra* note 30, at 83–84.

115. See *id.* at 88 (noting Righthaven was willing to settle its claims for \$5,000, which is less than hiring an attorney to defend its claims).

116. *Id.* at 100.

117. *Id.*; see also Masnick, *Voltage Pictures*, *supra* note 30 (attempting to use Oregon trademark law to get personal information when subpoenas for IP addresses failed) (“The legal damages are basically meaningless, because the copyright holder never intends to pursue this under the law.”). NPEs are forum shopping in less sophisticated jurisdictions to try and gather personal information when other courts catch on to NPEs tactics. *Id.* For example Prenda Law attempted to use a “bizarre interpretation” of the Computer Fraud and Abuse Act as well as a Florida state law called “pure bill of discovery” to get personal information, but both attempts failed. *Id.*

118. Prenda Law threatened to expose that potential infringers viewed pornography to family members and neighbors even if it was uncertain if the person being identified had downloaded the infringing file. See, e.g., Tim Worstall, *Quite Amazing, Prenda Law Was Seeding The Torrent Sites It Then Sues People For Downloading From*, FORBES (Aug. 21, 2013, 10:10 AM), <http://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/>.

claims, and this defense appears to be garnering more sympathy from judges who are aware of NPEs' methods.¹¹⁹

The ability to file for an infringement suit is not enough on its own to establish standing in court, but NPEs' threats are usually powerful enough to ensure that cases will settle before NPEs are required to demonstrate standing.¹²⁰ The thrust of an NPE's power comes from its letter, and the thrust of the letter comes from the entity's ability to cite legal loopholes, specifically high statutory damages, to foment the NPE's "threat value"; that is, its ability to scare infringers into settlements.¹²¹

C. NPEs' Threat Value

The power of an NPE's letter is derived from its "threat value."¹²² It is useful to think of threat value as a mathematical coefficient: the greater the

119. Boutsikaris, *supra* note 6, at 403 & n.89 Fair use "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (parodying lyrics of "Oh, Pretty Woman" was fair use)). The courts analyze four factors when determining whether fair use applies: "(1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2012). The four factors are not to be treated in isolation from one another; they are "weighted together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578. Professors Jaszi and Aufdierhede find that courts focus on two main factors: whether the use is transformative, and whether the amount of the original work utilized is appropriate. ROBERT R. MCCORMICK FOUNDATION, SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM 5 (2013) [hereinafter FAIR USE FOR JOURNALISM],

http://www.cmsimpact.org/sites/default/files/documents/pages/principles_in_fair_use_for_journalism.pdf. Righthaven also pursued *Ars Technica* for allegedly reposting a photo owned by the NPE. Daxton R. Stewart, *Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes*, 10 J. TELECOMM. & HIGH TECH. L. 93, 116 (2012). The court weighed all four elements of fair use and determined that *Ars Technica's* use of the photo was fair and therefore did not infringe Righthaven's copyright. *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 WL 3724897, at *2-4 (D. Nev. Sept. 17, 2010) (holding fair use, despite the defendant conceding the third factor regarding the substantial similarity of the reproduced photo). *Ars Technica's* success was also aided by the fact that the accused photo was used for news reporting purposes and it was not a direct copy of the protected photo, but a reproduction of a lower quality, black-and-white copy made from a public court filing. See Stewart, *supra* note 119, at 116.

120. Boutsikaris, *supra* note 6, at 405 (citing *Righthaven, LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 976 (D. Nev. 2011)).

121. Mann, *supra* note 94, at 1024.

122. *Id.*

letter's legitimacy and claim for damages, the more likely an infringer is to settle.¹²³ "Legitimacy" is comprised of the circumstantial and legal factors that would lead an infringer to believe that an NPE's threat is supported and validated by the legal system. Circumstances will vary from person to person. On a subjective level, the letter itself informs an infringer that she has done something illegal and punishable, and thus settling would be her best option.

Legal legitimacy is the objective legal mechanism an NPE may cite to give more potency to its claim for damages.¹²⁴ Examples of legal legitimacy often derive from Title 17 of the United States Code that governs copyright law. Under § 501(b), the owner of a copyright may institute any of several legal actions against an infringer, including sending a notice of infringement.¹²⁵ The civil statute of limitations for these actions is three years after the infringement accrued.¹²⁶ However, the Code's damages provisions, specifically statutory damages, propel the greatest legal threat.¹²⁷

At any point, the copyright owner may elect to sue for either actual damages or statutory damages.¹²⁸ It is often difficult to accurately calculate actual damages,¹²⁹ and statutory damages are a device for the court to

123. *See id.* *But see* H. L. A. HART, *THE CONCEPT OF THE LAW* 20 (3d ed. 2012) (responding to John Austin's Command Theory by positing a just law should be more than mere threats backed by the force of the government).

124. Recursively, how the state justifies its laws to its citizens and how its citizens justify using its laws within the state plays a crucial role in how the justice system is structured. *Cf.* Tom R. Taylor, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283, 283 (2003).

125. 17 U.S.C. § 501(b) (2012).

126. *Id.* § 507. The courts have interpreted an equitable tolling that benefits claimants suing for infringement. "A copyright claim accrues when the plaintiff learns or in the exercise of due diligence should have learned, that the defendant was infringing its rights." *Masterfile Corp. v. Gale*, No. 2:09-cv-966, 2011 WL 4702862, at *2 (D. Utah Oct. 4, 2011) (internal citation omitted). This gives NPEs more flexibility in when they can sue, but given their practices and the nature of the Internet, it is likely that NPEs discover the infringement close to the actual date of publication, and equitable tolling may not give NPEs a significant extension.

127. The first copyright troll, Harry Wall, took advantage of the statutory damages provided by the Copyright Act of 1842 in nineteenth century England, established a firm, and sued music infringers. Boutsikaris, *supra* note 6, at 402 n.86. The idea of copyright trolls is not novel, but the technology that facilitates the process is, and that is what this Comment concerns.

128. 17 U.S.C. § 504(a).

129. *See* THE TASK FORCE, *supra* note 24, at 8 n.27 (citing a Government Accountability Office report that claiming measure infringement damages is "extremely difficult" and that there does not appear to be a one-to-one correspondence between money lost to infringement and a work's legitimate licensing price).

award appropriate damages in the face of uncertainty.¹³⁰ Yet many NPEs choose statutory damages not because the actual damages are difficult to determine, but because the actual damages are low.¹³¹ A digital photo alone does not often hold much market value. The American Society for Media Photographers estimates the worth of a photo at \$2 per image, with a minimum charge of \$250 for a photography shoot.¹³² A photo's strongest asset is its ability to be licensed,¹³³ which is still not relatively high, especially when compared to the NPEs' damages.¹³⁴

Thus, NPEs generally elect for statutory damages.¹³⁵ Though statutory damages can be adjusted to reflect a judge's discretion,¹³⁶ NPEs often cite the highest statutory damages available: \$150,000 for instances of willful infringement.¹³⁷ Although statutory damages are available, it is disingenuous to cite such high damages when there is little relation to the actual damages suffered.¹³⁸ One safeguard to high damages is the

130. DeBriyn, *supra* note 30, at 106 (citing Samuelson & Wheatland, *supra* note 96, at 446).

131. *See, e.g.,* Masterfile Corp. v. Country Cycling & Hiking Tours by Brooks, Inc., No. 06 Civ. 6363(SAS)(FM), 2008 WL 313958, at *2-*3 (S.D.N.Y. Feb. 4, 2008) (seeking a retroactive "compliance fee" of \$5,600 per infringed image, well over what a licensing fee of \$1,120, arguing that it is an industry standard to charge infringers "three to five times the [applicable] amount").

132. *See Digital Photography Standards and Practices Project: Pricing Strategies*, AM. SOC'Y OF MEDIA PHOTOGRAPHERS, <http://www.peterkrogh.com/Pages/digital/pricing.html> (last visited June 8, 2014). A photographer will also perform other billable services such as editing and delivery that carry additional charges. *Id.*

133. A copyright license alone may not be enough for the licensor to use an image without fear of infringement. Economist Alex Tabarrock gives an example of getting a copyright license to use a photo of Scrooge McDuck diving into a pit of money, the license did not cover the intellectual property inherent in the character Scrooge McDuck. Cushing, *supra* note 113. This additional concern means that the licensor has to complete a separate fair use analysis despite licensing the work. *Id.*

134. *See, e.g.,* Country Cycling, 2008 WL 313958, at *3.

