FIGHTING IMAGE PIRACY OR COPYRIGHT TROLLING? AN EMPIRICAL STUDY OF PHOTOGRAPHY COPYRIGHT INFRINGEMENT LAWSUITS

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INTRODUCTION

In the last five years, there has been an explosion of lawsuits alleging the copyright infringement of a digital image.[1] Image piracy is on the rise because digital photography and the internet have enabled users to copy a photo with a simple right-click of the mouse. One study found that in 2018, approximately 2.5 billion images were used without authorization per day on the internet.[2] Meanwhile, 64% of professional photographers reported that they had had their

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[1] *See generally* LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, at 5 (Gloria Huang & Jason Maples eds., 2021) (noting growth in copyright cases since 2013); Ashley Cullins, *Has This Man Sued You? A "Copyright Troll" Takes on Hollywood*, HOLLYWOOD REP., (Apr. 6, 2018), https://www.hollywoodreporter.com/business/business-news/has-man-sued-you-a-copyright-troll-takes-hollywood-1099156/ [https://perma.cc/4EZZ-Z94Z] (discussing rise in lawsuits); Mathew Higbee, *The Rise of Copyright Infringement for Photographers*, LAW. MONTHLY (Mar. 1, 2019), https://www.lawyer-monthly.com/2019/03/the-rise-of-copyright-infringement-for-photographers/ [https://perma.cc/QNM9-LWNU]; Joshua Brustein, *Don't Sue Me Like That: Anatomy of a Copyright Troll*, BLOOMBERG BUSINESSWEEK (June 28, 2021), https://www.bloomberg.com/news/articles/2021-06-28/copyright-law-how-rock-photographer-larry-philpot-perfected-usage-lawsuits [https://perma.cc/WTF4-2A3S]; Daxton R. Stewart, *Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry*, 18 OHIO ST. TECH. L.J. 333 (2022).

[2] COPYTRACK GLOBAL INFRINGEMENT REPORT 2019: INTERNATIONAL IMAGE THEFT IN COMPARISON 2 (2019), https://www.copytrack.com/wp-content/uploads/2019/03/Global_Infringement_Report_2019_EN.pdf [https://perma.cc/3YQP-6NED].

digital images used without permission more than 200 times online.[3] Even the judiciary has taken notice of the problem, with one court observing that, "[m]isuse of intellectual property has become a pervasive problem in the internet era and one that is especially pernicious for freelance photographers . . . ."[4] It is estimated that photographers lose around $446 for every image taken illegally.[5] Nonetheless, many photographers do not bother to file a lawsuit when their images are taken because they do not have the resources to pursue litigation, and they recognize that even if they win, "they may receive mere token payments of a few hundred dollars for their work, far less than their legal fees."[6]

When photographers do file lawsuits, they often are met with accusations that they are copyright trolls out to extract settlements worth far more than their images.[7] Sometimes they are accused of setting honeytraps by putting their images on the internet for unsuspecting users to copy so that the photographer can later sue for infringement.[8] Meanwhile, law firms that specialize in bringing image copyright infringement lawsuits are charged with running extortion schemes.[9]

With the passage of the Copyright Alternative in Small-Claims Enforcement Act of 2020 (the CASE Act)—which directed the Copyright Office to establish a small-claims tribunal (the "Copyright Claims Board" or "CCB") to hear copyright infringement matters with damages under $30,000[10]—some are sounding the alarm that

[3] *How to Protect Your Images from Copyright Infringement*, PRO. PHOTOGRAPHERS OF AM. (Apr. 24, 2019), https://www.ppa.com/articles/how-to-protect-your-images-from-copyright-infringement [https://perma.cc/9J6M-X2LM].

[4] Ward v. Consequence Holdings, Inc., No. 3:18-CV-1734-NJR, 2020 U.S. Dist. LEXIS 80499, at *8 (S.D. Ill. May 7, 2020).

[5] Rose Leadem, *A Snapshot of Online Image Theft (Infographic)*, ENTREPRENEUR (Mar. 4, 2018), https://www.entrepreneur.com/article/309876 [https://perma.cc/TEW5-SV8Y].

[6] *Ward*, 2020 U.S. Dist. LEXIS 80499, at *8; *see also The State of Image Theft in 2016*, PIXSY (Dec. 16, 2016), https://www.pixsy.com/the-state-of-image-theft-in-2016/ [https://perma.cc/A4LX-S6S5] (noting that 33% of the over 800 photographers it surveyed in 2016 did not pursue litigation when their images were taken because they found the legal process "daunting or expensive").

[7] *See infra* Parts III.A, IV.C.

[8] *See* Nicole Murdoch, *Fraud Alert: The Photography Shakedown Edition*, LEXOLOGY (July 31, 2020), https://www.lexology.com/library/detail.aspx?g=002e425d-9ab2-45e9-9e77-61a0d93364e3&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body++General+section&utm_campaign=Chicago+Bar+Association+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2020-08-03&utm_term= [https://perma.cc/Y3XC-595G].

[9] *See infra* Parts III.A, IV.C.

[10] *See* 17 U.S.C.A. §§ 1501–1511 (West 2022).

there will be another spike in image infringement cases.[11] The CASE Act was passed on December 27, 2020, and is considered a belated Christmas gift to the photography industry, which lobbied heavily for its enactment.[12] Major photography industry organizations like the American Society of Media Photographers are educating their constituents about the CASE Act.[13] This has stoked fears that there will be an onslaught of claims by photographers against individuals for posting images to social media and that these claims will result in large statutory damages awards.[14]

This Article examines over 1,100 image infringement lawsuits that were filed between March 1, 2020, and March 1, 2021 (the "Study Period"), and analyzes the nature of the complaints. By studying the who, what, where, why, and how of image infringement, the Article seeks to shed light on the question of whether these lawsuits are being brought by copyright trolls and amateurs out to make a quick buck or legitimately aggrieved photographers trying to protect their copyrighted works and livelihood. It also tries to devise solutions to prevent copyright infringement. This is the first article to use empirical research to analyze the nature of image copyright infringement claims, and it provides insight into the types of claims that may be filed with the CCB.

Part I of the Article explains how the Copyright Act of 1976 ("Copyright Act") protects photographs and clarifies the rights that are infringed when images are copied on the internet and elsewhere. Given that many alleged infringers assert a fair use defense, this section describes the circumstances under which the copying of a photograph is fair use. Finally, because many critics claim that photography lawsuits are being driven by outsized statutory damage

[11] *See* 7 PATRY ON COPYRIGHT § 28:11, Westlaw (database updated March 2022) (noting that "[the CASE Act] is a copyright troll's dream come true"); Neda Ulaby, *Will Posting Memes or Pro Wedding Pics Land You in Copyright Small Claims Court?*, NPR (Mar. 12, 2021, 9:00 AM) https://www.npr.org/2021/03/12/957054009/will-posting-memes-or-pro-wedding-pics-land-you-in-copyright-small-claims-court [https://perma.cc/429P-7SAD].

[12] *See The CASE Act Is Here*, PRO. PHOTOGRAPHERS OF AM., https://www.ppa.com/benefits/advocacy-copyright-protection/fight-for-artists-rights [https://perma.cc/58RD-W6WW]; *Statements of Support*, COPYRIGHT ALL., https://copyrightalliance.org/news-events/statements-of-support [https://perma.cc/5EEF-ETFN].

[13] *See* Thomas Maddrey, *The Case Act–A Primer*, ASMP (Dec. 28, 2020), https://www.asmp.org/case/the-case-act-a-primer [https://perma.cc/UAW6-6CK2]; *The CASE Act Is Here*, *supra* note 12.

[14] 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/N8V8-SKRR].

awards, Part I analyzes the amount of statutory damages that successful plaintiffs typically receive in photography copyright cases.

