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RISE OF THE COPYLEFT TROLLS: WHEN PHOTOGRAPHERS SUE AFTER CREATIVE COMMONS LICENSES GO AWRY

DAXTON R. STEWART[1]

Creative Commons licenses typically signal that a photograph uploaded to the web may be used for limited purposes, such as non-commercial uses or with attribution. Some photographers are monetizing this, uploading photos with little commercial value, searching the web for uses with improper attribution, then demanding payment and engaging in high-volume litigation. This study examines more than forty cases involving photographers suing after a Creative Commons license terminated, finding that courts are showing a willingness to accept users' arguments of fair use based on transformative purposes and lack of economic harm, as well as a general distaste for the arguments of photographers engaging in this kind of litigation.

[1] Daxton R. "Chip" Stewart, J.D., Ph.D., LL.M., is a professor of journalism in the Bob Schieffer College of Communication at Texas Christian University. He currently serves as associate editor of the journal *Communication Law & Policy*. Recent works include serving as co-author of the 12th edition of *The Law of Public Communication* and editing the third edition of *Social Media and the Law*, both in press for publication in 2022, as well as *Media Law Through Science Fiction: Do Androids Dream of Electric Free Speech?*, published in 2019 by Routledge.

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The scam works a little like this:

A photographer posts photographs on Flickr or Wikipedia using the "Creative Commons" tag, a signal to Internet users that these can typically be reused online without permission as long as they include proper attribution.

The photographer searches the web for use of their photos or hires a company such as Copypants or Pixsy to do the search for them,[2] and they ferret out any uses that omit or otherwise mess up the attribution. This is an easy mistake for a less-savvy Internet user, particularly when the attribution requires full hyperlinks to the original and a hyperlink to the license itself, burdening any ability to use it as a thumbnail. Hits are investigated for potential noncompliance, and demand letters are sent to each user that doesn't follow the license requirements perfectly.[3]

Conveniently, the photographer claims an older version of the Creative Commons license (2.0, for example), which terminates automatically upon any error by the licensee.[4] The most recent version of the CC license, updated in 2013, allows correction and reinstatement of the license through proper attribution within thirty days of the discovery of the error, but older ones do not.[5] With the CC license terminated and

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[2] Steven Melendez, *Here Come the Copyright Bots for Hire, with Lawyers in Tow*, FAST CO. (Feb. 22, 2018), https://www.fastcompany.com/40494777/here-come-the-copyright-robots-for-hire-with-lawyers-in-tow [https://perma.cc/5SRX-U627] (These sites "use algorithms to scour the Internet for copies of photographers' works and help them enforce their rights.").

[3] Sandra J. Garcia, *Copyright Infringement: A Photograph Is Worth a Thousand Dollars*, OFF. LEGAL AFFS. (OCT. 27, 2020), https://www.utsa.edu/legalaffairs/news/2020/10/story/copyright-infringement-a-photograph-is-worth-a-thousand-dollars.html [https://perma.cc/9CTM-R55P] ("When they find an unauthorized use, the companies send proof of the unauthorized use, threats of litigation and a demand for compensation of damages of $500 to $2000 for loss of a license fee.").

[4] *What Happens if I Offer My Material Under a Creative Commons License and Someone Misuses Them?*, CREATIVE COMMONS USA (July 18, 2018), https://creativecommonsusa.org/index.php/ufaqs/what-if-someone-does-something-egregious-with-my-cc-licensed-work-that-i-dont-morally-ethically-support-what-happens-if-i-offer-my-material-under-a-creative-commons-license-and-someone-misus/ [https://perma.cc/FB7U-YT74].

[5] *Attribution 4.0 International*, CREATIVE COMMONS, https://creativecommons.org/licenses/by/4.0/legalcode [https://perma.cc/BYL2-JECB].

easy reinstatement off the table, users of the photographs are put in a difficult spot – pay the licensing demand of $750 or $1500 or $3500, or else.

If the license demand is not paid, a copyright infringement lawsuit is quickly filed in federal court. And these lawsuits are filed in bulk. One German photographer, Marco Verch, has filed forty-one such lawsuits in a variety of U.S. District Courts in 2019 and 2020 alone.[6] Verch's lawsuits usually stem from stock photography he savvily generates to meet market demand; he posted several such as "face coverings, test tubes and people wearing masks" on his website at the start of the COVID-19 outbreak in 2020.[7] Using an older version of the Creative Commons license that "includes sophisticated attribution requirements that victims claim have led them into a trap," he sues after the license automatically terminates.[8] A photographer based in Indiana, Larry Philpot, has been labeled a "copyright troll" by a court after pursuing more than 150 infringement lawsuits in the past decade.[9] In 2020, a federal district judge expressed dismay when Philpot testified that he had made "tens of thousands of dollars" licensing a photograph he had taken of Willie Nelson, when the reality was that he was "describing settlements extracted after [he] confronted the infringer for failing to provide attribution per the 'Creative Commons' license," and that Philpot "is more in the business of litigation (or threatening litigation) than selling his product or licensing his photograph to third parties."[10]

Unwitting photo users who slip up on attribution, and don't pay up on after a license demand, wind up sued with a demand for $150,000 in damages,[11] the maximum statutory amount for willful copyright

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[6] PACER search conducted on March 22, 2021.

[7] Chad O'Carroll, Sophie Lamotte & Bill Goodwin, *Automated Image Recognition: How Using 'Free' Photos on the Internet Can Lead to Lawsuits and Fines*, COMPUTER WEEKLY (Nov. 17, 2020), https://www.computerweekly.com/news/252488167/Automated-image-recognition-How-using-free-photos-on-the-internet-can-lead-to-lawsuits-and-fines [https://perma.cc/A5ZL-M3LS].

[8] *Id.*

[9] Philpot v. Emmis Operating Co., No. 18-CV-00816-RP, 2019 U.S. Dist. LEXIS 112440, at *4 (W.D. Tex. July 8, 2019).

[10] Philpot v. L.M. Communs. II of S.C., No. 17-CV-172, 2020 U.S. Dist. LEXIS 85901, at *9-10 (E.D. Ky. May 15, 2020).

[11] *Emmis Operating Co.*, 2019 U.S. Dist. LEXIS 112440, at *5.

infringement under U.S. law, plus filing costs and attorney fees.[12] It is a tactic common among copyright trolls, who have emerged over the past decade to exploit modern U.S. Copyright law's approach to online uses and statutory damages. And if users try to fight back in court, they potentially take on thousands of dollars of attorney fees of their own to make fair use arguments that can be challenging when it comes to the reuse of digital photographs.[13]

Over the past decade, legal scholars have written extensively about copyright trolling.[14] But the new twist of dangling images under Creative Commons licenses with complicated attribution requirements makes the practice particularly pernicious, as well as profitable, and courts are struggling to balance the equities involved in cases brought by photographers such as Verch and Philpot. While their scam is perfectly legal, it also entirely corrupts the ethos of Creative Commons (CC), long recognized as a "copyleft" system favoring open uses of materials posted on the Web so they can be reused and remixed with permission of their creators without violating copyright formalities.[15] CC license owners like Verch and Philpot are not interested in correcting attribution errors made by secondary users, evidenced by using licenses before CC 4.0 that automatically terminate when attribution errors are made. Rather, they lure potential users into thinking that CC-licensed materials are safe to post, then hunt them down and demand payment when mistakes are inevitably made.

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[12] 17 U.S.C. § 504 (2010).

[13] *See* 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, 99 (2012).

[14] Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105 (2015); Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571 (2018); Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77 (2020); *See* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013).

[15] *See What is Copyleft?*, GNU OPERATING SYS., https://www.gnu.org/licenses/copyleft.en.html [https://perma.cc/XD4R-JRSJ] ("Copyleft" was originally used as a term for open-source software, in which the creator of the software permits others to use the code to remix and remake the program into new things, on the condition that the new creation remains open-source and free to remix as well); *About the Licenses*, CREATIVE COMMONS, https://creativecommons.org/licenses/ [https://perma.cc/6V6L-AK4H] (Creative Commons notes that its Attribution-ShareAlike license is most similar to the "copyleft free and open source software licenses").

Photographs that have little to no value on the open market can become quite profitable in court.

How did Creative Commons, a copyright alternative looking to reduce transaction costs for sharing and reuse of works posted on the Web, become embraced as a litigation tool for copyright trolls? And how have courts responded to photographer plaintiffs making these claims, or defendants raising fair use and other arguments to fend off their demands? The purpose of this article is to address these questions and to provide potential law and policy responses to abuse by what we are calling "copyleft trolls."

First, the background and ethos of copyright alternatives such as Creative Commons are examined. This is followed by an analysis of how courts are handling lawsuits arising after Creative Commons license violations, looking at fair use arguments and attorney fee demands in cases by photographers against news organizations and bloggers who post their photographs without appropriate attribution. While U.S. copyright law may be daunting for Internet users who repost a photograph they thought was safe to use, courts have shown some sympathy for their plight, and the conclusion discusses the policy considerations and future potential issues in these situations.