135. DeBriyn, *supra* note 30, at 84.

136. *See id.* at 83-84. On the lower side, the statute says that damages for any one instance of infringement is at minimum \$750 to a maximum of \$30,000. 17 U.S.C. § 504(c)(1) (2012). If the defendant can show she was unaware of the infringement, her damages could be as low as \$200. *Id.* § 504(c)(2). Damages for \$150,000 are reserved for extreme cases of willful infringement, all at the judge's discretion. *Id.*

137. *See, e.g.,* Boutsikaris, *supra* note 6, at 391.

138. *See Country Cycling*, 2008 WL 313958, at *2 ("[S]tatutory damages should bear some relation to actual damages suffered.") (internal citation omitted). The court may consider several factors when determining the appropriate statutory award, including "the expenses saved and profits reaped by the defendants, the revenues lost by the plaintiffs, the value of the copyright, the deterrence effect of the award on other potential infringers, and factors relating to individual culpability." *Id.* (internal citations omitted). Here, the court diminished the total damages from \$22,400 to \$5,980. *Id.* at *3, *5.

rebuttable presumption of willful infringement, which allows damages that initially appear disproportionately high to be reduced in court later.¹³⁹ The purpose of statutory damages is (1) to give “specific unambiguous directions concerning monetary damages” to avoid “confusion and uncertainty” and (2) to allow courts to adjust damages to reflect the nature of the infringement.¹⁴⁰ Thus, their use is at odds with their purpose.¹⁴¹

One defense to infringement that would defeat a claim for statutory damages is fair use.¹⁴² On its face, a fair use defense is narrow,¹⁴³ and it is only granted to nonprofit educational institutions, libraries, and public broadcasting programs.¹⁴⁴ However, fair use is actually decided on a case-by-case basis.¹⁴⁵ Hence, keeping matters out of the courts prevents infringers from mounting what might otherwise be strong fair use defenses, and from possibly establishing favorable precedent for other Internet users. The inability to establish strong fair use defenses may be due in part to the fact that many instances of reposting photos do not involve a “transformative use,” making sure the new work does not merely “supersede[] the objects” of the original work,¹⁴⁶ which courts often look at when making their decision, so these instances are not clear cases of fair use.¹⁴⁷ While NPEs will try to avoid cases they are likely to lose, the uncertainty of a fair use defense has not deterred their activities.¹⁴⁸

Finally, a prevailing party may be awarded reasonable attorneys’ fees in

139. See DeBriyn, *supra* note 30, at 83–84.

140. H.R. REP. NO. 94-1476, at 154 (1976).

141. “[U]nder the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c) [of § 504].” *Id.*

142. See *supra* note 119 and accompanying text (discussing fair use).

143. Many instances of sampling, here reposting discrete photos, would be considered fair use, but few people would actually rely on “so weak a doctrine.” See LESSIG, *supra* note 41, at 107. But see FAIR USE FOR JOURNALISM, *supra* note 119, at 4 (“Fair use is flexible—but it is not unreliable.”). Despite being cloaked in uncertainties, the fair use doctrine plays a pivotal role in the United States economy, and fair use related industries were estimated to produce \$2.2 trillion in value added in 2007 alone. THOMAS ROGERS & ANDREW SZAMOSZEGI, FAIR USE IN THE U.S. ECONOMY 29 (2010).

144. 17 U.S.C. § 504(c)(2) (2012).

145. See RECLAIMING FAIR USE, *supra* note 9, at 24 (discussing the recent rise of fair use as an affirmative defense).

146. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (stating transformative use is not absolutely necessary).

147. See FAIR USE FOR JOURNALISM, *supra* note 119, at 5.

148. See *id.*

civil cases, which adds to the NPEs' threat value.¹⁴⁹ Attorneys' fees, like all other damages, can be cited in an NPE's threatening letter to increase the cost of potential litigation and scare infringers into settlements. The threat value the current legal regime confers to NPEs creates an economic and legal imbalance between the NPE and potential defendants. NPEs take advantage of gaps in legal procedure created by the group registration process and threaten unwitting users. Since these issues are composed of many moving parts, it is untenable to propose one panacea to cure all ills. The proceeding section suggests several solutions to help protect Internet users from NPEs.

IV. PROPOSED SOLUTIONS

It is easy to point at the misconduct of certain NPEs and demonize them in the process.¹⁵⁰ Yet these firms are extreme examples, and solely focusing on their misconduct would unlikely lead to a productive solution to NPE suits. The issues created by NPEs are not just the result of dodgy lawyers, but also more indicative of larger systemic issues.¹⁵¹ Indeed, there is not likely a silver bullet to fix all of the problems, and an effective and practical solution will likely come from multiple sources.¹⁵²

The Copyright Office should work with the Internet, not against it, when addressing the problems the group registration process has created.¹⁵³ Hence, it is useful to frame the problem, and its solution, in the cyberlaw context. Professor Lawrence Lessig suggests that there are four nodes at which issues pertaining to cyberlaw can be addressed to modify users' behavior.¹⁵⁴ These nodes include markets, laws, social norms, and the "architecture" of the Internet; that is, the Internet's hardware and software.¹⁵⁵ Concerning markets, the public goods problem renders the

149. 17 U.S.C. § 505 (2012).

150. The attorneys at Prenda Law in particular have received a substantial amount of media and judicial scrutiny for their bizarre and unscrupulous activities. Joe Mullin, *Judge Smash: Prenda's Porn-Trolling Days are Over*, ARS TECHNICA (Apr. 2, 2013, 4:35 PM), <http://arstechnica.com/tech-policy/2013/04/prenda-porn-trolls-clam-up-as-their-plans-crumble-in-an-la-courtroom/> (noting that the focus of the case has shifted from protecting intellectual property to lawyer misconduct).

151. See Lemley & Melamed, *supra* note 8, at 2170.

152. See THE TASK FORCE, *supra* note 24, at iii (emphasizing the importance of addressing education, law, and technology).

153. The Task Force still believes that, despite its faults, the Internet is an "engine of creativity" that adequately protects copyrights from piracy. *Id.* at 8. Yet the question remains if it protects innocent infringers from NPEs.

154. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

155. See *id.*

free market incapable of solving copyright issues, which is the theoretical basis for government and administrative intervention in intellectual property.¹⁵⁶ Thus, a purely market-based solution does not seem feasible.¹⁵⁷

The remainder of this Part will focus on the other three nodes. This Comment will address the various upshots and drawbacks of several solutions, but it will mainly advocate for administrative solutions. These include a public education campaign along with a mandatory digital registration to be augmented with a reverse image search engine. These solutions will work in tandem to increase public awareness of copyright law on the Internet, as well as provide the public with the tools to make more educated decisions about their online conduct. This will give the public a better chance to avoid the traps set by NPEs and ultimately make NPEs' activities less profitable and therefore less frequent.

A. Law

Adjustments to the law, like adjustments to the market, are not a productive avenue. This is due in part to the general difficulty of mobilizing Congress on novel technological issues and to the Task Force's signaling that reforming NPEs' practices are not a priority at this time.¹⁵⁸ One of the major concerns with group registration of photos is the difficulty of ascertaining the identity of the copyright owner. This Part will address some suggested legal reforms and explain why they are ineffective.

Some have suggested that online photo owners should take better care to watermark their photos or communicate that the work is protected.¹⁵⁹ Yet the legal requirement of identifying a work as copyright-protected with formalities, typically marking a work with a "©", year, and the author's name,¹⁶⁰ has been abandoned for over twenty years¹⁶¹ and there is no

156. See *supra* Part I; see also *supra* note 60 (discussing the Coase Theorem).

157. But see ELKIN-KOREN & SALZBERGER, *supra* note 54, at 137 (noting that some communities, like comedians and magicians, are not granted any copyright or agency protection, yet still manage to maintain order through industry norms).

158. See THE TASK FORCE, *supra* note 24, at 47 n.243 (mentioning NPEs only once in its report).

159. See *id.* at 65 n.351, 66 (discussing the use of a content filtering mechanisms, such as a third-party watermark, to signal to users that a work is legitimate, as opposed to pirated).

160. See *supra* Part II.D. (detailing *Alaska Stock*, the longstanding history of the Copyright Office not requiring every author's name in a group registration, and the growing trend in circuit courts of accepting this practice).

161. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7(a), 102 Stat. 2853, 2897 ("striking out [copyright notice] 'shall be placed on all' and inserting in lieu thereof 'may be placed on'"). Becoming a signatory to parts of the Berne Convention brought the United States more in line with international copyright practices in an

evidence to suggest that Congress or the Copyright Office intend to reinstate mandatory copyright formalities. Moreover, requiring formalities like copyright notice would render the United States' copyright law incompliant with the Berne Convention and cause a lack of harmony with international copyright practices.¹⁶² Thus, it is unlikely that Congress would bring back formalities anytime soon, so the inclusion of a watermark would have to be strictly voluntary.

Copyrighting through watermarks would be an ineffective solution to the NPEs' threats because innocent infringement would continue to fuel NPEs, and putting the public on notice of a work's protection would diminish the number of innocent infringers an NPE can go after. Thus, in the absence of a law requiring copyright owners to identify a work's protection through a watermark or any other formality, it is unlikely that an NPE would voluntarily identify or watermark a protected work because it would disrupt its revenue stream.

If Congress, no matter how unlikely, were to amend the law to require a watermark or formality, it may give the public better notice of a work's protection, but there are still many practical consequences that would dampen this solution's efficacy. A substantial majority of the public, including lawyers, are still unaware of the true scope and application of copyright law, and it is not clear if a lone watermark would give enough information to properly interact with that photo online. Also, from the creators' perspective, watermarking images online greatly detracts from the works' aesthetics, and hence, their value. A law requiring watermarks, in order to be effective enough to significantly reduce NPEs' activities, would either have to require all images be watermarked at all times (this would interfere greatly with a work's aesthetic, hence significantly diminishing its utility and value), or require that images be watermarked sometimes: (1)

increasingly global economy, a trend that has only hastened after the general public's access to the Internet at the end of the twenty-first century. See Shalmali Guttal, *Globalisation*, 17 DEV. PRACTICE 523 (2007) (noting that globalization—its effects, causes, and definition—are some of the most contested issues in contemporary social sciences). The United States' culture has massively influenced the international stage for the past fifty years, for better or worse. See *id.* (discussing that some commentators blame globalization for the homogenization or "McDonaldisation" of food and culture).

162. See Berne Convention, § 7(a), 102 stat. 2853, 2857. Although the United States is still a sovereign nation and not strictly beholden to international treaties, the public goods nature of intellectual property makes copyright concerns a global issue, and the trend seems to be towards international harmonization. See also *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (holding that the retroactive expansion of copyright terms under the Copyright Term Extension Act was in part constitutional and justifiable because it matched the terms requirement of the 1993 European Union directive, harmonizing United States and international copyright law).

when they are the result of a image search, but not all the time; (2) when they are being displayed on a website for its intended purpose. Though the second approach would keep the work's value intact, it would not be effective at giving notice because users could simply take the unwatermarked image directly from the intended website, thus bypassing any notice the watermark was intended to convey.

The abuse of statutory damages is another legal issue that seems unlikely to be resolved. Congress only intended for statutory damages to resolve the uncertainty of infringement damages¹⁶³ while playing a minor punitive role,¹⁶⁴ all at the discretion of the court.¹⁶⁵ James DeBriyn advocates for the complete abolition of statutory damages,¹⁶⁶ but this may be too radical. The elimination of statutory damages would prevent their abuse. However, this would leave the court without a metric to determine damages in the face of uncertain actual damages. Just because NPEs abuse statutory damages does not mean they are always a hindrance to justice. If they were eliminated, it is unclear if other parties in infringement proceedings would be better off only using actual damages as a means of calculating an appropriate remedy. Even a more tempered approach to statutory damages would likely fail. Enjoining NPEs from citing the extreme \$150,000 damage, even if it is used unscrupulously, may be difficult to prove and may even constitute a prior restraint in violation of the First Amendment.¹⁶⁷ However, this does not rule out sanctions for misconduct.

Even reducing the ceiling on statutory damages may have only minor effects, if any, on NPEs' practices.¹⁶⁸ First, NPEs only require the relatively high ceiling from statutory damages so that they can cite it in their letters to

163. H.R. REP. NO. 94-1476, at 162–63 (1976).

164. See *Masterfile Corp. v. Country Cycling*, No. 06 Civ. 6363(SAS)(FM), 2008 WL 313958, at *2–3 (S.D.N.Y. Feb. 4, 2008) (discussing that it is an industry custom to charge infringers five times the amount of the original licensing fee).

165. 17 U.S.C. § 504(c)(1) (2012) (“as the court considers just”).

166. See generally DeBriyn, *supra* note 30, at 107–10.

167. See *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, 976 F. Supp. 2d 1157, 1166–68 (D. Neb. Sept. 30, 2013) (suggesting that labeling a firm as abusive and banning it from sending cease and desist notices may constitute prior restraint). But see Karle Bode, *Voltage Pictures Both Wins and Loses In Canadian Copyright Troll Attempt*, TECHDIRT (Feb. 25, 2014, 2:09 AM), <https://www.techdirt.com/articles/20140224/12145326333/teksavvy.shtml> (according to Canadian Judge Kevin Aalto, “In order to ensure there is no inappropriate language in any demand letter sent to the alleged infringers, the draft demand letter will be provided to the court for review. . . . Any correspondence sent by Voltage [the NPE] to any subscriber shall clearly state in bold type that no court has yet made a determination that such subscriber has infringed or is liable in any way for payment of damages.”).

168. The current statutory maximum, \$150,000 for each infringement, is thirty times higher than what the previous 1909 Act allowed, and scares users from assuming “even small risks” when using copyrighted material. RECLAIMING FAIR USE, *supra* note 9, at 32.

increase their threat value and scare infringers into quick settlements. Thus even if the ceiling is reduced by two-thirds to \$50,000, NPEs will likely settle for a few thousand dollars because the defendant will recognize that it is not worth risking the higher damages in court (and it is still below the cost of hiring an effective attorney).¹⁶⁹ Second, in cases that only settle for a few hundred dollars, a severe reduction in statutory damages would not prevent an NPE from filing quick claims against thousands of infringers. Paradoxically, if any meaningful change were made to the statutory maximum, an NPE could then cite that reduction as a justification of citing a lower, but still high, ceiling. One could imagine an NPE citing a relatively high statutory damage in a frivolous case, and citing its recent reduction (no matter how significant) as grounds to legitimize their threatening letter. The Task Force shows no indication that it intends to adjust statutory damages;¹⁷⁰ therefore, the status quo damages amount will likely remain, at least for the near future.¹⁷¹

Another potential legal solution is to require that NPEs send takedown notices before threatening legal action.¹⁷² This solution would give infringers the opportunity to comply with the law, even if they were previously ignorant of it, without having to pay extortion settlements. On its face, this solution appears tenable, but if it were implemented it would not likely have a meaningful impact on curbing NPEs' practices.

Only two outcomes can result from this rule and neither substantially addresses the NPE problem. First, the infringing party may simply ignore the takedown. This has two effects. If an NPE's notice is ignored, it will proceed with sending its threatening letter, and both parties will remain in the same position they would have been in if takedown notices remained voluntary.¹⁷³ Refusal to comply may bolster an NPE's threat value when it

169. Lemley & Melamed, *supra* note 8, at 2163.

170. *Cf.* THE TASK FORCE, *supra* note 24, at 51–52. *But see id.* (conceding the possibility that the scope of statutory damages may need to be recalibrated).

171. Innocent infringers do have a quasi-protective measure built in to the statute. If a defendant can show she was “not aware and had no reason to believe” she was infringing someone else's copyright, statutory damages can be reduced to as low as \$200 per instance. 17 U.S.C. § 504(c)(2) (2012). This protection, however, is thin. Most cases do not make it to court, and thus this judicial discretion will almost never be actualized. The judge, jury, and executioner of NPE activities take place at the letter-writing stage, and most named defendants will pay the settlement amount before seeking expensive legal counsel, which would inform them of this provision, let alone risking even more expensive litigation.

172. 17 U.S.C. § 512(c)(3).