Part II summarizes the findings from the Author's study (the "Study") of 1,157 lawsuits (the "Lawsuits") filed during the Study Period. Specifically, the Study looked at who was bringing the Lawsuits and found that around 94% of the complaints were filed by professional photographers or stock photo agencies, not amateurs with iPhones.[15] The filings also were dominated by a handful of firms that specialize in photography copyright infringement cases, including the Liebowitz Firm, SRIPLAW, and the Doniger/Burroughs Law Firm.[16] The Study also examined who was being sued and found that almost 97% of the Lawsuits were filed against a business. In particular, media was the most sued industry.[17] The Study also examined why the defendants were being sued and found that over half of them were using images for commercial purposes, such as to advertise products or services, visually enhance a website, or to create a product.[18] In terms of where the images were being used, 97% of the Lawsuits involved online usage, and the top districts for filings were the Southern District of New York and the Central District of California.[19] Just under 50% of the Lawsuits were resolved via a settlement agreement.[20]

Part III then analyzes whether the plaintiffs in the Study (the "Plaintiffs") fall into any of the classic definitions of a troll. This section also describes the Author's observations about the nature of the Lawsuits and identifies trends in the types of cases that photographers are filing, such as lawsuits against celebrities who are reappropriating their images from the paparazzi.

Part IV offers solutions to prevent image infringement and trolling, including launching educational campaigns targeted at certain industries and limiting statutory damages. In this section, the Author draws upon lessons from the music industry about battling online piracy.

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[15] Melissa Eckhause, Empirical Study of Photography Copyright Infringement Lawsuits filed between March 1, 2020 and March 1, 2021 (February 15, 2023) (unpublished manuscript) (on file with author and Albany Law Review).

[16] *See infra* Part II.C.

[17] *See infra* Part II.B.1.

[18] *See infra* Part II.G.

[19] *See infra* Part II.F.

[20] *See infra* Part II.H.

I. HISTORY OF U.S. COPYRIGHT LAW PROTECTION FOR PHOTOGRAPHS

This section explains how copyright law protects photographs and the rights that photographers have in their works. It further provides a summary of the copyright principles at issue when a photograph is used without permission and potential defenses including fair use. Finally, the section concludes by analyzing the types of damages available to successful plaintiffs and the amounts of statutory damages that courts typically award in photography cases.

A. Copyright Protection and Rights

The United States Constitution grants Congress the power to enact laws "[t]o promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[21] The Copyright Act specifically protects "original works of authorship fixed in any tangible medium of expression."[22] While "[t]he *sine qua non* of copyright is originality," it is a low bar that "means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[23] Originality for photographs can be found in such things as the staging of the subject matter, the timing of when the photograph is taken, the camera angle and lighting, and the kind of camera, film, and lens that is used.[24] Copyright law can even protect photographs that are created for advertising purposes[25] and those that are created by amateurs.[26] As

[21] U.S. CONST. art. I, § 8, cl. 8.

[22] 17 U.S.C. § 102(a).

[23] ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 414 (9th Cir. 2018) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)); *see also* Boesen v. Dimoro Enters., LLC, No. 20-CV-354, 2020 WL 5891563, at *2 (N.D.N.Y. Oct. 5, 2020) (explaining that "[t]he requirements for originality are 'modest,'" (quoting Gym Door Repairs, Inc. v. Young Equip. Sales, Inc., 206 F. Supp. 3d 869, 896 (S.D.N.Y. 2016))).

[24] E. Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000) (citing Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992)).

[25] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (holding that advertisements are protected under copyright law and warning that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits"); *see also* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1077 (9th Cir. 2000) (holding that advertising photographs of a spirits bottle were entitled to copyright protection).

[26] *See*, *e.g.*, Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 432 (S.D.N.Y. 2018) (finding copyright protection for an image taken by "an amateur photographer with an iPhone"); *see also* Time Inc. v. Bernard Geiss Assocs., 293 F. Supp. 130, 131, 143–44 (S.D.N.Y. 1968) (holding that an amateur's home movie of President Kennedy's assassination was protectable under copyright law).

a result, in copyright infringement cases, "[p]hotographs are often found to be original works."[27] A copyright arises once the work becomes "'fixed' in a tangible medium of expression" for more than a transitory period of time.[28] For photographs, the copyright arises when the photographer clicks the shutter.[29]

The author of a photograph, and hence the owner of the image's copyright, is generally the photographer[30] unless the image was created as a work for hire.[31] Owners of image copyrights enjoy a bundle of "exclusive rights" under the Copyright Act, including the rights "to reproduce" the images, "to prepare derivative works based upon" the image, "to distribute copies" of the image, and "to display the [image] publicly."[32] Those wishing to use a photograph must license it from the owner of the copyright.[33] Courts routinely reject the argument that "because the [i]mage can be found on the internet, it can be used freely by anyone."[34] Photographers retain the

[27] Korzeniewski v. Sapa Pho Vietnamese Rest., Inc., No. 17-CV-5721, 2019 U.S. Dist. LEXIS 1901, at *14 (E.D.N.Y. Jan. 3, 2019) (citing Sheldon v. Plot Com., No. 15-CV-5885, 2016 U.S. Dist. LEXIS 116135, at *11 (E.D.N.Y. Aug. 26, 2016)), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 10949 (E.D.N.Y. Jan. 23, 2019); *see also Ets-Hokin*, 225 F.3d at 1073 (noting "the longstanding and consistent body of case law holding that photographs generally satisfy this minimal standard" of creativity); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (holding that "[a]lmost any photograph 'may claim the necessary originality to support a copyright'"). *But see* Oriental Art Printing, Inc. v. Goldstar Printing Corp., 175 F. Supp. 2d 542, 546–47 (S.D.N.Y. 2001) (finding that photographs of "commonly served Chinese food dishes" was the "rare case where the photographs contained in plaintiffs' work lack[ed] the creative or expressive elements" necessary to be original works); Bridgeman Art Libr. v. Corel Corp., 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (holding that a photograph may lack originality in rare cases, such as "where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying").

[28] 17 U.S.C. § 101.

[29] *See Mannion*, 377 F. Supp. 2d at 450.

[30] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60–61 (1884).

[31] *See* 17 U.S.C. § 201(b). Works for hire encompass two categories of work. *See* 17 U.S.C. § 101. First, works for hire include those photographs that are created as part of a person's employment, in which case the employer is considered the author and owner of the copyright in the work. *Id.*; 17 U.S.C. § 201(b). Second, works for hire include specially commissioned works where the parties agree in writing that the commissioner will own the copyright work. *See* 17 U.S.C. § 101; 17 U.S.C. § 201(b). However, the work must fall into one of the categories enumerated in the statute, such as motion pictures or textbooks. *See* 17 U.S.C. § 101 ("work made for hire").

[32] 17 U.S.C. § 106.

[33] *See* Ringgold v. Black Ent. TV, Inc., 126 F.3d 70, 73 (2d Cir. 1997) (noting that, "[i]n the absence of defenses, these exclusive rights normally give a copyright owner [of a visual work] the right to seek royalties from others who wish to use the copyrighted work." (citing Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994))); *see also* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (explaining that copyright owners have a "statutory right to license" their works).