II. Free Culture, Copyleft, and Creative Commons

As the World Wide Web became a driving force of economic and social interaction in the 1990s, facilitating copying and sharing of text, music, photographs, and video in ways never possible before, Congress enacted major revisions to U.S. Copyright law. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA), which lengthened most existing copyrights by twenty years, largely freezing the public domain for two decades.[16] And in 1999, Congress passed the Digital Theft Deterrence and Copyright Damages Improvement Act, which increased damages by fifty percent for

[16] Copyright Term Extension Act, Pub. L. No. 105-298 (1998) (the act increased the copyright terms for individual works from life of the author plus 50 years to life of the author plus 70 years, and terms for corporate works created before 1978 were extended from 75 to 95 years from the date of publication. This famously kept Mickey Mouse, who first appeared in 1928, out of the public domain for Disney for another two decades).

infringement, so the minimum statutory damages for violating someone's copyright went from $500 to $750 per infringement, while maximum damages for willful infringement increased from $100,000 to $150,000.[17] Congress also passed the Digital Millennium Copyright Act to give copyright owners the ability, among other things, to demand takedowns of infringing uses from Internet service providers.[18]

Backlash was swift against these extensions of "long and strong copyright," as Patricia Aufderhide and Peter Jaszi have called it.[19] Believers in the open web and supporters of "free culture" lamented what seemed to be the end of the public domain, largely at the hands of entertainment industry lobbyists.[20] Legal scholar and activist, Lawrence Lessig, was one of many who spearheaded efforts to challenge these new laws, particularly the CTEA, arguing that it essentially made copyright terms infinite in violation of the Constitutional provision that copyright was to be "for limited times."[21] Ultimately, the Supreme Court rejected these pleas in *Eldred v. Ashcroft* in 2003, finding that the CTEA's extension of copyright terms for an additional twenty years was not "an impermissible exercise of Congress' power under the Copyright Clause."[22] Meanwhile, courts were shutting down music file-sharing services such as Napster and Grokster as contributory infringers,[23] and music industry lawyers were suing teenagers who downloaded mp3 music files from these services, hitting them with multimillion-dollar judgments based on the newly enhanced damage awards Congress had passed.[24] In one case, the trial judge noted that the actual damages caused by a person downloading twenty-four songs were probably about $54, but nevertheless, the jury assessed statutory damages of $80,000 per song, resulting in a $1.92 million verdict.[25] In another case,

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[17] Digital Theft Deterrence and Copyright Damages Improvement Act, Pub. L. No. 106-160 (1999).

[18] Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998); *see also* 17 U.S.C. § 512.

[19] PATRICIA AUFDERHIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 12 (2011).

[20] *See* LAWRENCE LESSIG, FREE CULTURE – HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 484 (2004).

[21] U.S. CONST. art. I, § 1, cl. 8.

[22] Eldred v. Ashcroft, 537 U.S. 186, 208 (2003).

[23] *See* A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see also* MGM Studios v. Grokster, 545 U.S. 913 (2005).

[24] *See* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012).

[25] *See id.*; *see also* Paula Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 442 (2009).

after music industry litigants won a $675,000 verdict against a college student, the judge opined, "There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood."[26]

Several alternatives to the system began to emerge around this time. The movement to reform or replace copyright with a system better-suited to online use and culture, particularly favoring noncommercial secondary uses through contract-based alternatives, is sometimes called "copyleft." While most frequently used in the context of software and programming, "copyleft" is generally seen as an approach that programmers and artists can employ as a "some rights reserved" rather than an "all rights reserved" system, authorizing secondary uses without explicit permission provided that the creator's wishes about the work are respected.[27]

One example of "copyleft" is the GNU General Public License, established by the Free Software Foundation, which allows secondary uses for computer software programs with some limitations without direct permission of the author.[28] In the context of works such as art and photography, the "copyleft" ethos was embedded in the foundation of Creative Commons (CC), a nonprofit organization that launched in 2001, with free culture advocate Lessig as one of its founders. Lessig argued that CC would help "build a layer of reasonable copyright law resting on top of the extremes" that Congress and the courts had enabled.[29] CC created a contract-based copyright alternative that attempts to unbundle the exclusive rights granted by copyright law – rights to copy, distribute, make derivative works, or perform or display in public – by giving authors the ability to retain some rights of control and permit them to grant secondary users some latitude to use the works

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[26] Sony BMG Music Entertainment v. Tenenbaum, 672 F. Supp. 2d 218, 237 (D. Mass. 2009).
[27] *See* Severine Dusollier, *Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 271 note 1 (2010) (describing "copyleft" as "the term that is now commonly used to designate the free software or free art initiatives," with the term used "to emphasize that contrary to a traditional exercise of the copyright," the author instead "authorizes a broader right to use her work than what is traditionally granted.").
[28] *GNU General Public License*, FREE SOFTWARE FOUND. (June 29, 2007), https://www.gnu.org/licenses/gpl-3.0.en.html [https://perma.cc/25GA-2S4R].
[29] Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 11 (2004).

without permission.[30] For example, a creator may designate a work to be used provided that the secondary user attributes to the creator (denoted as CC-Attribution or CC-BY) and uses it for non-commercial purposes (CC-NC), which almost two-thirds of CC license holders apply to their works.[31] CC licensing became common among many photographers after the photo-sharing site Flickr made it an option in 2004,[32] and as of 2021 there are more than 500 million CC licensed works on Flickr. [33]. Such licensing had mixed reviews, at best from professional photographers, who noted that while CC facilitated the spread of their work around the Web, secondary users did not always follow attribution or other rights-reserving designations, and that it undermined efforts by photographers to make money from their works.[34] Stock photo companies such as Getty Images also were less enthused, as the cost of their stock images, which were up to an average of $210 for a license in 2004, saw prices "dwindle[ing] to the point of triviality" by 2009 with the emergence of better photo technology and sharing options such as Flickr and Facebook.[35] Within a decade, CC had become known as "possibly the best publicized of the efforts to create an artificial public domain through contracts, to compensate for the badly-eroded zone of copyright-free work."[36]

While Creative Commons is rooted in copyright law, it was not intended to embrace the same legalistic and litigious culture that copyright law imposed on creators and secondary users. Indeed, the plan was quite the opposite, to reduce formalities and transactions costs that tended to inhibit sharing and reuse of digital works. Lessig described the legal

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[30] *About the Licenses*, *supra* note 15.

[31] LAWRENCE LESSIG, REMIX 278 (2008); *see also Frequently Asked Questions*, CREATIVE COMMONS (Nov. 22, 2021), https://creativecommons.org/faq/ [https://perma.cc/Y5EY-UR65].

[32] Christa Pletcher, *Are Publicity Rights Gone in a Flash? Flickr, Creative Commons, and the Commercial Use of Personal Photographs*, 8 FLA. ST. U. BUS. REV. 129, 133 (2009).

[33] Duncan Geere, *The History of Creative Commons*, WIRED (Sept. 9, 2021), https://blog.flickr.net/en/2021/09/08/a-look-at-nearly-two-decades-of-creative-commons-licenses-on-flickr/#:~:text=As%20of%20September%202021%2C%20nearly,of%20openly%20licensed%20works%20online [https://perma.cc/88V6-U3QG].

[34] Katie Scott, *What Does Creative Commons Mean for Photography*, WIRED (Dec. 15, 2011, 12:29 PM), https://www.wired.co.uk/article/what-does-creative-commons-mean-for-photography [https://perma.cc/V584-A4YE].

[35] Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935, 1972 (2014).

[36] AUFDERHIDE & JASZI, *supra* note 19, at 12.

system as one that "doesn't work for anyone except those with the most resources," and that the "costliness, clumsiness and randomness" of the system made justice for regular people difficult.[37] These kinds of transaction costs had "become the dominant feature of the economic interaction" between photographers and users on the Web, as Eric Johnson noted.[38] Creative Commons was an effort to cut down transaction costs and risks for those interested in enabling better sharing and use of works, especially for noncommercial uses. As Creative Commons itself has recommended, "[t]hose who want to make their work available to the public for limited kinds of uses while preserving their copyright may want to consider using CC licenses. Others who want to reserve all of their rights under copyright law should not use CC licenses."[39]

The point of copyleft was never to replace copyright, nor was it to remove the possibility of programmers and artists from preventing infringement or from profiting from their work. But the copyleft movement also certainly did not intend to encourage or facilitate high-volume litigation by copyright owners who found harmless or innocent infringing uses scattered around the web. As Creative Commons itself noted after a German court found a photograph under a CC 3.0 Attribution-ShareAlike license to be enforceable, ordering the political party that reposted the photo online without attribution to take it down, one of the goals of Creative Commons is to limit litigation of this sort.[40] While CC applauded the court's decision to hold the license to be enforceable, they also said they were pleased because "among millions of uses of its licenses, the courts are rarely involved – the licenses allow licensors and licensees to easily avoid transaction costs, let alone the costs of court."[41] Additionally, copyright law might be an effective enforcement tool against willful misuse of CC-licensed photographs,

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[37] LESSIG, *supra* note 20, at 274.

[38] Johnson, *supra* note 35, at 1972.

[39] *Frequently Asked Questions*, CREATIVE COMMONS, https://creativecommons.org/faq/ [https://perma.cc/R7DG-KTUP].

[40] Diane Peters & Alexis Muscat, *Thoughts on "Non-Amicable" Enforcement of CC Licenses*, CREATIVE COMMONS (Jan. 15, 2020), https://creativecommons.org/2020/01/15/thoughts-on-non-amicable-enforcement-of-cc-licenses/ [https://perma.cc/ST54-RLNS]; *see* Mike, *Creative Commons Attribution – ShareAlike License Enforced in Germany*, CREATIVE COMMONS (Sept. 15, 2011), https://creativecommons.org/2011/09/15/creative-commons-attribution-sharealike-license-enforced-in-germany/ [https://perma.cc/9K5B-XJJS].