173. There is an argument that preparing and sending these additional notices will impose greater administrative and transaction costs on NPEs, and thus lessen the profitability of their actions. But as has been previously discussed, NPEs are legally sophisticated and generally deal with similar complaints, so any additional costs imposed by

drafts its letter. Even if there is no force of law behind its argument, if an NPE can cite that it gave the infringer a way out of the lawsuit, yet the infringer ignored it, the letter alone will increase the infringer's unease, and may further motivate her to settle.

Second, the infringing party may comply.¹⁷⁴ While this is what the solution intends, its consequences are not so simple. Bogus DMCA takedown notices,¹⁷⁵ in which people with untenable copyright claims send takedown notices and attempt to remove otherwise valid material, is a phenomenon that already exists online. Bogus takedowns not only stifle creativity, they act as an ersatz means of censorship.¹⁷⁶ There are legal remedies that assist people who are threatened with bogus notices that

this step would likely be negligible. See, e.g., *How Can I File A DMCA Takedown Notice?*, DMCA, <http://www.dmca.com/solutions/View.aspx?ID=53a29f5f-fbd6-4cc9-a660-921d6729c54c> (last visited June 8, 2014) (providing a service to prepare and send takedown notice, claiming to only take three minutes time and cost one hundred dollars a year).

174. There does not appear to be any data on the compliance rate regarding takedown notices.

175. See Mike Masnick, *MPAA Gets Its Wish: Court Basically Says It Can File Bogus DMCA Takedowns Without Concern for Fair Use*, TECHDIRT (Sept. 12, 2013, 8:16 AM), <http://www.techdirt.com/articles/20130911/18073124494/mpaa-gets-its-wish-court-basically-says-it-can-file-bogus-dmca-takedowns-without-concern-fair-use.shtml> (discussing the problems of not considering fair use before filing a takedown notice); see also Mike Masnick, *DMCA Copyright Takedowns To Google Increased 10x In Just The Past Six Months*, TECHDIRT (Dec. 12, 2012, 10:00 AM), <http://www.techdirt.com/articles/20121211/16152021352/dmca-copyright-takedowns-to-google-increased-10x-just-past-six-months.shtml>. For example, after making its takedown policy more transparent, Google was burdened with a surge of DMCA takedown requests, increasing ten-fold over a six-month period to 2.5 million requests per week. *Id.* Google reviews all requests and rejects an average of 2.5% of them.

176. Recently, the National Security Agency (NSA) sent a takedown notice to an independent online merchant for using its logo, which was obtained from a free cache of photos, on t-shirts and other merchandise. Max Read, *The NSA Sent a Takedown Notice Over My Custom PRISM-Logo T-Shirts*, GAWKER (June 8, 2013, 11:44 AM), <http://gawker.com/the-nsa-sent-a-takedown-notice-over-my-custom-prism-log-512085836>. Many argue that NSA's claim is invalid and is intended to chill criticism about NSA's activities. Ben Swan, *Exclusive: NSA Using Copyright Claims to Crush Free Speech?*, BEN SWAN (Aug. 20, 2013), <http://benswann.com/exclusive-nsa-using-copyright-claims-to-crush-free-speech/>; see also Mike Masnick, *Office Depot Sends World's Worst DMCA Notice to Reddit*, TECHDIRT (Nov. 6, 2013, 12:24 PM), <http://www.techdirt.com/articles/20131106/1130125151/office-depot-sends-worlds-worst-dmca-notice-to-reddit.shtml> (involving Office Depot sending a DMCA takedown notice to Reddit for hosting a link to a non-infringing image that overlays a swastika over the company's logo). See generally Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 623 (2006) (discussing arguments in favor of DMCA takedowns—creates a more democratic Internet by alleviating websites from secondary liability—and those against takedowns—has a chilling effect on expression).

contain “material[] misrepresent[at]ions,”¹⁷⁷ yet current jurisprudence on whether a good faith fair use inquiry is required before filing a takedown notice is ambiguous.¹⁷⁸ If a good faith fair use inquiry were required and actually enforced, this would impose substantial costs on NPEs. Administrative costs of researching each individual instance, which is fact-intensive,¹⁷⁹ would dampen some NPE operation and force them to only pursue cases of clear copyright infringement. This would create a positive result, in which NPEs would serve a public good by addressing legitimate copyright disputes, while reducing their extortive practices.

Assuming *arguendo* that the courts adopt the good faith fair use inquiry standard as in *Lenz*, there is also a question of what this heightened standard actually adds to the law. If takedown notices were mandatory, and thus if a fair use inquiry is mandatory, it is unclear how this new standard would be any different from the current requirement that Federal Rules of Civil Procedure Rule 11 imposes.¹⁸⁰ Asked another way, if this good faith standard is already part of the law, yet society still has an NPE problem, adding a redundant requirement at a mandatory notice level would probably not change anything because there is no way to enforce it. Although imposing a higher burden appears beneficial, it is unclear if it can actually deter NPEs.

Therefore, legal alterations, specifically adjusting statutory damages or requesting takedown notices, may not be the most productive avenue for combating NPEs and their abuse of the group registration process. A more effective alternative would be to stop infringement before it happens, that is, to educate the public on the perils of its online actions and teach it how to avoid being ensnared by NPEs’ tricks.¹⁸¹

177. 17 U.S.C. § 512(f) (2012).

178. *Compare* *Tuteur v. Crosley-Corcoran*, 961 F. Supp 2d 333, 343 (D. Mass. Sept. 10, 2013) (“Congress did not intend the DMCA to require that every takedown notice be preceded by a consideration of the possible applicability of fair use”), *with* *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (holding the party sending the takedown notice must consider fair use when determining its good faith belief as required by 17 U.S.C. § 512(c)(3)(A)(v)). The courts are also split on how to weigh the import of the takedown procedure’s expedience. *Compare* *Tuteur*, 961 F. Supp. 2d at 341 (holding the potential for abuse of the expedited procedure is offset by the remedies made available in § 512(g)), *with* *Lenz*, 572 F. Supp. 2d at 1155 (characterizing defendant’s concern that a fair use analysis is slow and uncertain as “overstated”). *See also* *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004) (“the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.”).

179. *See* *Lenz*, 572 F. Supp. 2d at 1155.

180. Fed. R. Civ. P. 11(b)(3) (“[T]o the best of the person’s knowledge . . . [the] factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”).

181. *But see* *infra* Part IV.B. (providing examples of educational programs in place that

B. Social Norms

Despite almost universal disapprobation from the public and professionals alike, NPEs continue to take advantage of the loopholes in copyright law.¹⁸² As such, it is unlikely that a public shaming campaign would have any real affect on NPEs' practices.¹⁸³ Addressing the behavior of the innocent infringers may be more productive.¹⁸⁴ A better response would be for the Copyright Office to launch a public awareness campaign that would educate citizens on the basics of copyright law as well as the NPEs' tactics.¹⁸⁵ The Copyright Office and other institutions already have some educational programs in place, such as the Global Intellectual Property Academy¹⁸⁶ and Taking the Mystery out of Copyright,¹⁸⁷ but they do not address the dangers posed by NPEs specifically.¹⁸⁸ Yet some privately operated blogs have sprung up to try to better educate the public on NPEs' operations.¹⁸⁹

have not stalled the tide of NPEs).

182. See Lemley & Melamed, *supra* note 8, at 2124 n.32.

183. If the disapprobation comes from a judge, however, it grows teeth. There are several instances of judges who, exhausted by a NPE's conduct, bite back by tipping the scale in the defendant's favor. DeBriyn, *supra* note 30 (discussing sanctions and rulings against NPEs).

184. The least cost avoider is the NPE, so attempting to reformulate the activities of the entire public may seem economically unsound, but it is difficult to configure a bright line definition of an NPE, hence it is difficult to design specific rules to target their behavior. See *supra* note 95 and accompanying text (detailing definitions of NPEs).

185. The Task Force lists several programs already initiated by the Copyright Office and Patent and Trademark Office to educate the public. THE TASK FORCE, *supra* note 24, at 75 n.413.

186. See *Global Intellectual Property Academy*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/ip/training/index.jsp> (last visited June 8, 2014) (outlining basic information about copyrights, registration, and infringing procedures).

187. See *Taking the Mystery Out of Copyright*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/copyrightmystery/#> (last visited June 8, 2014) (answering basic questions about copyright protection).