[34] Harrington v. Aerogelic Ballooning, LLC, No. 18-CV-02023, 2018 U.S. Dist. LEXIS 201866, at *4–5 (D. Colo. Nov. 29, 2018); *see also* FameFlynet, Inc. v. Shoshanna Collection, LLC, 282 F. Supp. 3d 618, 625–26 (S.D.N.Y. 2017) (rejecting the argument that when celebrity photos were published on *E! Entertainment* via a licensing agreement with the photographer, the

copyrights in their photographs even after they are sold unless there is a written agreement otherwise.[35]

B. Copyright Infringement

Copyright infringement occurs when someone violates one of the copyright owner's exclusive rights in the work.[36] A certificate of registration from the United States Register of Copyrights, "made before or within five years after first publication of the work, [is] prima facie evidence" of copyright ownership in the image;[37] and the acts of copying an image from the internet and then uploading it to a website or social media page violate the copyright owner's rights of reproduction, display, and possibly distribution.[38] Copyright infringement lawsuits must be brought in federal court.[39] Although the copyright in a photograph is automatic, the copyright in a United States work must be registered to bring a lawsuit for copyright infringement.[40]

There is a split among courts as to whether merely embedding an image is a violation of the right of public display. Embedding, also called in-line linking, occurs when a website incorporates a particular

defendants "gained 'the unfettered ability' to republish the [p]hotos 'throughout the Internet, without any restrictions'").

[35] *See* 17 U.S.C. § 202 ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

[36] 17 U.S.C. § 501(a).

[37] 17 U.S.C. § 410(c).

[38] *See*, *e.g.*, Stockfood Am., Inc. v. Adagio Teas, Inc., 475 F. Supp. 3d 394, 411 (D.N.J. 2020) ("Adagio does not dispute that posting the Images on its website without a license would infringe the rights of the copyright owner."); FameFlynet, Inc. v. Jasmine Enters., 344 F. Supp. 3d 906, 909, 914 (N.D. Ill. 2018) (finding copyright infringement where a wedding dress shop owner and blogger copied celebrity wedding photo to display on a blog); Bell v. Merchs. Bank of Ind., 456 F. Supp. 3d 1046, 1050–51 (S.D. Ind. 2020) (granting summary judgment for copyright infringement where bank displayed plaintiff's photograph on its website); Werner v. Evolve Media, LLC, No. 2:18-CV-7188, 2020 U.S. Dist. LEXIS 106477, at *15, *17 (C.D. Cal. Apr. 28, 2020) (granting summary judgment for copyright infringement where media company displayed plaintiff's photograph in an online article); Miller v. Haredim Consulting, Inc., No. 1:19-CV-1474, 2020 U.S. Dist. LEXIS 154865, at *8–9,*11 (N.D.N.Y Aug. 26, 2020) (holding that defendant infringed on the plaintiff's copyright by "placing the photograph on its website for the public to see"); APL Microscopic, LLC v. United States, 144 Fed. Cl. 489, 498 (2019) (explaining that "the act of transmitting the webpage—and the [image] therein—to a user would infringe on" the right to distribution); *Shoshanna Collection*, 282 F. Supp. 3d at 625–26 (finding copyright infringement where a fashion retailer saved photos from an entertainment website and then uploaded them to its own website); Reed v. Ezelle Inv. Props. Inc. 353 F. Supp. 3d 1025, 1029, 1036 (D. Or. 2018) (finding copyright infringement where real estate broker uploaded photographer's image to his website's homepage).

[39] 28 U.S.C. § 1338(a).

[40] 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with" the Copyright Act.).

piece of content, such as a photographic image, into its own website via linking.[41] When an image is embedded, the viewer sees the image on the linking website, even though the image actually resides on a third-party's server.[42] Many social media websites, like Twitter and Instagram, offer tools that allow the user to embed images; and embedding has become a widespread practice.[43] In the 2007 case *Perfect 10, Inc. v. Amazon.com, Inc.*,[44] the Ninth Circuit Court of Appeals established "the server test" under which a website operator is only liable for violating the right of public display if the site "store[s] and serve[s]" the copyrighted material on its own servers.[45] However, district courts outside of the Ninth Circuit, particularly in the Southern District of New York, have rejected the server test.[46] According to one Southern District of New York judge,

> The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have "displayed" a work within the meaning of the Copyright Act.[47]

The Second Circuit Court of Appeals has not yet addressed the validity of the server test.

Copyright infringement is a strict liability offense, and the intent or knowledge of the defendant is not relevant in determining liability.[48] Additionally, defendants can be held responsible for

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[41] *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 816 (9th Cir. 2003).

[42] Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342, 343 (S.D.N.Y. 2020).

[43] *See id.* at 343–44; s*ee also* Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018).

[44] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

[45] *Id.* at 1159–60 (citing Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828, 838–39, 844 (C.D. Cal. 2006)).

[46] McGucken v. Newsweek, LLC, No. 19 Civ. 9617, 2022 U.S. Dist. LEXIS 50231, at *15 (S.D.N.Y. Mar. 21, 2022) (finding that the defendant displayed the plaintiff's photograph when it embedded the photograph in an article); Nicklen v. Sinclair Broad. Grp., Inc., 551 F. Supp. 3d 188, 195-96 (S.D.N.Y 2021) (rejecting the server test and holding that embedding a video constitutes a display under the Copyright Act); *Goldman*, 302 F. Supp. 3d at 596 (rejecting the server test); Leader's Inst., LLC v. Jackson, No. 3:14-CV-3572-B, 2017 U.S. Dist. LEXIS 193555, at *32 (N.D. Tex. Nov. 22, 2017) ("[T]o the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copyright owner's exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit." (citing Flava Works, Inc. v. Gunter, No. 10-C-6517, 2011 U.S. Dist. LEXIS 98451, at *4 (N.D. Ill. Sept. 1, 2011))).

[47] *Goldman*, 302 F. Supp. 3d at 593.

[48] *See* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004).

infringing images on their websites even when a third party, like a web developer, was responsible for uploading the image.[49] Attribution to the photographer also is not a defense to copyright infringement.[50] Unauthorized copying also can occur when a licensee uses an image outside of the scope of a license from the copyright holder[51] or when the licensee continues to use the image after the license expires.[52]

C. The Fair Use Defense

A common defense in copyright infringement cases is fair use, especially if the defendant does not contest that they "directly copied the images wholesale."[53] Fair use is a statutory exception under the Copyright Act that permits the use of a copyrighted work without the authorization of the owner for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[54] The goal of the fair use doctrine is "to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible

[49] *See, e.g.*, Bell v. Merchs. Bank of Ind., 456 F. Supp. 3d 1046, 1048, 1051 (S.D. Ind. 2020) (holding bank liable for infringement where its website developer was responsible for uploading infringing photograph); *see also* Radabaugh v. Clay Turner Realty Grp., LLC, No. CV 120-058, 2021 U.S. Dist. LEXIS 113020, at *2 n.1, *10–11 (S.D. Ga. June 16, 2021) (holding real estate agency liable for web designer's copyright infringement even though it "was under the impression that the web design company would only use images that did not require a license or if a license was required, that the design company would handle the licensing process"); Tylor v. Hawaiian Springs, LLC, No. 17-00290, 2019 U.S. Dist. LEXIS 111726, at *17, *20–21 (D. Haw. July 3, 2019) (rejecting argument that defendant "used outside vendors to manage its commercial Facebook and Pinterest pages and that it did not have knowledge that the copyrighted [i]mages were being used on its pages without authorization" and finding defendant liable for copyright infringement).

[50] Iantosca v. Elie Tahari, Ltd., No. 19-CV-04527, 2020 U.S. Dist. LEXIS 171512, at *15 (S.D.N.Y. Sept. 18, 2020) ("Simply put, attribution is not a defense against copyright infringement." (citing Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989)). "[A]cknowledgement does not in itself excuse infringement." *Narell*, 872 F.2d at 914.

[51] *See* Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998) (citing Bourne v. Walt Disney Co., 68 F.3d 621, 631 (2d Cir. 1995)).

[52] *See* Palmer/Kane LLC v. Rosen Book Works LLC, 204 F. Supp. 3d 565, 580 (S.D.N.Y. 2016) (citing John Wiley & Sons, Inc. v. DRK Photo, 998 F. Supp. 2d 262, 287 (S.D.N.Y. 2014)).

