

The Uneasy Case Against Copyright Trolls

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The copyright troll and the phenomenon of copyright trolling have thus far received little attention in discussions of copyright law and policy. A copyright troll refers to an entity that acquires a tailored interest in a copyrighted work with the sole objective of enforcing claims relating to that work against copiers in a zealous and dogmatic manner. Not being a creator, distributor, performer, or indeed user of the protected work, the copyright troll operates almost entirely in the market for copyright claims. With specialized skills in monitoring and enforcing copyright infringement, the troll is able to lower its litigation costs, enabling it to bring claims against defendants that an ordinary copyright owner might have chosen not to.

As a matter of law, the copyright troll's model usually complies with all of copyright's formal rules. Courts have in turn struggled to find a coherent legal basis on which to curb the copyright troll's activities. In this Article, I show that the real problem with the copyright troll originates in the connection between copyright's stated goal of incentivizing creativity and the enforcement of copyright claims, which discussions of copyright law and policy fail to adequately capture. Copyright claims, much like other private law claims, are systematically under-enforced. This under-enforcement is neither purely fortuitous nor indeed marginal to the system, but instead operates as an important safety valve that introduces an informal breathing space into copyright's functioning. Over time, this under-enforcement results in a balance between claims that are actionable and enforced, and those that are actionable but tolerated. It is precisely this balance that the advent of the troll disrupts, since it seeks to enforce claims that copyright owners would have otherwise tolerated.

This Article unpacks the connection between the incentives to create and enforce in copyright to show why the troll's actions are indeed problematic despite its formal compliance with copyright's legal rules. In so doing, it shows how the troll exploits the secondary market for copyright claims, which might otherwise have important upsides, and argues that a permanent solution to the problem will entail targeting the troll's incentive structure rather than using any of copyright's existing doctrines.