188. See generally THE TASK FORCE, *supra* note 24, 74–76. Advocates against online piracy, which still dominates the digital copyright discussion, have experimented with several educational and commercial campaigns. See, e.g., CREATIVE FUTURE, <http://creativefuture.org/be-informed/> (last visited May 11, 2014) (discussing the social harms and legal consequences of pirating media). There is little evidence of these campaigns' success, see *infra* note 195 (discussing how content providers now monitor pirating websites to gauge market interest), but the MPAA is advocating for a program to educate children as young as kindergarteners about the perils of pirating media. See Russell Brandom, *The MPAA Wants Schools to Teach First-Graders the Dangers of Digital Piracy*, VERGE (Nov. 11, 2013, 10:05 AM), <http://www.theverge.com/2013/11/11/5090700/the-mpaa-wants-schools-to-teach-first-graders-the-dangers-of-digital>.

189. There are some small blogs that are devoted to garnering attention to and fighting

Americans are generally introduced to copyright law in school when they are taught the dangers of plagiarism,¹⁹⁰ but copyright law is much richer and more complex than mere issues of attribution. Indeed if 31 million Americans are bloggers,¹⁹¹ then knowing how to properly use—and not use—certain texts, audio, videos, or photos is all the more valuable.¹⁹² One could argue that, like the anti-piracy campaigns launched by the Recording Industry Association of America (RIAA) through publicized litigation, an NPE awareness campaign would be equally fruitless.¹⁹³ Yet there are two major differences between anti-piracy campaigns and NPE awareness campaigns. First, NPEs have a greater profit motive and are more likely to litigate, whereas the RIAA, despite some well-publicized suits, did not go after many pirates because it was financially impractical.¹⁹⁴ Thus, while the public may have simply ignored anti-piracy advertisements because individuals did not believe they would be prosecuted, the public is not so safe in the hands of NPEs. Second, the public gained something from piracy; namely, free media.¹⁹⁵ Individuals only stand to lose when confronted by an NPE, so it is in consumers' best interests to know how NPEs work and how to protect themselves. An educational campaign would provide the public with these tools.

NPEs take advantage of infringers' ignorance of possible defenses to make the threat of litigation appear more credible than it may actually be. If people were more informed of these types of tactics, they (1) may be more

against NPEs. See, e.g., FIGHT COPYRIGHT TROLLS, <http://fightcopyrighttrolls.com> (last visited Apr. 3, 2014).

190. See Stacey Conradson & Pedro Hernández-Ramos, *Computers, The Internet, and Cheating Among Secondary School Students: Some Implications for Educators*, PRACTICAL ASSESSMENT, RES. & EVALUATION, <http://pareonline.net/getvn.asp?v=9&n=9> (last visited Apr. 3, 2014) (explaining that schools have plagiarism policies). But see *id.* (noting the rise in student plagiarism corresponded with the rise of the Internet). Students are often unaware that copying and pasting violate copyright law because they simply do not “understand the whole concept of intellectual property.” *Id.*

191. See *supra* note 31.

192. See THE TASK FORCE, *supra* note 24, at 74–75 (suggesting that the public would benefit from education of what actions are prohibited online and what exceptions apply).

193. Piracy remained prevalent in 2011, a few years after the RIAA abandoned litigation. See MARKMONITOR, TRAFFIC REPORT: ONLINE PIRACY AND COUNTERFEITING 4 (2011) (describing online piracy as “rampant”).

194. See DeBriyn, *supra* note 30, at 84–85 (describing RIAA's difficulties with infringement litigation).

195. Piracy has become so prevalent that content providers and producers such as Netflix now follow trends on pirating websites to determine what content to license and produce. See Nick Bilton, *Content Creators Use Piracy to Gauge Consumer Interest*, N.Y. TIMES (Sept. 17, 2013), available at http://bits.blogs.nytimes.com/2013/09/17/content-creators-use-piracy-to-gauge-consumer-interest/?_r=0.

cognizant not to reappropriate photos with uncertain copyright protection, and (2) may be more inclined to fight an NPE's claim in court if they knew their legal protections.¹⁹⁶ If this were the case, NPEs would recognize that not all claims will settle, and NPEs would face the same expensive and uncertain trials that they used to scare infringers. This could have two benefits. If an NPE knows it will face opposition, it will drastically reduce its operations, because, for administrative and financial reasons, an NPE can only fight so many cases at the same time. The claims an NPE does pursue would then have to be strong on their merits, so an NPE would actually serve the more beneficial purpose of going after pirates and infringers who have an extreme disregard for the law, instead of innocent infringers. Education would make the public more aware of copyright law generally and how the law affects users' online behavior and liability. An educational campaign would also make the public more aware of available services, such as legal organizations or anti-NPE advocates.

Yet education is not even half of the equation—the Copyright Office should also update its registration process and notification system to help cure the loopholes that NPEs exploit. Educating Internet users about the ramifications of their activities only goes so far. Even if someone knows that she cannot simply repost every picture she finds on the Internet, this knowledge does not address the problem of notification; that is, how to determine if the photo is protected, registered with the Copyright Office, or the owner's identity if the user wants to negotiate a license. Therefore, the Copyright Office should develop additional technical procedures to allow for more accurate information gathering and enhanced searchability. The architecture of the Internet, both how users interact with photos and how the Copyright Office manages group registrations of photos, is another effectual node with which to address these issues.

C. Architecture

“The answer to the machine is in the machine.”¹⁹⁷ The Internet's unprecedented ability to allow users to communicate expediently at a low cost makes the Internet's architecture the ideal place to enact meaningful change. The Internet is constantly evolving, and many programs and applications have been proposed or designed to make the Internet a safer place for both copyright owners and the general public. One commonly discussed solution is encryption.

Encryption is a means of protecting a file by scrambling its code so that it

196. See Trebbe, *supra* note 61, at 103 nn.44–45, 108.

197. THE TASK FORCE, *supra* note 24, at 16.

can only be read by specified approved persons or applications.¹⁹⁸ Encryption prevents unauthorized users from altering a protected file.¹⁹⁹ Given NPEs' tactics, however, encryption is not a tenable solution. First, the benefits of encryption are very limited. It can halt unauthorized use of a work without having to worry about fair use claims,²⁰⁰ but there is an inescapable, technological game of "cat and mouse" in which Internet users find a way to break the encryption, forcing the copyright owner to invent and implement another form of encryption, *ad infinitum*.²⁰¹ Therefore, any protection afforded by encryption is short-lived and expensive to maintain. Second, if the NPE is one that wants to trick users into infringing its photos,²⁰² then it would have no incentive to encrypt its photos in the first place. So unless encryption was mandatory—which would be incredibly costly to implement and maintain—its protection would be very limited.

The most effective way to address the issues posed by group registrations is for the Copyright Office to adopt a two-fold approach: mandatory digital filings and a reverse image search. These solutions are useful in their individual respects but are optimal when used in conjunction with one another.

1. Mandatory Digital Filing and Metadata

As previously discussed, a work must be registered with the Copyright Office before a party can begin an infringement proceeding, and registration may be done by physically or electronically mailing a copy of the photo to the Copyright Office.²⁰³ At the moment, digital registration remains an option, not a requirement. While making digital filing for group registrations of photos mandatory may seem radical at first, digital registration would affect the filing habits of only a small segment of registrants. Current estimates suggest that 80% of all registrations are already done online.²⁰⁴ The remainder of registrants, however, still send

198. *Surveillance Self-Defense: Encryption Basics*, ELECTRONIC FRONTIER FOUNDATION, <https://ssd.eff.org/tech/encryption> (last visited Apr. 3, 2014). Encryption is a unique copyright tool because its protections supervene copyright law, so even if a user had a fair use basis to reappropriate a work, encryption would still prevent that user from copying that work. See RECLAIMING FAIR USE, *supra* note 9, at 14.

199. See *Surveillance Self-Defense*, *supra* note 198.

200. LANDES & POSNER, *supra* note 16, at 44.

201. THE TASK FORCE, *supra* note 24, at 16.

202. See, e.g., Chirgwin, *supra* note 2 (reporting accusations that Prenda Law uploaded content to torrent websites in the hopes of inducing users to illegally pirate the works).

203. See *supra* Part II.B.

204. THE TASK FORCE, *supra* note 24, at 90.

copies of their photos to the Copyright Office through traditional means.²⁰⁵ This can be done by mailing different forms of media, including DVDs and photocopies of the original photos.²⁰⁶ Thus, unless a registrant is sending the Copyright Office an original copy, the registrant already has the burden to digitize the work. Forcing registrants to digitize and upload their photos may not even create an additional step and, for those it does, the process of scanning a group of photos would be only a perceptible, and certainly not insurmountable, expenditure of time and money.