[53] BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 402 (S.D.N.Y. 2016); Terry S. Kogan, *How Photographs Infringe*, 19 VAND. J. ENT. & TECH. L. 353, 366 (2017) ("In most cases in which a plaintiff alleges that the defendant's photograph has infringed by replication, the defendant rarely denies copying, given the futility of such a defense."); Elatab v. Hesperios, Inc., No. 19 CV 9678, 2021 U.S. Dist. LEXIS 103661, at *11–12 (S.D.N.Y. June 2, 2021) (denying defendant's fair use and de minimis defenses where it conceded that it had posted the copyrighted image to Instagram).

[54] 17 U.S.C. § 107.

dissemination of ideas and information, on the other."[55] In considering the affirmative defense of fair use, courts weigh four factors.[56]

Under the first factor, courts generally examine the purpose of the use, whether the use is for commercial as opposed to non-commercial purposes,[57] the extent to which the use is transformative,[58] and whether the defendant acted in bad faith in using the image.[59] If the new work is "substantially transformative," the "other factors, [including] commercialism[,] [are of less significance]."[60] Whether a work is transformative hinges on whether it "merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[61]

Courts in photography cases have repeatedly held that "[u]sing a photo for the precise reason it was created does not support a finding that the nature and purpose of the use was fair."[62] Therefore, using a photograph to visually enhance a website[63] or to lure users to a website generally will not be considered fair use.[64] Likewise, using

[55] Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1174 (5th Cir. 1980).

[56] *Id.*

[57] *See* Clark v. Transp. Alts., Inc., No. 18 Civ. 9985, 2019 WL 1448448, at *4 (S.D.N.Y. Mar. 18, 2019) ("[U]se of the Photograph for noncommercial purposes—an opinion post on a non-profit organization's blog—further supports a finding that the first factor cuts in favor of fair use." (citing Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 83 (2d Cir. 2014))); Bell v. Powell, 350 F. Supp. 3d 723, 729–30 (S.D. Ind. 2018) (finding that since the conference was for a charitable purpose, the inclusion of the photo in the brochure was not commercial use). *But see* Monge v. Maya Mags., Inc., 688 F.3d 1164, 1176 (9th Cir. 2012) ("Commercial use is a 'factor that tends to weigh against a finding of fair use' because 'the user stands to profit from exploitation of the copyrighted material without paying the customary price.'" (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985))).

[58] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[59] NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004).

[60] Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006) (alterations in original) (quoting *NXIVM Corp.* 364 F.3d at 478).

[61] *Campbell*, 510 U.S. at 579 (alteration in original) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).

[62] *See, e.g.*, BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016).

[63] *See, e.g.*, Radabaugh v. Clay Turner Realty Grp., LLC, No. CV 120-058, 2021 U.S. Dist. LEXIS 113020, at *2, *9 (S.D. Ga. June 16, 2021) (rejecting real estate agency's fair use defense where agency used a photographer's copyrighted image to visually enhance its website).

[64] *See, e.g.*, Von Der Au v. Michael G. Imber, Architect, PLLC, No. 20-CV-00360, 2021 U.S. Dist. LEXIS 55298, at *11, *13 (W.D. Tex. Mar. 24, 2021) (rejecting the fair use defense where defendant used the photograph "to increase web traffic to [defendant's] blog"); Barcroft Media, Ltd. v. Coed Media Grp., LLC, 297 F. Supp 3d. 339, 353, 355 (S.D.N.Y. 2017) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)) (finding copyright infringement where entertainment website's business model hinged on using unlicensed celebrity photos that it could not otherwise afford to entice viewers).

an unlicensed photograph to advertise goods or services generally is not fair use.[65] Conversely, using photographs for historical or biographical purposes can be grounds for fair use. [66]

Photographs often are used for the purpose of news reporting, which is one of the enumerated categories of potential fair use under 17 U.S.C. § 107.[67] However, not all uses of photographs for news reporting are considered fair use because "[t]he promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report.'"[68] Courts typically find fair use in cases where the photograph itself was the story, and the publisher is reporting on a story that arose because of the copyrighted image.[69] For example, "a news report about a video that has gone viral on the Internet might fairly display a screenshot or clip from that video to illustrate what all the fuss is about."[70] In *Nunez v. Caribbean International News Corp.*, a photographer took pictures of Joyce Giraud, Miss Puerto Rico Universe 1997, to be included in her modeling portfolio. [71] Because at least one of the photographs pictured Giraud "naked or nearly naked," the risqué photographs

[65] Elatab v. Hesperios, Inc., No. 19 CV 9678, 2021 U.S. Dist. LEXIS 103661, at *1, *8, *11 (S.D.N.Y. June 2, 2021) (rejecting fashion designer's fair use defense and categorizing its posting of a model wearing its clothes to Instagram a "commercial use to advertise its clothing"); Malluk v. Berkeley Highlands Prods., LLC, No. 19-CV-01489, 2020 U.S. Dist. LEXIS 36236, at *7, *12 (D. Colo. Mar. 3, 2020) (granting default judgment for copyright infringement where defendant used a copyrighted photograph "on its website to advertise and promote a concert"); Iantosca v. Elie Tahari, Ltd., No. 19-CV-04527, 2020 U.S. Dist. LEXIS 171512, at *13, *16 (S.D.N.Y. Sept. 18, 2020) (granting photographer summary judgment where defendant did not "demonstrate[] that its use was anything other than a 'commercial use' intended to advertise and sell its clothing"); Tylor v. Hawaiian Springs, LLC, No. 17-00290, 2019 U.S. Dist. LEXIS 111726, at *20 (D. Haw. July 3, 2019) ("Defendant's use of Plaintiff's entire [i]mage for an exclusively commercial purpose of advertising its products on Pinterest is not subject to the fair use exception." (citing *Campbell*, 510 U.S. at 584; Monge v. Maya Mags., Inc., 688 F.3d 1164, 1176 (9th Cir. 2012))).

[66] *See, e.g.*, Marano v. Metro. Museum of Art, 472 F. Supp. 3d 76, 84, 86 (S.D.N.Y. 2020) (holding that an art museum's use of a copyrighted photo to illustrate an online exhibition was fair because it was used "as an historical artifact" and "in a scholarly context"); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 607–10 (2d Cir. 2006) (finding that a publisher's use of a Grateful Dead concert poster in a coffee table book about the "cultural history" of the band was fair use because the book was biographical).

[67] 17 U.S.C. § 107.

[68] Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 467 (E.D.N.Y. 2020) (alteration in original) (quoting *Harper & Row*, 471 U.S. at 557); *see also* Incredible Features, Inc. v. BackChina, LLC, No. CV 20-943, 2021 U.S. Dist. LEXIS 250121, at *9–10 (C.D. Cal. Dec. 16, 2021) (citing *Harper & Row*, 471 U.S. at 561) (rejecting media company's argument that its use in the "news" section of a website was fair use); *Monge*, 688 F.3d at 1173 ("The 'fact that an article arguably is "news" and therefore a productive use is simply one factor in a fair use analysis.'" (citing *Harper & Row*, 471 U.S. at 561)).

[69] Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000).

[70] Barcroft Media, Ltd. v. Coed Media Grp., LLC, 297 F. Supp 3d. 339, 352 (S.D.N.Y. 2017).

