

Copyright Trolls: The New Face of Copyright Litigation?

by Brittany Frandsen

By now, most people are familiar with the concept of a “patent troll,” but fewer are aware of the increasingly common “copyright troll.” A copyright troll owns a copyright, typically in a feature film or pornographic video, and attempts to enforce its copyright against individuals who download unauthorized copies of the copyrighted material using file-sharing software such as BitTorrent.

BitTorrent is a communication protocol for sharing files, such as music and video files, over the Internet. When a file is shared using the BitTorrent protocol, the file is divided into pieces that are shared with a group of users called a “swarm.” Each member of the swarm downloads pieces of the file from the other users while simultaneously uploading pieces of the file to other users until each member of the swarm has a copy of the entire file. If the file is an unauthorized reproduction of a copyrighted work, such sharing usually constitutes copyright infringement.

Enter the copyright troll. The copyright troll collects internet protocol (“IP”) addresses associated with a BitTorrent swarm, files a complaint listing tens, hundreds, or thousands of “John Does” corresponding to each IP address, and subpoenas the relevant Internet Service Providers (“ISP”) to discover the identities of the users to whom each IP address is registered. When the ISP providers comply with the subpoenas, the copyright troll amends its complaint to assert copyright infringement against each registrant and sends a demand letter to each registrant demanding several thousands of dollars to settle the case. If the registrant will not settle or ignores the troll, the troll formally serves the alleged infringer with the complaint.

Infringing and non-infringing registrants alike often settle with copyright trolls because legal fees to defend [copyright](#) claims often exceed the amount demanded by the trolls, and registrants risk paying up to \$150,000 in statutory damages^[1] if they fight the trolls and lose. Registrants are even more motivated to settle when the copyrighted content is pornographic, as registrants would rather pay a few thousand dollars than face the humiliation of defending themselves in public court.^[2]

Consequently, copyright trolling has the potential to be a lucrative business, and copyright

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troll cases are quickly consuming the federal copyright docket. One study estimates that copyright troll cases made up 52% of copyright cases filed in federal court in 2014, and 58% of copyright cases filed in federal court in 2015.^[3]

Such aggressive tactics are vulnerable to abuse. In 2017, an attorney named John L. Steele admitted to uploading pornographic videos to file-sharing sites so others would download them, then threatening individuals who had allegedly downloaded the videos with infringement suits.^[4] Prosecutors in the case against Steele claimed that Steele and his partner had garnished over \$6 million dollars between 2011 and 2014.^[5]

More troubling is the potential for groundless suits against defendants who may be innocent of copyright infringement, but do not have the resources or sophistication to defend themselves. Copyright trolls' complaints typically lack evidence of a direct link between the alleged infringement and the accused infringer. The only proof a copyright troll has when it serves its complaint is an alleged association between an IP address and a BitTorrent swarm. However, IP addresses can be spoofed, wireless routers can be hacked, and wireless passwords can be given to any of a number of individuals and guests in the same household. Thus, copyright trolls' lawsuits seem to be intended less to catch and deter infringers than to collect ransoms from registrants whose IP addresses are associated with BitTorrent swarms.

There is no obvious remedy for the abusive tactics inherent in copyright troll litigation, and absent legislative intervention (e.g., enacting statutes similar to those designed to combat abusive patent troll litigation), it is likely copyright troll cases will continue to proliferate and define the landscape of copyright litigation in online file-sharing cases.

^[1] See 17 U.S.C. § 504.

^[2] Not all registrants settle, however. One registrant in a copyright troll case successfully moved to dismiss the case against him and was awarded \$100,961 in attorney fees. Order Re: Defendant's Motion for Attorney Fees, *Elf-Man, LLC v. Ryan Lamberson*, 13-cv-0395 (E.D. Wa., Jan. 9, 2015).

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[3] Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, Iowa L. Rev., 101, 107 (2017). The authors of the study note that the percentage dropped to 37% in 2016 after a significant copyright troll, Malibu Media, lost a case on summary judgment in early 2016, but that the rate of filing has started to increase again. *Id.*

[4] *Co-Defendant of St. Paul Lawyer Pleads Guilty to Pornography Extortion*, Twincities.com (March 7, 2017, 8:21 a.m.), <https://www.twincities.com/2017/03/07/former-chicago-lawyer-pleads-guilty-to-pornography-download-extortion/>.

[5] *Id.*