Making electronic filings mandatory brings two benefits. First, it would save the Copyright Office the administrative cost of processing several types of media by reducing it all to a single digital registration system that is more affordable to maintain than other analogue technologies.²⁰⁷ Second, and more importantly, mandatory electronic filings would give the registrant and the Copyright Office the ability to manage the metadata of each individual photo.²⁰⁸ All forms of metadata serve an important role in aiding users to identify images online.

Descriptive metadata can be thought of as the so-called “tags” of a photo. These are the labeling systems that most users are familiar with because they are utilized on popular social media and photo-hosting websites that allow authors and other users to describe a photo to make it easier to search and catalogue. For example, Twitter popularized a hashtag system that allows users to track trends,²⁰⁹ and similar systems used by Tumblr²¹⁰ and Instagram²¹¹ catalog photos by subject. Thus, when a keyword like “flower” is put into a search engine, the search engine scans all the files’ metadata (specifically descriptive metadata), finds those files that contain the tag “flower,” and filters in that content.²¹²

205. See 37 C.F.R. § 202.3 (2013).

206. *Id.* § 202.3(b)(10)(iv).

207. See H.R. REP. NO. 94-1476, at 154 (1976) (explaining cost is a concern of the registration process); see also *U.S. Copyright Office Forms*, *supra* note 67 (noting that electronic registrations are processed faster).

208. See *Meta 101: Types of Metadata*, PHOTOMETADATA.ORG, <http://photometadata.org/META-101-metadata-types> (last visited June 10, 2014). There are essentially three classes of metadata: technical metadata, which describes characteristics of the image such as size and color; descriptive metadata, such as captions or keywords about an image; and, administrative metadata, which may contain information about the creator. See *id.*

209. See *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309-using-hashtags-on-twitter> (last visited Apr. 3, 2014).

210. See *How to Use Tags*, TUMBLR, http://www.tumblr.com/docs/en/using_tags (last visited Apr. 3, 2014).

211. See *Using #hashtags*, INSTAGRAM, <http://help.instagram.com/351460621611097> (last visited Apr. 3, 2014).

212. See, e.g., *Inside Search: Algorithms*, GOOGLE, http://www.google.com/intl/en_us/insidesearch/howsearchworks/algorithms.html (last visited Apr. 3, 2014).

Administrative metadata is not as readily apparent as descriptive metadata. Administrative metadata contains finer details that most users do not think to research—which is part of the problem. The information in the metadata is not about the photo *per se* but about the photo's creator and other pertinent information, such as licensing and contact information.²¹³ Metadata provides a unique opportunity for content owners and the Copyright Office to implement certain safeguards that are not available in the physical world.

Mandatory digitization of photos would give parties an opportunity to embed certain information that would help others identify the copyright protection of a given work.²¹⁴ If the Copyright Office mandated that certain information be embedded onto the digital photos being registered, such as the identity of the author, date, and duration of protection (information that the current notification system does not make easily accessible), the Copyright Office would ensure that newly registered photos contain this information when searched, thus eliminating some of the ignorance that NPEs take advantage of.²¹⁵

This raises an additional question: how will this information be

213. PHOTOMETADATA.ORG, *supra* note 208.

214. Courts have sometimes found implied licenses to nullify certain infringement claims. A license is a defense to infringement and can be implicitly granted if the licensee can reasonably infer the licensor would consent to the licensee's use. *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115–16 (D. Nev. 2006) (internal citations omitted). In *Field*, Google successfully argued that the photo's owner reasonably knew that Google would archive his photos. *Id.* at 1116. Because the owner failed to embed a “no-archive” meta-tag,” the court implied a license and Google was not found liable for infringement. *Id.* *Field* demonstrates that courts are keeping current with commonly accepted Internet practices. Not only are courts interested in the metadata of media and their use in copyright related issues, courts are becoming increasingly aware and sympathetic to common practices on the Internet, namely “freely and openly sharing certain information.” See, e.g., *Righthaven LLC v. Klerks*, No. 2:10-CV-00741-GMN-LRL, 2010 WL 3724897, at *4 (D. Nev. Sept. 17, 2010) (finding that the owner's act of allowing users to share the article constituted an implied license and thus there was no infringement). Even though copyright registration is an opt-in system, courts have also signaled that the Internet has become an “opt-out system,” and the only time someone's work is infringed is when a website actively chooses to remove itself from the system. See *id.* at *4 n.1.

215. It may be possible to insert identifying information retroactively to previously published photos, but this would be a much more expensive undertaking, though perhaps not cost-prohibitive. Despite the “error-prone tedium” that concerns the Copyright Office and courts when entering this volume of data, the Copyright Office is currently experimenting with a new provision that would require more information and material be submitted during a group registration. See *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 681–82 (9th 2014). Though the cost of such a program is difficult to estimate, the fact that the Copyright Office is considering revisions demonstrates that the proposal is at least a possibility.

displayed, and how will Internet users search for this information? Searching for an image only using descriptive metadata would be impractical because there are limits to a search's specificity. For example, trying to find a file for a specific photo by just querying "pepper" will likely return thousands of results, when only one result is needed. A more feasible solution would be to implement a reverse image search engine to better pair a searched photo with the desired information.²¹⁶

2. Reverse Image Search Engine

Search engines are useful tools for allowing users to search for information on the Internet by scouring countless files and compiling relevant information, reducing searchers' transaction costs.²¹⁷ A reverse image search engine, technically called content-based image retrieval,²¹⁸ is a method for searching for images online;²¹⁹ unlike familiar search engines, these programs allow users to search using the image as the query.²²⁰ It allows the user to search for information about an image.²²¹ Thus, when a blogger finds an image that she wants to use on her blog, searching a traditional text-based query that describes that image is, by its nature, limited to its tags, and is both arduous and imprecise.²²² Instead, a reverse

216. The breadth of technology should never be underestimated, and since editing of this Comment has commenced, Google has announced that it developed a visual-recognition program capable of solving "CAPTCHA," a series of numbers and letters that, up until recently, were only discernable by humans. Jacob Kastrenakes, *Google Develops Computer Vision Accurate Enough to Solve Its Own CAPTCHAs*, THE VERGE (Apr. 16, 2014, 4:05 PM), <http://www.theverge.com/2014/4/16/5621538/google-algorithm-can-solve-recaptcha-almost-every-time>. Visual-recognition technology may become so accurate that metadata tags will become less and less necessary.

217. James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L.R. 1, 15 (2007).

218. *Content Based Image Retrieval*, SYNAPTICACENTRAL, <http://www.synapticcentral.com/content/content-based-image-retrieval-google-and-similar-image-search> (last visited June 10, 2014).

219. Matt McGee, *Up Close With Google's Search By Image: Hits, Misses & More*, SEARCH ENGINE LAND (June 17, 2011, 3:50 PM), <http://searchengineland.com/up-close-with-google-search-by-image-82313>. Google's "Search by Image" function will serve as this Comment's archetype, but there are several other engines available on the Internet.

220. *E.g., Google: Inside Search*, GOOGLE, <http://www.google.com/insidesearch/features/images/searchbyimage.html> (last visited June 10, 2014) (listing methods of inputting a query, such as "drag and drop," uploading the image, and copying the image's URL).

221. *Content Based Image Retrieval*, *supra* note 218 (explaining how reverse image search engines operate).

222. Joyce Y. Chai, Chen Zhang & Rong Zin, *An Empirical Investigation of User Term Feedback in Text-based Targeted Image Search*, 25 ACM TRANSACTIONS INFO. SYS. at 1-2, available at <http://www.cse.msu.edu/~jchai/Papers/TOIS06.pdf>.

image search utilizes advanced technology to provide the most precise results about that image.²²³ For example, Google's "Search by Image" engine, which can be accessed through Google Image,²²⁴ utilizes an algorithm to compile information about the image, such as its lines, shapes, and colors.²²⁵ Thus, this engine radically expands the user's ability to accurately search for a specific image and consequently, for information about that image.²²⁶

A reverse image search of copyrighted photos would be remarkably useful in combating innocent infringement. Assuming a user knows to search for an image's copyright protection, which is the aim of the educational campaign discussed above, a quick and relatively simple search could reveal that an image is protected and thus would require a license to use. It is innocent infringers' failure to obtain or even negotiate for this license that imbues NPEs with the force of law they need to launch threats and quick settlements against infringers.²²⁷ Arming Internet users with the tools to conduct a good faith search would strike a massive blow against the NPEs.