[71] 235 F.3d at 21.

sparked a controversy as to whether Giraud was fit to retain her crown.[72] The defendant newspaper then published several of the photographs alongside several articles about the controversy surrounding the photographs.[73] The First Circuit held that the newspaper's publication of the pictures was transformative and fair use because "the pictures were the story"[74] and by using them "in conjunction with editorial commentary," it gave the photographs "a new 'meaning, or message.'"[75]

Likewise, in *Boesen v. United Sports Publ'ns, Ltd.*,[76] professional tennis player Caroline Wozniacki announced her retirement in an Instagram post that contained the plaintiff's photograph of a young Wozniacki playing tennis.[77] A sports news publisher subsequently ran a story reporting on Wozniacki's retirement announcement.[78] The court held it was fair use to embed the copyrighted photograph in the article because the Instagram post itself was the story.[79]

However, if the publisher is using an image solely as an "illustrative aid[]" to depict the subjects of an article[80] or to "provide[] an attractive image to go along with the story,"[81] courts are reluctant to find fair use.[82] For example, in *Cruz v. Cox*, a news outlet ran an

[72] *Id.*
[73] *Id.*
[74] *Id.* at 22.
[75] *Id.* at 23 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
[76] Boesen v. United Sports Publ'ns, Ltd., No. 20-CV-1552, 2020 U.S. Dist. LEXIS 203682 (E.D.N.Y. Nov. 2, 2020).
[77] *Id.* at *2.
[78] *Id.* at *3.
[79] *Id.* at *8–9 (citing Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 581–82 (S.D.N.Y 2020)).
[80] Barcroft Media, Ltd. v. Coed Media Grp., LLC, 297 F. Supp 3d. 339, 352 (S.D.N.Y. 2017).
[81] Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 62, 64, 67 (E.D.N.Y. 2021) (granting summary judgment in favor of photographer because blogger's post of copyrighted image was not fair use); *see also* Dermansky v. Tel. Media, LLC, No. 19-CV-1149, 2020 U.S. Dist. LEXIS 44475, at *2–3 (E.D.N.Y. Mar. 13, 2020) (granting photographer's motion for default judgment where media company used her copyrighted photograph to illustrate an article).
[82] *See, e.g.*, Werner v. Red Blue Media Inc., No. 2:20-CV-01024, 2021 U.S. Dist. LEXIS 153313, at *9 (C.D. Cal. Aug. 9, 2021) ("A defendant's use of a copyrighted image in news reporting will generally not tip the first factor in favor of fair use where the image simply illustrates the subject matter of a report." (citing Monge v. Maya Mags., Inc., 688 F.3d 1164, 1173, 1175 (9th Cir. 2012); L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1121–22 (9th Cir. 1997))); Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018) ("Though 'news reporting is a widely-recognized ground for finding fair use under the Copyright Act,' the use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use in this District." (citing BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016))); *BWP Media*, 196 F. Supp. 3d at 407 ("The Court has found no case, however, in which the use of an image solely to present the content of that image, in a commercial capacity, was found to be fair." (citing 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))); Wood v. Oberserver Holdings, LLC, 20 Civ. 07878, 2021 U.S. Dist. LEXIS 127484, at *3–4, *7 (S.D.N.Y. July 8,

article about the arrest of a terrorist and used plaintiff's photograph of the arrest to accompany the story.[83] The court found there was no fair use because the media company did not use the photograph to criticize or comment on the photograph, but instead, it used the photograph to "depict[] the subjects" of the story.[84] To find such use fair would "eliminate copyright protection any time a copyrighted photograph was used in conjunction with a news story about the subject of that photograph. That is plainly not the law."[85] Another court noted that, "[n]ewsworthy contents will rarely justify unlicensed reproduction; were it otherwise, photojournalists would be unable to license photos, and would effectively be out of a job."[86] Merely adding "some token commentary" also will not be enough to transform an image when the image is not the subject of the story.[87] Similarly, simply cropping a photograph does not make the use transformative.[88]

Under the second factor, the court examines "the nature of the copyrighted work," including "whether the work is expressive or creative . . . or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and [] whether the work is . . . unpublished," which weighs against fair use.[89] Even though photographs have an informational purpose, they

2021) (finding that media company's publishing of photographs of a house purchased by celebrities was not transformative because the photos were used as "illustrative aids for precisely the same reason they were created"); *Golden*, 524 F. Supp. 3d at 62, 64 (rejecting argument that blogger's post of a copyrighted image was fair use); Sands v. What's Trending, No. 20-CV-02735, 2020 U.S. Dist. LEXIS 236019, at *1, *10 (S.D.N.Y. Dec. 14, 2020) (holding that a digital media company's website's use of a copyrighted photograph to illustrate an article was not transformative where "the Photograph was the subject of the article, and it would be reasonable to infer that displaying the content of the Photograph was the precise reason the Photograph was created in the first place"); Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 185–86 (D. Mass. 2007) (finding a media outlet's use of an image of an arrest to report on that arrest was not transformative); *Psihoyos*, 1998 U.S. Dist. LEXIS 9192, at *6 ("The Examiner's use is not transformative, because its piece uses the photo to show what it depicts.").

[83] Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 462–63 (E.D.N.Y. 2020).

[84] *Id.* at 468, 471 (quoting *Barcroft*, 297 F. Supp. 3d at 352).

[85] *Cruz*, 444 F. Supp. 3d at 468 (quoting *Barcroft*, 297 F. Supp. 3d at 352).

[86] *BWP Media*, 196 F. Supp. 3d at 406 n.6 (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557–59 (1985)).

[87] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 606 (S.D.N.Y. 2020); *see also* N. Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 609, 617 (S.D.N.Y. 2015) (holding that superimposing the text "#neverforget" over an image of the twin towers from September 11 was not transformative); *Monge*, 688 F.3d at 1176 ("[W]holesale copying sprinkled with written commentary—[is] at best minimally transformative.").

[88] *See, e.g.*, Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 263 (4th Cir. 2019) ("The only obvious change Violent Hues made to the Photo's content was to crop it so as to remove negative space. This change does not alter the original with 'new expression, meaning[] or message.'" (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994))).

[89] Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006).

generally are deemed creative under this factor.[90] However, when the photographer "did not create the scene or stage his subjects" but instead "the photograph 'just happened,'" or the photograph merely captures the moment, the court may find the photograph is factual, thus favoring fair use.[91]

Under the third factor, using a copyrighted work in its entirety normally would weigh against a finding of fair use.[92] However, "this factor 'weighs less when considering a photograph—where all or most of the work often must be used in order to preserve any meaning at all—than a work such as a text or musical composition, where bits and pieces can be excerpted without losing all value.'"[93] Thus, because of the necessity of using the whole image with photographs, especially where the photograph is the story, some courts find this factor to be neutral because no more is being taken than necessary.[94] Other courts have found using the entirety of an image weighs against fair use if the photograph was not transformed and the article did not comment on the photograph itself.[95]

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[90] Baraban v. Time Warner, Inc., No. 99 Civ. 1569, 2000 U.S. Dist. LEXIS 4447, at *11 (S.D.N.Y. Apr. 6, 2000) ("Although photographs are often 'factual or informational in nature,' the art of photography has generally been deemed sufficiently creative to make the second fair use factor weigh in favor of photographer-plaintiffs." (citing Strauss v. Hearst Corp., No. 85 Civ. 10017, 1988 U.S. Dist. LEXIS 1427, at *14 (S.D.N.Y. Feb. 19, 1988))); *see also* Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc., 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (explaining that "photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations"); Mathieson v. Associated Press, No. 90 Civ. 6945, 1992 U.S. Dist. LEXIS 9269, at *17 (S.D.N.Y. June 25, 1992) (finding that a photograph's "informational purpose does not negate a finding of imaginativeness or creativity").

[91] *See N. Jersey Media Grp.*, 74 F. Supp. 3d at 620 (finding the second factor weighed in favor of fair use); *see also* Werner v. Red Blue Media Inc., No. 2:20-CV-01024, 2021 U.S. Dist. LEXIS 153313, at *13 (C.D. Cal. Aug. 9, 2021) ("'[C]andid' photographs benefiting from 'fortuitous timing' may be less creative.").

[92] *See* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998) ("[T]he more of a copyrighted work that is taken, the less likely the use is to be fair . . . ."); Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 62–63 (S.D.N.Y. Mar. 9, 2021) (holding that the third factor favored the photographer favor "because [the infringer] used the entire image, unaltered").