[41] Mike, *supra* note 40.

such as when a professional photographer received a $139,000 judgment in 2021 against news website *LifeZette,* which posted a CC-BY licensed photograph of Senator Elizabeth Warren on its site thirteen different times without attribution, had "intentionally removed information identifying" the photographer, refused to take them down upon receiving notice, and even went so far as to post "copyright management information that falsely identified (*LifeZette*) as the copyright owner."[42]

In response to how licenses were being used and how works were being distributed on the Web, Creative Commons made an important change to the termination rules in 2013 when it launched the CC 4.0 license. In all previous versions of the CC license, such as 3.0 that was released in 2007, termination of the license was automatic upon non-compliance by the licensee.[43] This meant that if, for example, the license was designated Attribution-ShareAlike (BY-SA), and the licensee made a mistake on any aspect of the attribution to the author of the work, the license was immediately terminated and was not reparable by the licensee without express approval by the licensor. During the development of the 4.0 license, drafters called to relax the automatic termination provision, noting that it was "too harsh" for licensees not to be given the opportunity to correct mistakes, instead favoring "(q)uick correction to comply with the terms of the license."[44] When the 4.0 license was released, Creative Commons highlighted the new "cure provision" in its announcement, saying the thirty-day period after discovery of the license violation "better reflects how licensors and licensees resolve compliance issues in practice."[45] In 2020, years after termination language in the CC 4.0 had been updated, Creative Commons noted that, "[i]n all cases, we recommend that creators use the latest version of the licenses, because it reflects the latest thinking of Creative Commons and its global network of legal experts."[46]

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[42] Pierce v. Lifezette, Inc., No. 20-0693, 2021 U.S. Dist. LEXIS 113266, at *1-5, 20 (D.C. Cir. June 2, 2021).

[43] *Creative Commons Attribution 3.0 United States*, SPDX (2018), https://spdx.org/licenses/CC-BY-3.0-US.html [https://perma.cc/F5JJ-ENY8].

[44] *4.0/Termination*, CREATIVE COMMONS, https://wiki.creativecommons.org/wiki/4.0/Termination [https://perma.cc/25W8-XY4Y].

[45] *What's New in 4.0*, CREATIVE COMMONS, https://creativecommons.org/version4/ [https://perma.cc/2Q4S-N3P7].

[46] CREATIVE COMMONS, CREATIVE COMMONS FOR EDUCATORS AND LIBRARIANS 56 (ALA eds., 2019).

The change has been noted by Pixsy, one of the companies photographers can hire to enforce their copyrights, as well. In a post about Creative Commons licensing, Pixsy explained that if any terms of the CC license are breached, the use becomes unlicensed, except for CC license "release type 4.0 (or above)" in which licensees "are granted a 30-day grace period in which they can resolve breaches of license terms."[47]

This "grace period" is necessary to maintain the low transaction costs and other ideals of the copyleft movement. Johnson pointed out that while the mechanics of Creative Commons licensing may seem simple in theory, they are "seen as unduly confusing by many people in practice," particularly regarding attribution requirements.[48] For materials licensed under the terms of CC 3.0 or earlier, if any of these requirements are unmet, the license automatically terminates, opening up users for copyright infringement lawsuits and thousands of dollars owed to potential litigants.[49]

This weakness in pre-4.0 Creative Commons licenses is one that photographers have been willing to exploit. Enter the copyleft trolls.

III. The High-Volume Copyleft Litigant

> "Philpot is far from a shining example of a litigant who uses the court system to vindicate important rights.

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[47] Pixsy, *What is a Creative Commons License, & What Are Its Benefits?*, https://www.pixsy.com/academy/image-owner/creative-commons-licensing/ [https://perma.cc/32D9-6JL].

[48] Johnson summarized the attribution required by CC licenses as follows: "[t]he attribution must include the author's name or pseudonym, along with the names of any other parties designated by the licensor. This designation may be made in a myriad of places - adjacent to the licensor's copyright notice, inside the licensor's terms of service, or by any other 'reasonable means,' meaning the licensee must undertake a certain amount of due diligence. The attribution must also include the title of the work used, if the work has a title, along with the web address that the licensor specifies to be identified with the work. Further, there is a kind of favored-nations clause tied to the credit provided to the licensor. The credit must appear 'in a manner at least as prominent as the credits for the other contributing authors.'" Johnson, *supra* note 35, at 1983-84 (quoting *Frequently Asked Questions*, CC WIKI (Sept. 3, 2014, 5:40 PM), http://wiki.creativecommons.org/FAQ [http://perma.cc/FG9U-K2U9]).

[49] *Creative Commons Attribution 3.0 United States*, SPDX (2018), https://spdx.org/licenses/CC-BY-3.0-US.html [https://perma.cc/F5JJ-ENY8].

> Instead, he seems to want to use the courts as a blunt object with which to coerce nuisance value settlements from unsuspecting parties." – Judge Andrew Austin, Western District of Texas, 2019.[50]

Perhaps nobody embodies the copyleft troll than Larry Philpot, a freelance music photographer based in Indiana. Judge Austin's comment came in a case in which TexasMonthly.com made an attribution error on a photograph Philpot had posted online under a CC 2.0 license.[51] The website had attributed it to "Flickr/BehindTheMusic," an account controlled by Philpot, rather than the full attribution he demanded under the CC 2.0 license, "Willie Nelson getting ready to perform. Farm Aid 2009. Photo by Larry Philpot, www.soundstagephotography.com."[52]

Philpot gave no opportunity to amend the attribution and fix the error. Instead, he sued the website and demanded $150,000 for willful copyright infringement as well as court costs and attorney fees.[53] After a default judgment that was reversed, multiple district court opinions denying Philpot's demands for $7252.23 of attorney fees,[54] and nearly a year of litigation, the parties settled for an undisclosed amount with an agreement to each bear their own fees and costs.[55]

This was one of more than 150 cases Philpot has filed in federal courts since 2014.[56] Sometimes, he is more successful. A photo of the musician Macy Gray resulted in a default judgment of $10,500 – three times the license fee Philpot testified he would have charged[57] – plus $12,910 in attorney fees and $844.33 in costs for Philpot in 2019.[58] In another case,

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[50] Philpot v. Emmis Operating Co., No. 1:18-CV-816-RP, 2019 U.S. Dist. LEXIS 112440, at *6 (W.D. Tex. July 8, 2019).
[51] *Id.* at *10-11.
[52] *Id.*
[53] *Id.* at *7.
[54] *Id.* at *4.
[55] Stipulation of Dismissal with Prejudice at 1, Philpot v. Emmis Operating Co, No. 1:18-CV-816-RP, 2019 U.S. Dist. LEXIS 112440 (W.D. Tex. Oct. 2, 2019).
[56] There were 154 cases filed by Larry Philpot in federal courts since 2014 according to a PACER search conducted by the author on March 27, 2021.
[57] Philpot v. Scene Ent., LLC, No. 18-9085, 2019 U.S. Dist. LEXIS 229671, at *2-3 (E.D. La. May 28, 2019).
[58] Philpot v. Scene Ent., LLC, No. 18-9085, 2019 U.S. Dist. LEXIS 125264, at *2 (E.D. La. July 26, 2019).

a country music news and commentary website settled and paid Philpot $40,000 after more than a year of litigation over two photos of musicians it published without proper attribution.[59]

This kind of behavior is emblematic of copyright trolling, in which plaintiffs are more in the business of litigation over their works than in attempting to license or sell them. As Matthew Sag defined the practice, "[t]he paradigmatic troll plays a numbers game, in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim."[60] Of course, this only works if the targets know that the demands for payment they receive are a real threat, so inaction is responded to quickly in court, facilitated by services such as Pixsy. Cases are brought by a growing number of attorneys, who determine the targets for demand letters and lawsuits and wind up with most of the profits from settlements on a contingency basis.[61]

When users fight back against troll lawsuits like these, they face an uphill battle. The best argument they have is fair use, which they will need to hire a lawyer to litigate, and if that argument fails, they face potentially tens of thousands of dollars in damages, costs, and attorney fees, a risk that is "intolerable for anyone who is not completely insolvent or staggeringly wealthy."[62] Fair use, of course, turns on four factors that a court will analyze on a case-by-case basis: (1) purpose and character of the use, (2) nature of the original work, (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) potential effects on the market for the original.[63] In the copyleft troll cases involving photography, typically only the first and fourth factors are in play; a news or stock photograph, while it contains a creative aspect, is also not as substantively creative as a work of

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[59] Philpot v. WOS, Inc., No. 1:18-CV-339-RP (W.D. Tex. April 25, 2019) (final judgment).
[60] Sag, *supra* note 14, at 1108.
[61] "While Copyright owners derive some benefit, the direction of the litigation, a large portion of the settlement amount, and the actual infringement targets, are determined by attorneys." Goodyear, *supra* note 14, at 88.
[62] Sag, *supra* note 14, at 1120.
[63] 17 U.S.C. § 107 (1992).

fiction,[64] rendering the second factor neutral, and because the whole of the photograph is typically used, the third factor typically favors the copyright owner.[65]

As courts handle cases by Philpot and others that originate under copyleft-style licenses, they are employing a variety of approaches to these fair use arguments, particularly regarding whether the secondary use is "transformative" under the first factor, and any actual or potential harm to the market of the original work under the fourth factor.[66] Additionally, courts are divided on how to handle demands for attorney fees and costs when the photographers prevail.[67] After identifying forty-four court opinions involving Creative Commons licenses and copyright claims – thirty-four of which involved Philpot – the author reviewed how courts have handled these factors, addressing each below.[68]

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[64] The Supreme Court clarified in 1884 that photographs, as "original intellectual conceptions of the author," are subject to copyright protection, in that case affirming a photographer's copyright in a picture he arranged of Oscar Wilde. The court noted that it was within the power of Congress to protect such works because of the creativity a photographer displays, noting that said photographer, "entirely from his own original mental conception . . . gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 54, 55 (1884). Since then, courts have found that "(a)lmost any photograph 'may claim the necessary originality to support a copyright.'" Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1] (1999)).

[65] In non-photograph cases, using all of something is not always deal-breaker on the third factor. In one of the cases involving Righthaven, a company that purchased rights to sue based on copyrights owned by newspaper publishers, a district court found fair use by a blogger that had posted the entirety of an article published in the *Las Vegas Review-Journal*, determining that the non-commercial nature of the use and the lack of harm to the market of an article freely accessible by the public on the newspaper's website established a "sufficiently meritorious affirmative defense of fair use." Righthaven LLC v. Klerks, No. 10-CV-741, 2010 U.S. Dist. LEXIS 105307 (D. Nev. Sep. 17, 2010).