How the Copyright Office would implement such a search engine is a more complicated issue.²²⁸ No doubt it could develop its own, but this may prove unduly expensive to create and maintain, especially if the Copyright Office wants to incorporate not just newly registered works, but past ones as well. The Copyright Office can, however, outsource the task to a private company. Companies like Google already have a powerful system in place, and it may be more efficient to simply form a partnership.²²⁹ When

223. McGee, *supra* note 219.

224. GOOGLE IMAGES, <https://images.google.com> (last visited June 10, 2014). "Google Goggles," which allows users to take a digital picture of an object or other image, such as a painting, and then the program searches the Internet for similar images and information about that image. *Google Goggles*, GOOGLE MOBILE, <http://www.google.com/mobile/goggles/#text>; see also Google, *Google Goggles*, YOUTUBE (Dec. 6, 2009), <http://www.youtube.com/watch?v=Hhgfz0zPmH4> (displaying specific examples of reverse image searches).

225. McGee, *supra* note 219 (noting that unique, never-before-seen images will not work with a reverse image search engine).

226. Chai, Zhang & Zin, *supra* note 222, at 1-2 (noting the limits of traditional text searches using descriptive metadata).

227. See *supra* Part III.C.

228. There would not likely be a legal issue when implementing this type of search engine. Although an image database would require a copy of the original images, both to archive and display, the courts have already held that these actions are fair use. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (finding thumbnails to be fair use because "users are unlikely to enlarge the thumbnails and use them for artistic purposes").

229. For example, Google recently launched Google Patents, which allows users to search for prior art and other patents using Google's programs. *Google Patents*, GOOGLE,

fighting copyright NPEs online, the more information the user has, the less likely she is to fall prey to innocent infringement, and the Copyright Office should take all steps necessary to ensure no one is taken advantage of by NPEs online. Notwithstanding these proposed solutions, the impact of *Alaska Stock* cannot be understated, and the following section highlights the case's shortcomings and suggests that practitioners should not view it as the final word on the group registration debate.

*D. Completing the Circuit: The Death of the Author
and Working Around Alaska Stock*

These solutions, though they would ultimately serve the public's interests, do appear to contravene the jurisprudence of both the Copyright Office and several circuits. Following *Alaska Stock*, this begs the question: If the Copyright Office is not required to adopt any of these solutions, how would these solutions be implemented? There are two potential responses. The first, and simpler of the two, is that the Copyright Office can voluntarily implement these solutions despite decades of practice to the contrary. This would effectively undue the deference argument in the case, in which the Ninth Circuit found *Chevron* deference for the Copyright Office's naming procedure.²³⁰

In order to make the deference argument, the court must have first found ambiguity in the Copyright Act. The Ninth Circuit recognizes that the statutory ambiguity that triggers *Chevron* deference,²³¹ whether "authors" and "works" refer to each constituent work in the group,²³² reflects a tension between a "superficial reading" and the "long standing administrative practice."²³³ The Ninth Circuit opts for the latter interpretation, but other district courts have held differently.²³⁴ Although

<http://patents.google.com> (last visited May 12, 2014). This competes with the United States Patent and Trademark Office's search engine, but both groups have agreed to partner on providing certain services, with the Patent and Trademark Office citing that it simply did not have the technical abilities to support such services. Gene Quinn, *USPTO and Google to Make Patent & Trademark Data Public*, IPWATCHDOG.COM (June 7, 2010, 10:10 AM), <http://www.ipwatchdog.com/2010/06/07/uspto-google/id=10881/>.

230. *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 677–78 (9th Cir. 2014).

231. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

232. *Alaska Stock*, 747 F.3d at 680–81.

233. *Id.* at 680.

234. *See id.* at 684 n.50 (citing *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co.*, 712 F. Supp. 2d 84, 92–94 (S.D.N.Y. 2010); *Muench Photography, Inc. v. Pearson Educ., Inc.* 2013 WL 6185200, at *10–13 (N.D. Cal. Nov. 19, 2013); *Bean v. Houghton Mifflin Harcourt Publ'g Co.*, 2010 WL 3168624, at *3 (D. Ariz. Aug. 10, 2010)).

how to interpret the statute's language may not be clear, what is clear is that the Ninth Circuit has established that there is an ambiguity, and *Chevron* deference will likely be triggered in any dispute including authors' names in group registrations of photos, resulting in the *status quo* Copyright Office practice that does not require listing all author's names.

Yet, even accepting the existence of an ambiguity, how the Ninth Circuit grants deference to the Copyright Office's practice is troubling. First, the source of this practice comes from the Copyright Office's circulars, an industry letter on which *Alaska Stock* relied,²³⁵ and *Compendium II: Compendium of Copyright Office Practices* (1984).²³⁶ If these are the only sources for the Copyright Office's practice, this sets a concerning precedent that an administrative agency can establish gap-filling laws with memos: a fiat by circular. This type of material may be practical and help the Copyright Office deal with its day-to-day activities, but they often lack the legal and hermeneutic rigor that one is required to give when establishing if an agency's practices are sufficient for *Chevron* deference.²³⁷ A lower form of deference, like *Mead* deference,²³⁸ seems more appropriate for these documents.

The Copyright Office's amicus brief in favor of petitioner's position *does* utilize statutory justification when interpreting the Copyright Act, finding that the Act does not require a registrant to list each individual author's name.²³⁹ Yet this is the only document presented in the case on which such a legal justification for this practice can be found. More problematic is that the Ninth Circuit may have just radically increased the scope of *Chevron*. The Court establishes that there is an ambiguity, but by accepting the Copyright Office's practice without giving much consideration to the origin of the practice, which appears to be mainly concerned with practicality and

235. *Id.* at 677–78.

236. Compendium II of Copyright Office Practices § 615.07(b)(3), available at [http://www.copyrightcompendium.com/#615.07\(b\)\(3\)](http://www.copyrightcompendium.com/#615.07(b)(3)) (“The [Copyright] Office prefers, however, that the application name all authors, using as many continuation sheets as necessary.”); see *Alaska Stock*, 747 F.3d t 679. The Compendium is an internal manual used by the Copyright Office and does not produce binding law. *Kugel v. United States*, 947 F.2d 1504, 1507 (D.C. Cir. 1991). The *Compendium II* is soon to be replaced by the *Compendium III*.

237. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (requiring that the interpretation be tied to some rational statutory construction).

238. *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (holding that an agency's interpretation may merit some deference whatever its form, even though interpretation is not entitled to *Chevron* deference).

239. Brief for the United States of America as Amicus Curiae in Support of Reversal at *13, *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, No. 10-36010, 2011 WL 860443 (9th Cir. Feb. 18, 2011).

not legality, an agency can interject its own interpretation whenever it wants. This seems to be the exact type of activity the arbitrary and capricious threshold is designed to curtail.

The second way to get around *Alaska Stock*'s holding is to upend the practical argument: the current practice that does not require a registrant to list every authors' name saves the registrant and Copyright Office the needlessly cumbersome labor of tracking down every member of the group. Yet the Ninth Circuit's logic here is circular. Although the court favors *Chevron* deference in light of the Copyright Office's longstanding practice, it appears that the Copyright Office's primary concern when designing this practice was not related to a legal interpretation of the statute, but instead to judicial economy. Thus, the circle completes itself: the Copyright Office's practice bolsters judicial economy, which according to this case is (1) an independent and more regarded justification for its ruling,²⁴⁰ and (2) clarifies a statutory ambiguity that is logically consistent with a "*permissive construction of the statute*," which implicitly demands practical concerns.²⁴¹ Therefore, this practice is valid with or without *Chevron* because it is a longstanding practice that achieves judicial economy.

There are two issues with the type of practical argument presented in the case. The first is the implicit assumption that this practice best achieves judicial economy and that judicial economy should be the main consideration when interpreting the statute. Practicality is what gives our otherwise metaphysical laws teeth, but it does not supersede the spirit of the law. For example, NPEs cause substantial harm to judicial economy,²⁴² yet most of their tactics are still legal. The highest concern is always justice, and justice here is applying the Copyright Act as Congress intended it.