[93] Ferdman v. CBS Interactive Inc., 342 F. Supp. 3d 515, 539 (S.D.N.Y. 2018) (quoting *N. Jersey Media Grp.*, 74 F. Supp. 3d at 621).

[94] *See N. Jersey Media Grp.*, 74 F. Supp. 3d at 620–21; Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) ("[T]o copy any less than [the entire picture] would [make] the picture useless to the story. As a result, . . . we count this factor as of little consequence to our analysis.").

[95] *See, e.g.*, *Werner*, 2021 U.S. Dist. LEXIS 153313, at *15–16 (holding "[t]he third factor . . . weighs strongly against fair use" where "the articles constituted at best a minimally transformative use of the photographs" and "the photographs . . . were not themselves the focus of the articles" (citing Dr. Seuss Enters., L.P. v. ComicMix LCC, 983 F.3d 443, 458 (9th Cir. 2020)); VHT, Inc. v. Zillow Grp., Inc., 918 F.3d 723, 744 (9th Cir. 2019); Monge v. Maya Mags., Inc., 688 F.3d 1164, 1173, 1179 (9th Cir. 2012))); Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 431 (S.D.N.Y. 2018) (finding that because the defendant "used the entirety of the image in an article that neither discussed the photograph itself nor transformed its use, no reasonable factfinder could find that the third factor weighs in favor of Defendant"); Iantosca v. Elie

Under the fourth factor, which many courts consider to be "the most important element of the fair use inquiry,"[96] the court examines "not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[97] The potential market includes "traditional, reasonable, or likely to be developed markets."[98] There is a presumption that an allegedly infringing use would replace the copyrighted work if the use is determined to be non-transformative and commercial.[99]

This factor will generally weigh against fair use in cases involving professional photographers and stock agencies because they are in the business of licensing images.[100] When an image is used without authorization, these professionals and agencies are being deprived of their normal licensing fee.[101] The fact that the market for an older image has "gone cold" will not alone justify fair use.[102]

One of the main markets for photographs is media companies.[103] Therefore, courts recognize that the unchecked free use of images would decimate the freelance photography industry because if media

Tahari, Ltd., No. 19-CV-04527, 2020 U.S. Dist. LEXIS 171512, at *13–14 (S.D.N.Y. Sept. 18, 2020) (finding the third factor to weigh in favor of the photographer where the "Defendant reposted the Photograph without modification" for commercial, non-transformative purposes).

[96] *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 662 (2d Cir. 2018) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

[97] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

[98] Bill Graham Archives v. Dorling Kindersley Ltd, 448 F.3d 605, 614 (2d Cir. 2006) (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994)).

[99] *See Campbell*, 510 U.S. at 591.

[100] *See* N. Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 622 (S.D.N.Y. 2015) (finding that the effect on the market weighed against the media outlet defendant, which used an iconic September 11 photograph that had earned over one million dollars in licensing fees).

[101] *See* Sands v. What's Trending, Inc., No. 20-CV-02735, 2020 U.S. Dist. LEXIS 236019, at *18 (S.D.N.Y. Dec. 14, 2020) ("[B]y neglecting to pay Plaintiff a licensing fee, [defendant] deprived [the photographer] of revenue he would have otherwise received."); Elatab v. Hesperios, Inc., No. 19 CV 9678, 2021 U.S. Dist. LEXIS 103661, at *11 (S.D.N.Y. June 2, 2021) (finding that fashion designer's "posting of the photograph to promote its clothing certainly has the potential to supplant [the photographer's] market for licensing the photograph").

[102] *See* Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 63 (S.D.N.Y. Mar. 9, 2021) (noting that "allowing websites to post copyrighted material without a license merely because the market for the material has gone cold would pose a substantial threat to the licensing market in general").

[103] *See* Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 189 (D. Mass. 2007) ("CBS's use of the photographs is paradigmatic of the only market the photographs could reasonably have: licensing to media outfits.").

outlets "could use such images for free, there would be little or no reason to pay for . . . works."[104]

Even in cases involving "amateur photographer[s] with an iPhone," the fourth factor weighs against fair use because plaintiffs are entitled to profit from their works.[105] Courts have recognized that "'the Progress of Science and useful Arts'" would be hampered if "all personal images posted on social media are free grist for use by media companies" because "there would be no incentive for publishers to create their own content to illustrate articles."[106]

D. Damages

Under the Copyright Act, a prevailing party in a copyright infringement lawsuit can elect to recover actual damages or statutory damages.[107] Actual damages are "the amount [the copyright owner] would have received but for [the infringer's] unlawful copying" plus any additional "profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[108] Courts calculate actual damages in photography cases by using benchmark licenses[109] or approximating the lost licensing fee according to the fair market value of the image.[110] Oftentimes in

[104] *See* Barcroft Media, Ltd. v. Coed Media Grp., LLC, 297 F. Supp 3d. 339, 355 (S.D.N.Y. 2017); *see also Sands*, 2020 U.S. Dist. LEXIS 236019, at *16, *18 (finding the fourth factor weighed against fair use because the photographer "would struggle to make ends meet as companies would simply use his photographs without permission and without any associated risk of legal liability"); Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 268 (4th Cir. 2019) ("[I]f Violent Hues' behavior became common and acceptable, the licensing market for Brammer's work specifically, and professional photography more broadly, might well be dampened.").

[105] *See* Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 431–32 (S.D.N.Y. 2018); *see also* Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 462, 470 (E.D.N.Y. 2020) (noting that an amateur photographer "[a]s the owner of the Photograph, . . . had the right to sell the Photograph to media outlets" and defendant's "publication of the Photograph without [the photographer's] permission, therefore, 'usurp[ed]' his market" (quoting Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998))).

[106] *See Otto*, 345 F. Supp. 3d at 428; *see also Barcroft*, 297 F. Supp. 3d at 355 (noting that if defendant's "practice of using celebrity and human interest photographs without licensing were to become widespread, it is intuitive that the market for such images would diminish correspondingly").

[107] *See* 17 U.S.C. § 504(a).

[108] Thoroughbred Software Int'l, Inc. v. Dice Corp., 488 F.3d 352, 358 (6th Cir. 2007) (quoting Thoroughbred Software Int'l, Inc. v. Dice Corp., 439 F. Supp. 2d 758, 772 (E.D. Mich. 2006)); 17 U.S.C. § 504(b).

[109] *See e.g.*, Pasatieri v. Starline Prods., Inc., No. 18-CV-4688, 2021 U.S. Dist. LEXIS 149131, at *2 (E.D.N.Y. Aug. 9, 2021) (using Getty Images license as benchmark).

[110] *See, e.g.*, Davis v. Gap, Inc., 246 F.3d 152, 166 (2d Cir. 2001) ("The question is not what the owner would have charged, but rather what is the fair market value."); Leonard v. Stemtech Int'l, Inc., 834 F.3d 376, 391 (3d Cir. 2016) (finding that the fair market value approach for calculating damages is an acceptable approach to valuing the defendants' uses of photographs).

photography lawsuits, the actual damages are nothing more than the lost licensing fee for the image, which varies greatly depending on the photographer and the image. For example, Michael Grecco, one of the photographers in the Study, has licensed his images for $17,500,[111] but sometimes his images license for mere dollars.[112] Likewise, Andrew Paul Leonard, another of the photographers in the Study, has licensed his images for fees ranging from under $100 to $6,500.[113] Meanwhile, many photos license for "as little as tens or hundreds of dollars."[114]

Alternatively, photographers who register their works with the Copyright Office "within three months after the first publication of the work" or prior to the infringement may elect to receive statutory damages.[115] The range of statutory damages is between $750 and $30,000, "as the court considers just."[116] In cases where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," the court has discretion to reduce the statutory damages to $200.[117] Statutory damages are meant to provide "an appropriate sanction to ensure that the cost of violating the copyright laws is substantially greater than the cost of complying with them."[118] Therefore, an award of statutory damages higher than the actual damages is justified in part by the need to "put 'infringers on notice'"[119] and deter future infringement.[120] Courts also recognize the need to assess substantial statutory damages against defendants who are in the publishing industry, and therefore are "in

[111] *See* Michael Grecco Prods., Inc. v. 8 Decimal Cap. Mgmt., No. 20-CV-07466, 2021 U.S. Dist. LEXIS 116586, at *20–21 (N.D. Cal. June 1, 2021).