[66] Richard Stim, *Measuring Fair Use: The Four Factors*, STAN. LIBR., https://fairuse.stanford.edu/overview/fair-use/four-factors/ [https://perma.cc/99NR-WPDL].

[67] Philpot v. L.M. Communs. II, No. 17-CV-173, 2020 U.S. Dist. LEXIS 85901, at *1-2 (E.D. Ky. May 15, 2020).

[68] Three of the decisions were on cases filed by Marco Verch, though none of them explicitly referenced the Creative Commons aspect of the license, likely because they were all default judgments with no response or appeal by defendants to date. *See* Verch v. White Rock Security Group, No. 9-CV-01457-S, 2020 U.S. Dist. LEXIS 141324 at *1 (N.D. Tex. June 30, 2020); Verch v. Sea Breeze Syrups, Inc., No. 19-CV-5923, 2020 U.S. Dist. LEXIS 152357 at

A. First Factor – Is the Use Transformative?

Since the Supreme Court's ruling in *Campbell v. Acuff-Rose Music* in 1994,[69] the transformative use doctrine has become one of the most important factors in fair use analyses. A transformative use, as the Court described it, is one that is "altering the first with new expression, meaning, or message," such as the parody of Roy Orbison's song "Oh, Pretty Woman" performed by the notorious rap group 2 Live Crew; "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[70] An empirical analysis by Jiarui Liu in 2017 found that transformative use "has been approaching total dominance" of the fair use analysis; transformation was a factor in ninety percent of court decisions on fair use in the previous five years, and when courts found a use to be transformative, they sided with defendants' fair use arguments ninety-four percent of the time.[71] Even in cases in which the third factor – amount and substantiality of the use – is 100 percent, as is most commonly the case with photographs, a finding of transformative use "raised the chance of a fair use finding from 6.6% to 96.7%.," a stunning increase reflecting the importance of this factor.[72]

But establishing that a use is transformative is not easy for defendants in photography cases. Simply "us[ing] the photo to show what it depicts," such as what a person or a thing looks like, is typically not transformative.[73] The Associated Press photograph of Barack Obama that was used as a model for the artist Shepard Fairey's famous "Hope" poster, seemingly highly transformative as a work of art and political speech, nevertheless resulted in years of litigation before the parties

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*1 (E.D.N.Y. Aug. 20, 2020); Verch v. Nocturnal Times, No. 19-CV-5912, 2020 U.S. Dist. LEXIS 240425 (E.D.N.Y. Dec. 22, 2020).

[69] 510 U.S. 569 (1994).

[70] *Id.* at 579.

[71] Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 240 (2017).

[72] *Id.* at 195.

[73] Psihoyos v. Nat'l Exam'r, No. 97 Civ. 7624, 1998 U.S. Dist. LEXIS 9192, at *6 (S.D.N.Y. June 22, 1998) (no transformative value in an auto magazine's use of a photograph of man standing by a decorative Cadillac, finding that the photo merely showed "how an art car looks").

reached a settlement that included no definitive finding of fair use.[74] Just this past year, a district court rejected an argument by Andy Warhol's estate that paintings he made of Prince based on a copyrighted photograph, saying that the "bare assertion of a 'higher or different artistic use' is insufficient to render a work transformative."[75] In the news context, unless the underlying photograph is the news story itself – such as the existence of nude modeling photographs that tainted a beauty pageant winner's title,[76] or a politician's scandalous selfie – fair use claims for republishing photographs without a license tend to fail.[77]

In the aforementioned case involving Philpot's lawsuit against a concert promoter for using a CC-licensed photo of Macy Gray without proper attribution, the defendant defaulted and never appeared, so no fair use defense was raised or analyzed.[78] In *Philpot v. LM Communications II of South Carolina*, the Eastern District of Kentucky found no fair use as a matter of law because it said the defendant could not prove that the work was "transformative" as it was merely a copy of Philpot's photograph of Willie Nelson placed on its own commercial website and "did nothing more than 'repackage or republish the original copyrighted work.'"[79] The court awarded $3,500 in statutory damages to Philpot.[80] The Middle District of Florida, similarly, found that a reasonable jury could conclude that photographs of Willie Nelson and Carlos Santana posted on local websites owned by MyArea were not transformative because they "served the same purpose in the articles as when Philpot created them" and did not offer any additional criticism or commentary, but instead were merely present to illustrate news articles about upcoming concerts in the area.[81]

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[74] *See* William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 244 (2012).
[75] Andy Warhol Foundation for the Visual Arts v. Goldsmith, 992 F.3d 99, 24 (2d Cir. 2021) (citing Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)).
[76] Nunez v. Caribbean International News Corp., 235 F.3d 18 (1st Cir. 2000).
[77] *See* Stewart, *supra* note 13.
[78] Philpot v. Scene Entm't, LLC, No. 18-9085, 2019 U.S. Dist. LEXIS 229653 at *1 (E.D. La. Apr, 4, 2019).
[79] Philpot v. L.M. Commc'ns II of South Carolina, Inc., No. 17-CV-173, 2018 U.S. Dist. LEXIS 113927, at *20 (E.D. Ky. July 10, 2018).
[80] Philpot v. L.M. Commc'ns. II of S.C., Inc., 343 F. Supp. 3d 694, 704 (E.D. Ky. 2018).
[81] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423, at *18-19 (M.D. Fla. June 28, 2021).

Nevertheless, some courts have been sympathetic to the transformative use argument in cases brought by Philpot for posting photos in a way he alleged violated the terms of Creative Commons licenses. In 2018, the Eastern District of Virginia found fair use for publication of Philpot's CC 3.0 licensed photographs of Kenny Chesney and Kid Rock in *Philpot v. Media Resource Center*.[82] The court held that use of these photos on the website of a non-profit company engaging in political advocacy for conservative and Judeo-Christian causes was "transformative" because, rather than being about their musical performances, the secondary use was for "news reporting and commentary on issues of public concern."[83] Namely, the transformative purpose was identified as "informing citizens about pro-life celebrities and conservative celebrities running for political office," in part because they changed "the way in which viewers experience the Photographs."[84] The Chesney photo was used in an online article entitled "8 AList Celebrities That Are Pro-Life," and the Kid Rock photo in an article "Kid Rock Announces 2018 U.S. Senate Bid."[85]

The result was not appealed, and some critics panned the court's fair use finding.[86] But other courts have extended similar consideration to the transformative use argument by people Philpot sued. These typically have come in response to arguments on motions to dismiss or motions for summary judgment, in which judges are considering the plausibility of arguments the parties made early in the case. Courts have been unwilling to dismiss fair use arguments by defendants due to a lack of evidence on the record at the early stages, thus not handing Philpot an easy win, though also not giving defendants an easy out.[87] One case in

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[82] Philpot v. Media Res. Ctr, 279 F. Supp. 3d 708, 722 (E.D. Va. 2018).
[83] *Id.* at 715.
[84] *Id.* at 715-16.
[85] *Id.* at 711-12.
[86] *See, e.g.*, Keith Kupferschmid, *Copyright Law in 2018: Top 10 Court Cases*, COPYRIGHT CLEARANCE CTR. (Jan. 18, 2019), http://www.copyright.com/blog/copyright-law-in-2018-top-10-court-cases/ [https://perma.cc/LF43-KF5K] (noting "how colossally the district court botched the fair use analysis" and arguing that if it stood, it would be damaging to news and stock photographers).
[87] *See* Philpot v. Toledo Radio, LLC, No. 15CV1401, 2016 U.S. Dist. LEXIS 128872, at *3-4 (N.D. Ohio Sept. 21, 2016) (regarding a photo a radio station posted on its website of Willie Nelson, under a CC 2.0 license, the court found "a genuine material issue of fact remains as to whether the fair use defense applies…I cannot conclude reasonable minds could come to but one conclusion concerning whether defendant's publication of the Nelson photo constituted fair use.").

particular revealed a court seemingly at odds with itself while ruling on dueling motions for summary judgment coming from both parties.[88]

In *Philpot v. WOS, Inc.*, the Western District of Texas was considering the fair use argument raised by a website publishing news and commentary about country music called "Wide Open Country" that used two of Philpot's photographs, one of Jakob Nelson and another of Kenny Chesney, without proper attribution as required by the Creative Commons license.[89] The website moved for summary judgment, arguing that the use was transformative, because its purpose was for "news commentary" about, in the Chesney photo, a story about a man beaten to death after a Chesney concert, and in the Nelson photo, "commentary unrelated to the image's subject," as opposed to the original purpose of depicting these artists performing in concert.[90] The court said a reasonable jury could find that these were actually both "reproduced exactly for the same purpose" and thus were "not transformative."[91] But the court was no more receptive to Philpot's own motion for summary judgment on the fair use defense. The court said a reasonable jury may also "conclude that the parties used the works with different purposes" after all, because the website "fully copied Philpot's photos to draw attention to articles that had nothing to do with the photos themselves."[92] While the court noted that the use may be, at most, "minimally transformative," it said a reasonable jury could ultimately give that significant weight in the fair use analysis.[93]

Applying *Kelly v. Arriba Soft Corp.*, in which the U.S. Court of Appeals for the Ninth Circuit found transformative use of an image for use in a search engine, the Northern District of California found a similar opening for transformative fair use of one of Philpot's photos.[94]

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[88] *Id.* at *3-4.

[89] Philpot v. WOS, Inc., No. 18-CV-339, 2019 U.S. Dist. LEXIS 67978 at *7-8 (W.D. Tex. Apr. 22, 2019) (both photographs were attributed but not properly to Philpot; one was attributed merely to "Wikimedia Commons," and the other to 'Wikimedia Commons/Nightshooter," one of the accounts Philpot operates).

[90] *Id.* at *12.

[91] *Id.* at *13.

[92] *Id.* at *23-25.

[93] *Id.* at *25.