Furthermore, judicial economy, though perhaps a tacit goal of the law in general, is not the primary consideration for having a registration system in copyrights. According to *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*,²⁴³ also hailing from the Ninth Circuit, the main goal of a registration system is to have a "compilation of a *robust* national register of existing copyrights."²⁴⁴

240. *Id.* at *10 (accepting the deference argument but proclaiming the pragmatic, that is, judicial economy, argument as "stronger").

241. *Chevron*, 467 U.S. at 843 (emphasis added).

242. See generally *supra* Part III.A.

243. 606 F.3d 612 (9th Cir. 2010).

244. *Id.* at 621 (emphasis added) (calling a robust national register the statute's "central purpose" while mentioning judicial economy as an ancillary consideration). *But see* Reply Brief of Appellant at *5, *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, No. 10-36010, 2011 WL 2532815 (9th Cir. April 11, 2011) ("If the registration system is not usable by citizens attempting to find owners of copyrighted works, what goal is furthered by the requirement of detailed information about each work in a compilation?").

“Robust” may be ill defined, but a practice that provides the registrar and public with more information about a work by definition is more robust than one that lacks such information.²⁴⁵ If creating a robust system is our primary concern, then depriving it of material information is contrary to this goal. Though judicial economy is a concern, there are methods of identifying authors in a group registration that are reasonable, both administratively and fiscally.²⁴⁶

Finally, the circumstances surrounding the practice of not naming all authors have changed dramatically over the past three decades in which it has been in effect. Absent any empirical evidence on the economics of the Copyright Office’s procedure, gathering the names of all the authors in a group registration three decades ago would certainly have been unduly burdensome. But now, since the proliferation of digital technologies and the Internet, the world in which copyright law operates is entirely different. What may have been a reasonable factor to consider when developing the practice then, is not necessarily a reasonable factor now.²⁴⁷

Indeed in *Alaska Stock*, the Copyright Office and court’s primary concern is the stress that recording the names of every author would place on the storage capacity of the Copyright Office’s servers.²⁴⁸ Though a metadata tag is a very small file by itself, it is understandable that adding this tag to every photo in the register’s cache would be substantial. It is difficult then to say with any accuracy just how burdensome this would be. There are simply too many variables to give a reliable figure. Implementing these solutions would be costly, but plenty of other companies store large caches of photos, such as Google and Facebook, while still not diminishing their ability to serve their customers. While it may not be a cost efficient solution tomorrow, technological trends favor increasing power with decreasing prices, and the ability to store all the metadata information becomes more and more of a reality with each breakthrough.²⁴⁹

245. See *supra* Part IV.C.1 (advocating that all photos be tagged with metadata of authors’ names).

246. *Id.*

247. See *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding an agency’s rule could be arbitrary and capricious if the agency “offered an explanation for its decision that runs counter to the evidence before the agency”).

248. *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 681–82 (noting that in 2011 the Copyright Office expressed concerns about the “capacity of [its] system to accommodate applications listing very large numbers of authors . . . which may affect file size and transmission speed”).

249. See MOORE’S LAW, <http://www.mooreslaw.org> (last visited May 12, 2014).

CONCLUSION

Copyright NPEs are drawing wealth from society to quickly line their pockets while creating nothing of value. They take advantage of the current state of affairs, a combination of the rise of the Internet's popularity and outdated copyright law, to put infringers in an unfair bargaining position and threaten them to induce settlements of often extortionate amounts.

NPEs also gain unfair advantages from the issues that arise during the group registration phase at the Copyright Office. The current system does not provide Internet users with adequate notice about what photos are protected or for how long. On top of that, runaway statutory damages, though no doubt intended to help determine damages that would otherwise be too confusing to calculate, imbue NPEs with an unbalanced threat power that allows them to induce quick settlements. This prevents innocent infringers from mounting increasingly recognized defenses, such as fair use, and costs individuals as well as society money while not contributing to or incentivizing creative works.

There are many moving parts to this issue, and the solution will not come from any one source. Changes in the law will likely be fruitless because of the technological limits and the current unfavorable climate. Innocent infringement is more indicative of Internet users' ignorance rather than malice, yet it is the source of many suits for NPEs. An educational campaign that aims to make users aware of how commonplace online activities like copying and pasting photos, are actually in conflict with copyright law would help curb users' ignorance and protect them from NPEs. The campaign could also teach people how to perform a proper image search to identify a photo's protection so that a user can contact and negotiate a license if desired.

Mandatory electronic registration of groups of photos would give the creators and the Copyright Office the opportunity to embed useful information onto the digital image's metadata, such as the owner's name and the terms of the work's protection. Adding this step to the registration process would make it easier for users to ascertain otherwise difficult-to-find information and further aid them in the licensing process. Finally, the Copyright Office could implement a reverse image search database that would allow users to search to see if an image they want to use is protected.

The only tried and true method for stopping a troll is to answer the questions it raises,²⁵⁰ and these questions are systemic ones. The reforms

250. *Troll Bridge*, TVTROPES, [http://tvtropes.org/pmwiki/pmwiki.php/Main/Troll Bridge](http://tvtropes.org/pmwiki/pmwiki.php/Main/Troll_Bridge) (last visited Nov. 16, 2013) (listing examples of the troll trope in different forms of media).

suggested are practicable and would both educate the public, while providing it with the tools to use the Internet responsibly, and combat NPEs. No doubt copyright NPEs, like those in the patent sector, will become an increasingly prevalent problem until action is taken, and the Copyright Office is in an advantageous position to act.²⁵¹

251. See Mike Masnick, *One Single Porn Copyright Troll, Malibu Media, Accounted for Nearly 40% of All Copyright Lawsuits This Year*, TECHDIRT (May 19, 2014, 1:40 PM), <http://www.techdirt.com/articles/20140517/06552727268/one-single-porn-copyright-troll-malibu-media-accounted-nearly-40-all-copyright-lawsuits-this-year.shtml>.



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Elizabeth Beske, A.B., Princeton University; J.D., Columbia University. *Legal Rhetoric Instructor*

Elizabeth Boals, B.S., Virginia Polytechnic Institute and State University; J.D., George Mason University. *Associate Director of the Stephen S. Weinstein Trial Advocacy Program*

Brandon Butler, B.A., University of Georgia; M.A., University of Texas at Austin; J.D. University of Virginia School of Law. *Practitioner in Residence, Associate Director, Stephen S. Weinstein Trial Advocacy Program*

Kate Elengold, *Practitioner in Residence, Glushko-Samuels Intellectual Property Law Clinic*

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Daniela Kraiem, B.A., University of California at Santa Barbara; J.D., University of California at Davis. *Associate Director of the Women and the Law Program*

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Daniel Marcus, B.A., Brandeis University; LL.B., Yale University. *Fellow in Law and Government*

Claudia Martin, Law Degree, Universidad de Buenos Aires; LL.M., American University Washington College of Law. *Professorial Lecturer in Residence*

Juan Mendez, Certificate, American University College of Law; Law Degree, Stella Maris Catholic University. *Professor of Human Rights Law in Residence*

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Natalie Nanasi, B.A., Brandeis University; J.D., Georgetown University. *Practitioner in Residence, Disability Rights Law Clinic*

Sunita Patel, *Practitioner in Residence, Civil Advocacy Clinic*

Victoria Phillips, B.A., Smith College; J.D., American University Washington College of Law. *Professor of the Practice of Law and Director of the Glushko-Samuels Intellectual Property Law Clinic*

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Darren Rosenblum, B.A. University of Pennsylvania; J.D. University of Pennsylvania Law School. *Visiting Professor of Law*

Diego Rodriguez-Pinzo, J.D., Universidad de los Andes; LL.M., American University Washington College of Law; S.J.D., The George Washington University. *Professorial Lecturer in Residence and Co-Director, Academy on Human Rights and Humanitarian Law*

Susana SáCouto, B.A., Brown University; M.A.L.D, The Fletcher School of Law and Diplomacy; J.D., Northeastern University. *Professorial Lecturer in Residence and Director, War Crimes Research Office*

Macarena Saez, J.D., University of Chile School of Law; L.L.M. Yale Law School. *Fellow in the International Legal Studies Program*

Anita Sinha, B.A., Barnard College; J.D., New York University. *Practitioner in Residence, Immigrant Justice Clinic*

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