[112] Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 63 (S.D.N.Y. Mar. 9, 2021) (noting that a Grecco photo of Xena the Warrior Princes "was licensed 11 times between 2009 and 2013, generating $3.94 in fees for Grecco, and has not been licensed since").

[113] *Leonard*, 834 F.3d at 382–83.

[114] Cullins, *supra* note 1; *see also* Mango v. Democracy Now! Prods., Inc., No. 18-CV-10588, 2019 U.S. Dist. LEXIS 123550, at *12 (S.D.N.Y. July 24, 2019) ("The highest licensing fee that Mango charges on photo licensing websites appears to be $220 for a single photograph.").

[115] 17 U.S.C. § 412.

[116] 17 U.S.C. § 504(c)(1).

[117] 17 U.S.C. § 504(c)(2).

[118] Joe Hand Promotions, Inc. v. Alburl, No. 5:18-CV-1935, 2020 U.S. Dist. LEXIS 29309, at *16–17 (N.D. Ala. Feb. 20, 2020) (citing Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1229–30 (7th Cir. 1991); Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1153 (S.D. Ala. 1996); Sailor Music v. IML Corp., 867 F. Supp. 565, 570 (E.D. Mich. 1994); Major Bob Music v. Stubbs, 851 F. Supp. 475, 481 (S.D. Ga. 1994)).

[119] Reed v. Ezelle Inv. Props. Inc., 353 F. Supp. 3d 1025, 1038 (D. Or. 2018) (quoting Broad. Music, Inc. v. R Bar, 919 F. Supp. 656, 660 (S.D.N.Y. 1996)).

[120] *See* Bryant v. Media Right Prods., Inc., 603 F.3d 135, 143–44 (2d Cir. 2010).

a position to repeat the unauthorized reproduction of copyrighted material."[121]

Additionally, courts award statutory damages when there is no proof of the plaintiff's actual damages or the infringer's profits.[122] Even when awarding statutory damages, courts generally try to ensure that the statutory damages plausibly relate to the plaintiff's actual damages.[123]

In cases of willful infringement of an image, a photographer may recover a maximum of $150,000 per work infringed.[124] A plaintiff can establish willful infringement by demonstrating that the defendant was aware, or should have been aware, of the infringing use of the photograph.[125] Cease-and-desist letters and injunctive relief requests can be used to show willfulness.[126] Also, courts may infer willfulness when a defendant defaults.[127]

On occasion, a court will infer willfulness based on the defendant's industry. For example, some courts will assume that those who work in publishing or media should have a greater understanding of copyright law.[128] Also, one court concluded that a defendant who was an "experienced apparel manufacturer and seller" acted with reckless disregard by "printing *identical* photographs onto its products."[129]

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[121] *See* Bass v. Diversity Inc. Media, No. 19-CV-2261, 2020 U.S. Dist. LEXIS 93318, at *9–10 (S.D.N.Y. May 28, 2020) (noting that "large statutory damages award[s]" may be available where the defendant is a "serial copyright infringer, or . . . continues to infringe copyrights in spite of repeated notices of infringement." (quoting Van Der Zee v. Greenidge, No. 03-CV-8659, 2006 U.S. Dist. LEXIS 400, at *6 (S.D.N.Y. Jan. 6, 2006))); *see also* Bigelow v. Jerrick Ventures, LLC, No. 20-CV-1412, 2021 U.S. Dist. LEXIS 125372, at *7 (S.D.N.Y. July 2, 2021).

[122] *See* EMI April Music Inc. v. 4MM Games, LLC, No. 12 Civ. 2080, 2014 U.S. Dist. LEXIS 11448, at *11 (S.D.N.Y. Jan. 13, 2014) (citing Lucerne Textiles, Inc. v. H.C.T. Textiles Co., No. 12 Civ. 5456, 2013 U.S. Dist. LEXIS 7820, at *7 (S.D.N.Y. Jan. 17, 2013), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 42555 (S.D.N.Y. Mar. 26, 2013)).

[123] *See, e.g.*, Zosma Ventures, Inc. v. Nazari, No. CV 12-1404, 2013 U.S. Dist. LEXIS 198279, at *8 (C.D. Cal. Sept. 23, 2013).

[124] 17 U.S.C. § 504(c)(2).

[125] *See* Johnson v. Classic Material NY, LLC, No. 19-CV-10529, 2021 U.S. Dist. LEXIS 57182, at *10 (S.D.N.Y. Mar. 25, 2021) (citing Hamil Am., Inc. v. GFI, Inc., 193 F.3d 92, 97 (2d Cir. 1999)).

[126] *See* Hirsch v. Forum Daily, No. 18-CV-6531, 2021 U.S. Dist. LEXIS 26752, at *19 (E.D.N.Y. Feb. 9, 2021).

[127] *See* Hirsch v. Sell It Soc., LLC, No. 20 CV 153, 2020 U.S. Dist. LEXIS 184247, at *9 (S.D.N.Y. Oct. 5, 2020) ("Copyright infringement is deemed willful by virtue of a defendant's default." (quoting Rovio Ent., Ltd. v. Allstar Vending, Inc., 97 F. Supp. 3d 536, 546 (S.D.N.Y. 2015))).

[128] *See* Farrington v. Fingerlakes1.com, Inc., No. 19-CV-6802, 2020 U.S. Dist. LEXIS 235712, at *14 (W.D.N.Y. Dec. 15, 2020) (finding that willfulness demonstrated by defendant's default and its operation of a website that publishes articles weighed in support of a substantial award of statutory damages); *see also* Fallaci v. New Gazette Literary Corp., 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (charging publisher with particular awareness of the importance of copyright law).

[129] *Johnson*, 2021 U.S. Dist. LEXIS 57182, at *10.

Similarly, a website developer was hit with $30,000 in statutory damages for including an infringing photo on a client's website because "as a website developer, [defendant] ought to know the importance of respecting copyright law as [defendant] itself engages in the creative process."[130]

Given that typical licensing fees in photography cases are far less than $30,000 per work, successful plaintiffs in copyright lawsuits generally elect to receive statutory damages.[131] The amount of statutory damage awards in photography cases are all over the board depending on the district. Often, courts "use a multiple of a licensing fee in calculating statutory damages,"[132] and an award of two to three times the licensing fees has repeatedly been held to be appropriate.[133] If the infringement was willful, courts may make higher awards.[134]

Courts in the Second Circuit—which includes the Southern District of New York, which had the greatest number of copyright filings during the Study Period—usually refuse to award the plaintiff the maximum or "substantial" statutory damages in cases involving the single use of an image.[135] When the photographer does not provide evidence of the standard licensing fee, courts in the Second Circuit typically award between $1,000 and $5,000 per infringed work.[136] However, the Second Circuit upheld a jury award for willful

[130] Prokos v. Grossman, No. 19-CV-4028, 2020 U.S. Dist. LEXIS 25591, at *5–6 (E.D.N.Y. Feb. 12, 2020).

[131] *See, e.g.*, *Johnson*, 2021 U.S. Dist. LEXIS 57182, at *10–12.

[132] Michael Grecco Prods. v. 8 Decimal Cap. Mgmt., No. 20-CV-07466, 2021 U.S. Dist. LEXIS 116586, at *20 (N.D. Cal. June 1, 2021) (collecting cases).