[94] Philpot v. Alternet Media, Inc., No. 18-CV-4479, 2018 U.S. Dist. LEXIS 203500, at *8 (N.D. Cal. Nov. 30, 2018) ("[T]he Ninth Circuit has consistently held that 'making an exact

Alternet, a news website, posted Philpot's image of Willie Nelson on Facebook with the quote, "[r]ednecks, hippies, misfits – we're all the same. Gay or straight? So what? It doesn't matter to me. We have to be concerned about other people, regardless. I don't like seeing anyone treated unfairly. It sticks in my craw. I hold on to the values of my childhood."[95] Alternet argued that adding the quote was an act of political commentary and altered the purpose of Philpot's original photo, which the court said was at least "possible," though not enough to support Alternet's motion to dismiss in the face of Philpot's argument that the photo was used "merely for the purpose of identifying who the quote came from."[96]

As courts consider the first factor, they may be embracing a shift that Jane Ginsburg identified as one from "transformative work" to "transformative purpose," in which a secondary user's effort "is not a new work at all but rather a new form of dissemination."[97] These examples of more technological transformativeness can be seen in the Ninth Circuit's decision in *Perfect 10 v. Amazon*, in which the court found fair use in a web host using thumbnail images of the copyright owner's larger, high-definition photos,[98] as well as the Second Circuit's ruling finding fair use by Google Books in scanning millions of copyrighted books into their database.[99] Unlike the aforementioned lack of fair use found in cases involving artists altering underlying photographs of Barack Obama or Prince, courts seem more amenable to finding transformation in the Creative Commons license cases when photographs are moved from a documentary context ("here is Willie Nelson at a concert in 2009") to a political or commentary context ("here is a list of pro-life musicians," or "here is an inspirational quote by Willie Nelson"), even if the underlying photograph is unaltered.

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copy of a work may be transformative so long as the copy serves a different function than the original." (quoting Perfect 10 v. Amazon, 508 F.3d 1146, 1165 (9th Cir. 2007)); *see* Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003).

[95] Philpot v. Alternet Media, Inc., No. 18-CV-04479, 2018 U.S. Dist. LEXIS 203500, at *3 (N.D. Cal. Nov. 30, 2018).

[96] *Id.* at *10.

[97] Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 265 SINGAPORE J. LEGAL STUD. 14 (2020).

[98] *Perfect 10*, 508 F.3d 1146.

[99] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

To date, all of the opinions regarding Creative Commons licenses that consider transformative use as an argument have been at the district court level, and only one of those cases, *Philpot v. Media Resource Center*, was based on a full record with facts to support a final finding rather than on default or determining whether to proceed on a pretrial motion.[100] But in that one case, the court sided with the secondary user, finding the use of Philpot's photos was transformative, even though they were made after the Creative Commons license had terminated due to improper attribution.[101] A similar situation is evident when courts consider the fourth factor of the fair use analysis, as only district courts have handled such cases to date.[102]

B. Fourth Factor – Is the Market for the Original Work Harmed?

Even if the court finds the defendant's use to be transformative, that may not be enough to establish fair use. Alternet, which used Philpot's photograph of Willie Nelson over Nelson's "rednecks, hippies, misfits" quote on its Facebook page, was deemed to have transformed the purpose of the photo, but the court found flaws in Alternet's fourth factor argument about harm to the market of the work.[103] Ultimately, the Northern District of California denied Alternet's motion to dismiss Philpot's case, largely because there was not enough evidence on the record to oppose Philpot's assertion that the Willie Nelson photograph had value and that Philpot had suffered economic harm as a result.[104]

Ginsburg suggests that as courts move more toward finding fair use because of a "transformative purpose," they may reinvigorate the fourth factor of the fair use analysis, in which courts consider the market value

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[100] Philpot v. Media Rsch. Ctr. Inc., 279 F. Supp. 3d 708, 710 (E.D. Va. 2018).
[101] *Id.* at 714.
[102] In one case involving Philpot, a court considered the first factor, but not regarding transformative use. Rather, the court found a reasonable dispute as to whether the use by the World Public Library Association (WPLA) was nonprofit or commercial, thus denying Philpot's motion to dismiss and allowing the fair use argument to proceed. The court also did not reject WPLA's argument that Philpot had waived his infringement argument by posting photos to Wikipedia under Creative Commons licenses. *See* Philpot v. World Pub. Libr. Ass'n, No. 18-00057, 2018 U.S. Dist. LEXIS 118024, at *4-5 (D. Haw. June 25, 2018).
[103] Philpot v. Alternet Media, Inc., No. 18-CV-04479, 2018 U.S. Dist. LEXIS 203500, at *3 (N.D. Cal. Nov. 30, 2018).
[104] *Id.* at *13.

of the copyrighted work and any potential harm to its market caused by the secondary user.[105] The Creative Commons Attribution (CC-BY) license complicates the analysis for courts, as photographers basically make their works available for free to users as long as the secondary user attributes it to them properly, hinting that the licensor's primary market interest is in attention or credit rather than financial reward.[106] But in the case of the copyleft troll, quite the contrary is the situation; these licensors claim a robust market for their photographs and seek license fees of hundreds or thousands of dollars when the attribution goes awry.[107]

Philpot presents an interesting case study. In a deposition in the *MyArea Network* case in the Middle District of Florida, Philpot said he was not paid for any photographs from recent concert engagements, and he was "unsure of the last time he was compensated for photographs he had taken" and "could not recall any instances in which he was paid for his photographs outside of alleged infringement actions."[108] In testimony in the *WOS* case in the Western District of Texas, he said he realized he "wasn't making any money at all" as a photographer so he "began using software to search the Internet for infringing uses of his copyrights."[109] When pressed on whether he had ever made any money for his photography outside of litigation, he testified that "once he did a shoot for a hidden-camera show and that he once earned $0.88 for an image of Prince that he took at a concert he paid $2,000 to attend."[110] The court noted that Philpot had no training in photography and had never been employed full-time as a professional photographer, and that he was compensated for his work "mostly in concert tickets, drinks, and food."[111]

The court found that the WOS country music website's use of the photos was undoubtedly commercial, which would typically entitle plaintiffs

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[105] Ginsburg, *supra* note 97, at 286.
[106] *Id.* at 289.
[107] *Id.*
[108] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423, at *3-4 (M.D. Fla. June 28, 2021).
[109] Philpot v. WOS, Inc., No. 1:18-CV-339-RP, 2019 U.S. Dist. LEXIS 67978, at *2 (W.D. Tex. Apr. 22, 2019).
[110] *Id.*
[111] *Id.* at *17.

like Philpot to a presumption of market harm under the fourth factor.[112] But here, the court said that the evidence introduced was enough to show that the country music website's use had not "usurped the market" for Philpot's two photographs.[113] Ultimately, the court said the lack of evidence of any financial value of the photos meant the fourth factor "weighs heavily" toward a finding of fair use by the defendant.[114] The Eastern District of Virginia applied similar reasoning in *Media Resource Center*, finding the fourth factor in favor of the defendant website because there was no evidence that there is "currently any market for the Chesney or Kid Rock Photographs or that any preparations have been made to establish or create a market."[115] Uploading the photographs to Wikipedia for use under Creative Commons also undermined Philpot's assertions of an economic market for the photographs, as he testified that "his purpose was to gain greater fame . . . not to make money."[116] The speculative market harms Philpot alleged based on lack of attribution did not outweigh the lack of direct financial harm as the court considered the fourth factor, particularly when the use was largely non-commercial.[117] And the Middle District of Florida, in the *MyArea* case, found on a motion for summary judgment that the fourth factor "weighs heavily in MyArea's favor" and that any presumption of market harm due to commercial use of the photos was overcome because Philpot offered "the Nelson and Santana photographs for free with attribution" which "undermines a finding of damage to a potential market."[118]

In these cases, Philpot argued that attribution as required by the CC-BY license has "economic value as advertising for his work."[119] He also argued that "his real damages are the opportunities he has lost" due to uses of his photographs without attribution.[120] The court in WOS found

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[112] *Id.* at *16-17.
[113] *Id.* at *17.
[114] *Id.* at *26-27. As mentioned above, though, the court ultimately denied the summary judgment motions of both WOS and Philpot, finding that a reasonable jury could find fair use or no fair use after presentation of evidence.
[115] Philpot v. Media Res. Ctr., 279 F. Supp. 3d 708, 719-21 (E.D. Va. 2018).
[116] *Id.* at 719.
[117] *Id.* at 721.
[118] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423, at *28 (M.D. Fla. June 28, 2021).
[119] Philpot v. WOS, Inc., 1:18-CV-339, 2019 U.S. Dist. LEXIS 67978, at *18.
[120] *Id.* at *4.

this argument without merit and unsupported by evidence,[121] which included his testimony that he'd only ever once had someone contact him for a photo as a result of seeing it attributed to him.[122] Another court said it was "at least conceivable that the omission of attribution...may have cost Philpot the loss of potential business," but said there was no evidence on the record to support that allegation.[123] The evidence in the Philpot cases may not have been strong enough to support the attribution-as-value argument, though Ginsburg suggests it may have some merit for other authors, especially in a "loss leader" business model, which may be undermined if courts dismiss this kind of claim entirely.[124] In this model, while the photographer "has effectively relinquished any claim to compensation" for the "free work" by requiring only attribution, the photographer's entire business – which may be attractive to licensees – would still have economic value that could be harmed by allowing non-attributed works to go unremedied.[125] Ginsburg suggests courts should consider the "*value of* the copyrighted work" (emphasis in original) more broadly, beyond the "direct harm or current or future sales or licensing of that work," to matters such as the author's reputation and the quality of their other offerings.[126]

This is a stronger doctrinal and policy argument than Philpot has made. And again, the facts in the handful of cases in which district courts have considered the fourth factor – which found either no market value for the photos in question or no evidence on the record supporting value or the lack thereof – has come only in district courts, largely handling motions to dismiss or summary judgment motions.[127] Defendants could counter the argument that the harms plaintiffs suffer because of lack of attribution of CC-BY licenses could be remedied by repair through correcting the attribution, rather than copyright infringement litigation seeking statutory damage awards of thousands of dollars. But copyleft trolls and their legal advisers take this option off the table by employing CC 2.0 or 3.0 licenses with automatic termination built in, rather than

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[121] *Id.*

[122] *Id.*

[123] Philpot v. L.M. Commc'ns. II of S.C., Inc., 343 F. Supp. 3d 694, 703 (E.D. Ky. 2018).

[124] Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"*, 67 J. COPYRIGHT SOC'Y 19, 22 (2020).

[125] *Id.*

[126] *Id.* at 22, 26-27.

[127] *See, e.g.*, Philpot v. WOS, Inc., 2019 U.S. Dist. LEXIS 67978, at *18.

CC 4.0 licenses that would allow the license to be reinstated once the error was detected and attribution was corrected.

Courts seem to be expressing skepticism that authors of works that only have value through nuisance litigation and demand letters suffer economic harm from lack of proper attribution, at least to the extent that any such harm would be sufficient to weigh the fourth factor in favor of the author. That said, this is a situation in which the evidence on the record matters. Both *WOS* and *Media Resource Center* involved detailed records and depositions about the market value, or lack thereof, of Philpot's works.[128] *Alternet* serves as a warning that defendants should be prepared to introduce evidence of the lack of market value to support a motion to dismiss, and that evidence should be more than referring to evidence in seventy-three prior lawsuits brought by the plaintiff.[129]

The market harm analysis courts engaged in above is only one factor to be considered in the fair use argument, even though, as one court noted, it is a "very important factor."[130] If the court finds no fair use, the market has less relevance to the assessment of damages because plaintiffs generally are not seeking actual damages in these cases. Instead, Philpot routinely seeks statutory damage awards, asking for willful infringement of up to $150,000 per use in his pleadings. Courts have rejected Philpot's willful infringement claim,[131] or even found on default that the defendant's infringement was willful but nevertheless denied the heightened statutory damage award.[132] Instead, courts have awarded lower amounts in these cases, citing both norms of other courts

[128] *See id.* at *27; *see also* Philpot v. Media Research Ctr. Inc., 279 F. Supp. 3d 708, 721 (E.D. Va. 2018).
[129] Philpot v. Alternet Media, Inc., No. 18-CV-04479, 2018 U.S. Dist. LEXIS 203500, at *5 (N.D. Cal. Nov. 30, 2018).
[130] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423, at *9-10 (M.D. Fla. June 28, 2021).
[131] The Eastern District of Kentucky court said, e.g., Philpot's willful infringement claim was "wholly unsupported" by "scant evidence" referring to defendant's experience in the radio industry and "therefore must have known about copyrights." Philpot v. LM Commc'ns. II of S.C., No. 17-CV-173-CHB, 2020 U.S. Dist. LEXIS 85901, at *5-6 (E.D. Ky. May 15, 2020).
[132] Philpot v. Music Times, No. 16-CV-1277, 2017 U.S. Dist. LEXIS 48454, at *26 (S.D.N.Y. Mar. 29, 2017).

and deterrence as reasons for assessing the amount.[133] The Eastern District of Louisiana cited a typical "multiplier of 3-5 to the licensing fee that would have been paid" in assessing statutory damages.[134] This resulted in a $10,500 damage award for the Macy Gray photograph, which Philpot asserted would usually be licensed for $3500, a figure the defendant did not rebut by defaulting.[135] The court went on to note that the award would also send a message that "it costs less to obey the copyright laws than to violate them."[136] The Eastern District of Kentucky in the *LM Communications II* case said damages could "range from $3,500 to $30,000"[137] in its recognition of the "'de facto treble' award (or more) followed by other district courts."[138] In that case, the court awarded $3500 in statutory damages "as a deterrent to wrongful conduct."[139] In *Philpot v. Music Times*, a case involving CC-BY licensed photographs of Norah Jones and John Mellencamp that a music news website posted to illustrate articles about each of those artists, the Southern District of New York found the appropriate range to be $3000 to $5000 for these kinds of cases, "where the plaintiff's licensing or royalty fees have been so low" that other damages would be "insufficient to satisfy the objectives of the Copyright Act."[140] The court settled on a $5000 award for the two photographs, which it said was "more than sufficient to compensate Plaintiff for any attenuated damages associated with Defendant's use of his work without attribution" and also served to "punish Defendant for its willful infringement and to deter others from engaging in similar conduct in the future."[141] While deterrence is a "legitimate goal of statutory damage awards," the escalating damages can have a punitive effect outside of the purpose of Copyright Law, as Pamela Samuelson and Tara Wheatland noted, especially in cases with heightened awards by

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[133] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423 (M.D. Fla. June 28, 2021); Philpot v. Scene Ent., LLC, No. 18-9085, 2019 U.S. Dist. LEXIS 229671 (E.D. La. May 28, 2019).
[134] Philpot v. Scene Ent., LLC, 2019 U.S. Dist. LEXIS 229671, at *2.
[135] *Id.* at *2-3.
[136] *Id.* at *3.
[137] *See* Philpot v. L.M. Commc'ns. II of S.C., Inc., 343 F. Supp. 3d 694, 700, 704 (E.D. Ky. 2018).
[138] *Id.* at 704.
[139] *Id.*
[140] Philpot v. Music Times, No. 16-CV-1277, 2017 U.S. Dist. LEXIS 48454, at *24-25 (S.D.N.Y. Mar. 29, 2017).
[141] *Id.* at *27-28.

"overzealous plaintiffs and judges" involving "innocent and ordinary infringement" like those in noncommercial cases.[142]

These kinds of damage awards are not the only deterrent against unwitting defendants who slip up on attribution requirements under CC-BY licenses. Philpot seeks attorney fees and court costs in all of his cases as well, putting secondary users at even further risk of deep financial harm.

IV. Attorney Fees and Costs – Mandatory or Discretionary?

District courts have generally not been inclined to grant Philpot's demands for attorney fees in these cases, though one dispute is ongoing between the Eastern District of Kentucky and the U.S. Court of Appeals for the Sixth Circuit that is illustrative of the issues in play here.

In the *LM Communications II* case (involving Philpot's photos of Willie Nelson posted on defendant's radio station website to promote a concert), the district court found no fair use as a matter of law and awarded $3500 in statutory damages after a trial.[143] But Judge Claria Horn Boom awarded no attorney fees to Philpot, noting that the Copyright Act says "the court *may* . . . award a reasonable attorney's fee to the prevailing party" (emphasis added) and finding that Philpot "cannot be said to be a clear 'prevailing party' given the amount of claims he lodged and the relatively small award the Court granted . . . relative to what he sought."[144] Judge Boom was concerned that awarding attorney fees here served "no deterrent value" but, after repeated motions by both parties for sanctions and overcomplicating what should have been a simple copyright infringement matter, "instead might *incentivize* the kinds of acrimonious and unreasonable litigation conducted in this case."[145] The Sixth Circuit reversed and remanded, determining that Philpot was indeed the prevailing party because he ultimately won when the district court granted his summary judgment motion on infringement.[146] The court cited precedent in the circuit that

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[142] Pamela Sanderson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 500 (2009).
[143] Philpot v. L.M. Commc'ns. II of S.C., Inc., 343 F. Supp. 3d 694, 701 (E.D. Ky. 2018).
[144] *Id.* at 704.
[145] *Id.* at 705.
[146] Philpot v. LM Commc'ns II of S.C., Inc., 776 Fed. App'x. 906, 907 (6th Cir. 2019).

in copyright cases, "[t]he grant of fees and costs is the rule rather than the exception and they should be awarded routinely."[147]

On remand, the district court again denied attorney fees to Philpot, citing the U.S. Supreme Court's recent language in *Kirtsaeng v. John Wiley & Sons* that even if Philpot is the prevailing party, courts have "wide latitude to award attorney's fees based on the totality of circumstances in the case."[148] Judge Boom again explored the parties' conduct and arguments, saying that the "objective reasonableness" of a losing party's position should weigh against an order to pay attorney fees.[149] The judge noted that the defendant radio station prevailed in its argument that its infringement was not willful, as Philpot had argued, meaning it was clearly a reasonable argument.[150] The court also found that Philpot's arguments were "a mixed bag," including a poorly investigated claim under the DMCA with no evidence to support it and the aforementioned failed willful infringement argument.[151] While noting that this balance weighs "slightly in favor of granting a minimal amount of attorney's fees," Judge Boom nevertheless denied the fees altogether, again finding that the "acrimonious and unreasonable litigation conducted in this case is the type that should not be encouraged under any circumstance."[152] She noted that Philpot had filed fifteen lawsuits in the Eastern District of Kentucky alone and was more in the business of litigation than licensing or selling his work, and cited a case with the parenthetical "defining copyright trolls" as a reference.[153] She expressed concern that regular awards of attorney fees in cases like this "would incentivize that plaintiff to bring as many other claims as possible, regardless of their merit, because the defendant would be on the hook for the attorney's fees."[154] Though Judge Boom denied attorney fees, she did award Philpot costs of $1889.80, largely made up of fees for transcripts and notices, saying the radio station

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[147] *Id.* at 908 (citing Bridgeport Music, Inc. v. WB Music Corp., 520 F.3d 588, 592 (6th Cir. 2008)).
[148] *See* Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 203 (2016).
[149] Philpot v. LM Commc'ns II of S.C., No. 17-CV-173-CHB, 2020 U.S. Dist. LEXIS 85901, at *4 (E.D. Ky. May 15, 2020).
[150] *Id.*
[151] *Id.* at *5.
[152] *Id.* at *6.
[153] *Id.* at *9.
[154] *Id.* at *11.

defendant was unable to meet its burden of showing that such an award would be inequitable.[155]

In the published decisions of cases brought by Philpot, only one district court has awarded him attorney fees, and that was in a default judgment in which the defendant never appeared to make objections. That award was substantial, $12,910, based on evidence of "50.1 hours of work performed by four different attorneys, charging rates of $250 to $450 per hour," plus some travel reimbursement.[156] Two other district courts have denied Philpot's requests for attorney fees.[157] After a default judgment in the TexasMonthly.com case, Philpot requested $7252.23 in attorney fees based on 21.6 hours of work he said were required by seeking the default and, later, objecting to the defendant's motion to vacate that default judgment. Judge Austin from the Western District of Texas denied this request, noting that "Philpot and his counsel are, in essence, copyright 'trolls'" and detailing Philpot's scheme of using Creative Commons licenses, suing upon republication with lack of proper attribution, and demanding maximum statutory damages for willful infringement.[158] The judge went on to describe how Philpot's counsel moved for default judgment the day after an answer was due, and that he used essentially the same language in the motion that he had in another proceeding in the Western District of Texas, "undermining the claim that his counsel needed six hours (or $2100) to generate the very same motion here."[159] Opposing the motion to set aside the default judgment, Judge Austin said, was further a problem of Philpot's own making, and he "should not be rewarded with an additional $5100 for his attorney's time spent making what was going to be a losing argument all along."[160]

The Southern District of New York recognized similar issues with Philpot's request for attorney fees in the *Music Times* case. Even after

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[155] *Id.* at *13, *15.
[156] Philpot v. Scene Ent., No. 18-9085, 2019 U.S. Dist. LEXIS 125264, at *1-2 (E.D. La. July 26, 2019).
[157] Philpot v. MyArea Network, Inc., No. 20-CV-1239, 2021 U.S. Dist. LEXIS 119423, at *38 (M.D. Fla. June 28, 2021); Philpot v. Emmis Operating Co., No. 18-6207, 2019 U.S. Dist. LEXIS 112440, at *8 (W.D. Tex. July 8, 2019).
[158] Philpot v. Emmis Operating Co., 2019 U.S. Dist. LEXIS 112440, at *8.
[159] *Id.* at *7.
[160] *Id.* at *8.

awarding $5000 in statutory damages, Judge Debra Freeman denied the request for fees "because the manner in which Plaintiff has litigated this case (like others that he has filed in this Court) suggests that any roles played by counsel have been extremely limited."[161] Judge Freeman described Philpot's tactic of hiring an attorney who would file the initial complaint and then immediately withdraw and let Philpot proceed pro se; Philpot would then bring in new counsel to handle matters when an appearance or argument was needed. The court also noted that the cases Philpot brings are "virtually identical" to those he has brought previously in the district, identifying three previous cases he filed based on Creative Commons licenses, so attorney work on them was "largely duplicative."[162]

Overall, district court judges seem disinclined to encourage Philpot's continued litigation in cases involving improper attribution of his photographs on outdated CC-BY licenses.[163] They are open to finding transformative purposes of the works, even when the uses themselves do not transform the underlying work at all. They do not buy Philpot's arguments about economic harm due to lack of attribution of his photographs, and they seem to calculate statutory damages awards toward the lower end of the ranges they identify as available. Time and again, they deny his requests for attorney fees and express distaste for his questionable business practices and litigation tactics in their decisions. When a user of his photographs gets sued, there are paths to avoid liability, if they push back in the right places.

V. Conclusion

If one thing is clear after reviewing more than thirty copyright infringement decisions based on Creative Commons licenses that terminated after improper attribution, it is this: courts are getting sick of

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[161] Philpot v. Music Times, No. 16-CV-1277, 2017 U.S. Dist. LEXIS 48454, at *30 (S.D.N.Y. Mar. 29, 2017).

[162] *Id.* at *32-33. The court did award $400 in filing costs.

[163] In a case not otherwise referenced in this article, a judge expressed exasperation with Philpot, ordering him to show cause due to his inactivity for eight months after filing an infringement lawsuit. The court did not accept his excuse that he "completely overwhelmed himself by filing too many actions, and has been reacting rather than proactively pursuing the Defendant." The court dismissed his case. Philpot v. Music Times, LLC, No. 1:14-CV-01978, 2015 U.S. Dist. LEXIS 1246, at *3-4 (S.D. Ind. Sept. 17, 2015).

Larry Philpot. When judges start to feel comfortable calling you a "troll," as has happened in two large federal districts already for Philpot, your likelihood of success on future lawsuits and motions is not enviable.

And it's not just Philpot. In December 2020, Southern District of New York Judge Jesse Furman sanctioned attorney Richard Liebowitz with a $103,517.49 fine, referred him to the court's grievance committee, and ordered him to serve a copy of the decision ordering sanctions to every client of his law firm.[164] The sanctions were in response to consistent bad faith behavior in litigation in the nearly 1300 copyright infringement lawsuits he had brought in the district, including repeatedly lying to courts under oath, refusing to abide by court orders, and filing motions with false allegations about a copyright having been registered.[165] When a different judge in the district called Liebowitz a "copyright troll" in an opinion denying an award of attorney fees, Liebowitz moved to have those words struck from the opinion; the judge denied that motion, noting that, "as evidenced by the astonishing volume of filings coupled with an astonishing rate of voluntary dismissals and quick settlements in Mr. Liebowitz's cases in this district, it is indisputable that Mr. Liebowitz is a copyright troll."[166]

Courts' distaste for the behavior and tactics of the new wave of photo copyright trolls is reminiscent of one of the earliest high-volume copyright litigants, Righthaven LLC, which also quickly became recognized as a "copyright troll" for its hardball tactics and willingness to file infringement lawsuits in district courts when people did not give in to their demands. Righthaven launched in 2010 as a potential "financial savior" for newspaper companies struggling with revenues by offering a new stream of income: copyright litigation.[167] Essentially, the company bought up a right to sue from publishers such as the *Las Vegas Review-Journal* and the *Denver Post*, then scoured the web for

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[164] Liebowitz v. Bandshell Artist Mgmt., 6 F.4th 267 (2d Cir. 2021).
[165] *See* Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368, 2020 U.S. Dist. LEXIS 112368 (S.D.N.Y. June 26, 2020).
[166] McDermott v. Monday Monday, LLC, No. 17-CV-9230, 2018 U.S. Dist. LEXIS 184049, at *9 (S.D.N.Y. Oct. 26, 2018).
[167] Ian Polonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 COLUM. L.J. 71, 78-79 (2013).

news articles and other items used without permission or license.[168] The company reported filing 276 lawsuits and reaping $352,500 in settlements in its first sixteen months of business.[169] But district courts quickly soured on Righthaven, finding fair use in several unexpected cases and ultimately determining that Righthaven lacked standing to sue because the company did not actually own the copyrights in question.[170]

As Brad Greenberg noted, these rulings "did not close the door on trolls," but rather, "they provided would-be copyright trolls with guidelines for better trolling."[171] Photo copyright trolls like Liebowitz and Philpot followed this path, exploiting the statutory damage provisions of the Copyright Act to pursue high-volume litigation regarding photographs that appear on websites without a proper license. Philpot took things a step further by adding the CC-BY license twist and immediately suing when the photo was attributed inappropriately. Philpot has even attempted tactics of another kind of copyright troll, Multidefendant John Doe (MDJD) litigation, in which a copyright owner files a lawsuit against a multitude of unnamed defendants and then tries to compel web hosts to provide information identifying their users.[172] In 2020, Philpot attempted to subpoena Domains by Proxy and GoDaddy, two Internet service providers, for lists of their users he believed had posted his photographs without proper attribution or license; the District of Arizona court quashed the subpoena on the motion of one of the Jane Does who argued that Philpot is a "serial litigant and the only money he makes from his photography comes from filing and settling frivolous lawsuits."[173] Judge Dominic Lanza followed the denial with a warning: "[i]f indeed Mr. Philpot is filing frivolous lawsuits in the hope of settling them, this is not an appropriate use of judicial resources and should not continue. This order should serve as clear warning that future misconduct will not be tolerated."[174]

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[168] Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 86 U. COLO. L. REV. 53, 68 (2014).
[169] *Id.* at 67.
[170] *See* Righthaven LLC v. Democratic Underground, 791 F. Supp. 2d 968 (D. Nev. 2011).
[171] Greenberg, *supra* note 168, at 69.
[172] Johnson, *supra* note 35, at 1108-09. MDJD litigation largely involves copyright infringement lawsuits over pornographic videos; Johnson found that more than 43% of copyright lawsuits in 2013 were MDJDs of this sort.
[173] Philpot v. Domains by Proxy, No. MC-20-0001-PHX-DWL, U.S. Dist. LEXIS 69718, at *2-3 (D. Ariz. Apr. 21, 2020).
[174] *Id.* at 3-4.

There is something that is unseemly about Philpot's growing stable of lawsuits, and judges across the country seem to be more and more sympathetic to the people he sues. This author contends that it is not merely because Philpot is a copyright troll, but that he is one of new breed of "copyleft trolls," who use the trappings of Creative Commons licensing that are rooted in an ethos of sharing and reuse but instead employs them to ensnare unwitting users into paying extortionary license fees or face nuisance litigation that could financially break them. It's a mistake any Internet user can and probably has made, and every one of us is a potential sitting duck.

When secondary users believe they have acted innocently or harmlessly and receive a demand letter, the reactions can be fiery, even if their remedies are limited. Against Philpot, users responded with a variety of motions trying to call out his bad behavior, such as in *LM Communications II*, in which the radio station filed motions for abuse of process and malicious prosecution, both of which the judge found to be without merit.[175] Some defendants have tried to challenge Philpot's underlying copyright, arguing they were not properly registered or otherwise were invalid.[176] An even more extreme example of retaliation occurred in a case involving photographer Nicholas Youngson, who posted images on his website with a CC-BY-SA license saying they were "free to use" but that licenses would be "automatically revoked if attribution requirements are not maintained."[177] When Youngson sent a demand letter for $9200 to a New York law firm that posted five of his images on its website without proper attribution, the law firm sued on various grounds, including New York's state deceptive trade practices law and the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, as well as a push for declaratory judgment that the

[175] Philpot v. LM Commc'ns II of S.C., No. 17-CV-173-CHB, 2020 U.S. Dist. LEXIS 85901, at *5 (E.D. Ky. May 15, 2020).
[176] These motions have also all been denied. *See, e.g.*, Philpot v. New Orleans Tourism Mktg. Corp, No. 18-9087, 2009 U.S. Dist. LEXIS 3953 (E.D. La. Jan. 9, 2019); Philpot v. UMG Recordings, Inc., 17 Civ. 5058, 2017 U.S. Dist. LEXIS 186293 (S.D.N.Y. Nov. 8, 2017).
[177] Coppola v. Higbee, No. 1:19-CV-00678, 2020 U.S. Dist. LEXIS 41536, at *10-11 (W.D.N.Y. Mar. 10, 2020).

underlying copyright was invalid.[178] The Western District of New York dismissed those efforts.[179]

The animosity is evident in lawsuits relating to Creative Commons license terminations that stem from users receiving a surprise demand letter for hundreds or thousands of dollars. That level of hostility, as well as the high transaction costs of litigation, are far outside the ideals of the free culture and copyleft movements that led to the creation of Creative Commons. One of the points of Creative Commons, Lessig noted, was to authorize at least noncommercial distribution and "decriminalize the copy" in the face of expensive damage awards at the dawn of the 21st century.[180] But, he noted, Creative Commons is "not itself an ultimate solution" to the problems plaguing copyright law on the web, but rather "just a step to rational reform."[181] When not being used for a new form of copyright trolling, Creative Commons licenses have shown to be both flexible and useful in managing disputes arising over reuse. U.S. courts have regularly upheld these kinds of licenses when users exceed the terms set by licensors,[182] though they have also been reluctant to force liability on to third parties such as copying services when CC licensors file suit claiming license violations.[183] Courts around the world have also enforced CC-licensed photographs,

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[178] *Id.*; *see also* Ken White, *Lawsplainer: It's Not Rico, Dammit*, POPEHAT (June 14, 2016), https://www.popehat.com/2016/06/14/lawsplainer-its-not-rico-dammit/ [https://perma.cc/3ALZ-H55U].

[179] The court also denied the photographer Youngson's request for attorney fees in fighting off the meritless motions. Coppola v. Higbee, No. 1:19-CV-00678-CCR, 2020 U.S. Dist. LEXIS 162554, at *9. (W.D.N.Y. Sept. 4, 2020).

[180] Lessig, *supra* note 20, at 278.

[181] *Id.* at 279.

[182] *See* Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008) (finding that an "open source" copyright license for software, not under Creative Commons but requiring attribution, was enforceable against a user who incorporated into their own software); Lasica v. Am. Online, Inc., No. CV 15-4230-GW(FFMx), 2015 U.S. Dist. LEXIS 188106, at *8 (C.D. Cal. Oct. 8, 2015) (for a CC photo posted on Flickr with a non-commercial tag, "both parties contend that the commercial use prohibition is a condition and thus gives rise to a copyright infringement claim").

[183] *See* Great Minds v. Off. Depot, Inc., 945 F.3d 1106 (9th Cir. 2019) (court dismissed plaintiff Great Minds' copyright infringement case against Office Depot, saying Office Depot did not become a licensee under the CC BY-NC-SA 4.0 license by making copies on behalf of school districts using Great Minds' products); Great Minds v. FedEx Off. & Print Services, 886 F.3d 91, 94 (9th Cir. 2018) (allowing licensee school district to use FedEx to make copies of materials used under valid CC-BY-NC-SA 4.0 license. "Applying well-established agency principles, we conclude that licensees may use third-party assistance in exercising their rights under non-exclusive copyright licenses unless the license clearly states otherwise.").

but copyright law in those countries resulted in different remedies when the license terminated.[184] For example, in 2006, a court in the Netherlands found a violation of a CC-licensed photo posted on Flickr, but rather than awarding damages, it issued an injunction prohibiting the defendants from any future uses or reproductions of the works of the photographer plaintiff, with penalties for violating that order of 1000 euros per violation, up to a maximum of 20,000 euros.[185]

In 2021, Creative Commons noted the "alarming increase in enforcement actions relating to CC licenses" and issued a new Statement of Principles Around License Enforcement, recognizing that CC licenses "should be a way of making sure that creators are treated fairly, not a scheme to trap well-meaning reusers[sic] who would be willing to correct errors."[186] The draft guidelines included recommendations that legal actions should be taken sparingly, and that enforcement of licenses "should not be a business model."[187]

United States courts have shown that they have some leeway to rein in copyleft trolls, giving defendants brave enough to take on the challenge a path to victory through finding transformative purposes and lack of market harm to support fair use arguments. But fighting back in these cases is not free, and courts have also been hesitant to grant defendants' motions to dismiss and summary judgment motions that would end the process sooner. While in this article, the author has identified defense arguments that courts have found acceptable, there may be other options for courts to consider as well. For example, courts could as a matter of law determine that noncommercial uses are both transformative and cause no harm to the market when authors employ copyleft-style licenses, especially when they allow no opportunity to cure the license defect as a CC 4.0 license would require. A presumption in favor of defendants in these circumstances could result in quicker dismissal of cases, less transaction costs, and fewer incentives for copyleft trolls to bring cases. Courts could express even more skepticism about Creative

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[184] *Photography*, CREATIVE COMMONS, https://wiki.creativecommons.org/wiki/photography [https://perma.cc/UT88-493N].

[185] Curry v. Audax, No. 334492, KG 06-176 SR (District Court of Amsterdam, Mar. 9, 2006).

[186] CREATIVE COMMONS, https://creativecommons.org/ [https://perma.cc/VZ7L-7YYS].

[187] Sarah H. Person, *New License Enforcement Principles for Public Comment*, CREATIVE COMMONS (Aug. 5, 2021), https://creativecommons.org/2021/08/05/new-license-enforcement-principles-for-public-comment/ [https://perma.cc/C2ZQ-V2JY].

Commons licenses established after 2013, when CC 4.0 was released with the thirty-day period for licensees to correct errors upon notice, especially if authors continue to employ previous versions of the CC license. Courts could also be more mindful of the power and knowledge imbalance between copyright trolls and regular Internet users and assess awards of attorney fees and costs to prevailing defendants, which is permissible under the Copyright Act[188] but was not allowed in any of the decisions involving Philpot reviewed for this study, despite his many losses.

Finally, as a matter of policy, these kinds of situations should be kept in mind as the new Copyright Claims Board begins its work. The CCB was created as part of the Copyright Alternative in Small-Claims Enforcement (CASE) Act, which became law in December 2020.[189] Participation in cases before the CCB is voluntary, with damages capped at $15,000 per use and $30,000 per claim, not including attorney fees and costs, and limited availability of appeals.[190] One Internet user advocacy group expressed concerns that the CCB would "create a system that will harm everyday users who, unlike the big players, won't have the time and capacity to negotiate this new bureaucracy."[191] Another worried that the CCB would be able to award judgments "without the knowledge or consent of the 'defendants' on whom those judgments are levied" and that it would create "an opportunity for copyright trolls."[192] It is plausible that high-volume litigators, who usually receive well below the $30,000 damage maximum, could have streamlined access to judgments and enforcement, without the consideration or development of a body of fair use law in which judges have more time and inclination to consider the equities and potential

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[188] *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (In copyright cases, "[p]revailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to the prevailing parties only as a matter of the court's discretion.").

[189] The CASE Act was part of the COVID-19 stimulus relief bill. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020).

[190] *Copyright Claims Board Frequently Asked Questions*, COPYRIGHT.GOV https://www.copyright.gov/about/small-claims/faq.html [https://perma.cc/J9U5-2R9E].

[191] Jason Kelley, *The CASE Act Is Just the Beginning of the Next Copyright Battle*, ELEC. FRONTIER FOUND. (Dec. 22, 2020), https://www.eff.org/deeplinks/2020/12/case-act-hidden-coronavirus-relief-bill-just-beginning-next-copyright-battle [https://perma.cc/5WA3-MX2Q].

[192] Shiva Stella, *Public Knowledge Condemns Passage of CASE Act in Funding Bill*, PUB. KNOWLEDGE, (Dec. 21, 2020), https://www.publicknowledge.org/press-release/public-knowledge-condemns-passage-of-case-act-in-funding-bill/ [https://perma.cc/DV5V-R6TH].

policy outcomes, as they otherwise have been doing in the past decade in dealing with copyright trolls.

At the moment, defendants have some tools to fight back against copyleft trolls in court, and defendants with the resources to litigate can help to build a stronger body of law favoring transformative uses of low-value works for non-commercial purposes. One of the goals of this article was to point out the problem for scholars, students, and advocates, with some ways to avoid danger – never, ever, ever use a photograph posted under a pre-4.0 CC license, for example – with the hope that by shedding light on the issues, perhaps the copyleft trolls will be driven back into their caves.[193]

[193] The author is uncertain where trolls live, exactly, but in the fictional Middle Earth, they lived in caves. *See* J.R.R. TOLKIEN, THE HOBBIT 52-53 (First Ballantine Books ed. 1965) (1937) (in which, after the wizard Gandalf tricks three trolls into bickering until the sun rises and turns them to stone, Bilbo Baggins and the dwarves follow the trolls' boot prints to their cave, which contains treasures including a few swords; of course, these would turn out to be Orcrist the goblin-cleaver, Glamdring the foe-hammer, and Bilbo's trusty blade, Sting).