[133] *See, e.g.*, Sadowski v. Shivley, No. 1:18-CV-01703, 2019 U.S. Dist. LEXIS 188160, at *6–7 (D. Or. Oct. 30, 2019) (collecting cases and awarding three times licensing fees for willful infringement of two photos for a total of $9,735); Crisman v. Van Der Hoog, No. 20-CV-02723, 2021 U.S. Dist. LEXIS 211807, at *5 (N.D. Cal. Nov. 2, 2021) (acknowledging that there is "a 'rule of thumb' in infringement cases that damages should be approximately three times the amount of the estimated licensing fee" (quoting Broad. Music, Inc. v. JMN Rest. Mgmt. Corp., No. 14-CV-01190, 2014 U.S. Dist. LEXIS 145871, at *7–8 (N.D. Cal. Oct. 9, 2014))).

[134] *See, e.g.*, Howarth v. FORM BIB LLC, No. 18-CV-7047, 2020 U.S. Dist. LEXIS 83566, at *7 (S.D.N.Y. May 11, 2020) (awarding five times the licensing fees per work); BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 412 (S.D.N.Y. 2016) (awarding five times the licensing fee).

[135] *See, e.g.*, Verch v. Sea Breeze Syrups, Inc., No. 19-CV-5923, 2020 U.S. Dist. LEXIS 152357, at *9–10 (E.D.N.Y. Aug. 20, 2020) (collecting cases), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 237715, at *2 (E.D.N.Y. Dec. 17, 2020); Dermansky v. Tel. Media, LLC, No. 19-CV-1149, 2020 WL 1233943, at *5 (E.D.N.Y. Mar. 13, 2020) (collecting cases).

[136] *See, e.g.*, Hirsch v. Sell It Soc., LLC, No. 20 CV 153, 2020 U.S. Dist. LEXIS 184247, at *10, *12 (S.D.N.Y. Oct. 5, 2020) (awarding $5,000 in statutory damages for a single use infringement where plaintiff had not presented evidence of licensing fee history or actual losses); Idir v. La Calle TV, LLC, No. 19-CV-6251, 2020 U.S. Dist. LEXIS 125102, at *9 (S.D.N.Y. July 15, 2020) (awarding $2,500 in statutory damages where "the need to deter such conduct justifies an award greater than the minimum of $750, but a higher award is not warranted where there is no evidence of actual losses or additional evidence of willfulness on the part of the defendant"

infringement of two photos for $30,000 and $100,000 in damages, respectively, even though there was no direct correlation between the statutory damages and the photographer's actual damages.[137]

Although courts have awarded a wide range of statutory damages in photograph cases, at least in the Second Circuit, the maximum amount for willful infringement—$150,000—is rarely awarded in copyright cases of any type.[138] However, there are outlier cases.[139] For example, in *Warrington v. Taylor*,[140] a court in the Central District of California awarded a photographer the statutory maximum of $600,000 for the copyright infringement of four photographs.[141] The defendant, who had reproduced and displayed the photographs in print and online magazines, defaulted.[142] In determining the damages, the court noted that the defendant had ignored the photographer's cease and desist letter and allegedly "refused to cooperate or even acknowledge fault" when the photographer attempted to informally resolve the matter.[143] Moreover, the defendant failed to remove the photographs from circulation.[144]

Similarly, in *Doggie Dental, Inc. v. Shahid*,[145] Judge Seeborg granted a default judgment in favor of the plaintiff and awarded it $300,000 for the infringement of two photographs, even though the magistrate judge only had recommended statutory damages in the amount of $4,500.[146] The photographs had been created by the

(citing *Dermansky*, 2020 WL 1233943, at *6)); *Verch*, 2020 U.S. Dist. LEXIS 152357, at *10–11 (recommending $1,000 in statutory damages where "there is only one alleged act of infringement, there are no cease-and-desist letters, there are no requests for injunctive relief, the usual licensing fee has not been provided, and there is no evidence of actual harm"), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 237715, at *2 (E.D.N.Y. Dec. 17, 2020).

[137] *See* Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 123, 126–27 (2d Cir. 2014).

[138] *See* Peer Int'l Corp. v. Max Music & Ent., Inc., No. 03 Civ. 0996, 2004 U.S. Dist. LEXIS 12760, at *12–13 (S.D.N.Y. July 9, 2004) (collecting cases).

[139] *See, e.g.*, Erickson Prods. Inc. v. Kast, 2021 WL 528769, at *38–39 (N.D. Cal. Feb. 12, 2021) (affirming the jury's statutory damage award of $150,000 per photo and awarding Erickson $450,000 in statutory damages), *appeal filed*, No. 21-15459 (9th Cir. Mar. 15, 2021); Getty Images (U.S.), Inc. v. Virtual Clinics, No. C13-0626, 2014 WL 1116775, at *1, *5 (W.D. Wash. Mar. 20, 2014) (awarding Getty maximum statutory damages of $300,000 for website developers' use of two images to design websites for veterinarian offices).

[140] Warrington v. Taylor, No. CV 21-06583, 2022 U.S. Dist. LEXIS 55312 (C.D. Cal. Mar. 9, 2022).

[141] *Id.* at *9.

[142] *Id.* at *1–2.

[143] *Id.* at *2.

[144] *Id.* at *8–9.

[145] Doggie Dental v. Shahid, No. 19-CV-01705, 2021 U.S. Dist. LEXIS 195462 (N.D. Cal. Aug. 2, 2021).

[146] *Id.* at *1–2.

inventor of a pet chew toy.[147] The defendant, who operated a pet supply retailer, displayed the images on his website, where he also sold the chew toy without authorization.[148] Defendant's unauthorized selling of the chew toy, which deprived Doggie Dental of sales, may have been a factor in awarding enhanced damages for willfulness although Judge Seeborg's opinion does not expressly state so.[149]

Another court, in awarding the maximum amount of $30,000 in statutory damages, noted that the defendant's conduct "was egregious willfulness" which "could trigger the application of enhanced damages under 17 U.S.C. § 504(c)(2) of up to $150,000."[150] In that case, the defendant website designer, who admitted to being a repeat offender, not only used an infringing image on his client's website but also advised his client, who wanted to settle, to not pay the photographer.[151] But because plaintiff had not sought enhanced damages, the court did not award them.[152]

In addition to actual or statutory damages, a court may award full costs, including reasonable attorneys' fees, to the prevailing party in a claim arising under the Copyright Act.[153] When photographs license for modest amounts, making it cost prohibitive for a photographer to bring a copyright infringement lawsuit in federal court, a court may be inclined to award attorneys' fees.[154] This ensures that photographers can hire attorneys to enforce the copyrights, otherwise "defendants will not respect photographers' rights if they are permitted to infringe without facing the prospect of suit and payment of attorneys' fees."[155] Costs typically include the filing fee for the lawsuit and the cost of serving the complaint.[156]

[147] Complaint at 1–2, *Doggie Dental*, 2021 U.S. Dist. LEXIS 195462 (No. 19-CV-01705).
[148] *Id*. at 4.
[149] *See Doggie Dental*, 2021 U.S. Dist. LEXIS 195462, at *1.
[150] Prokos v. Grossman, No. 19-CV-4028, 2020 U.S. Dist. LEXIS 25591, at *5–6 (E.D.N.Y. Feb. 12, 2020).
[151] *Id*. at *1.
[152] *Id*. at *5.
[153] *See* 17 U.S.C. § 505.
[154] *See* Cuffaro v. Fashionisto LLC, No. 19-CV-7265, 2020 U.S. Dist. LEXIS 121890, at *16–17 (S.D.N.Y. July 9, 2020).
[155] *Id*. at *17.
[156] Master Grp. Glob. Co. v. Toner.Com Inc., No. 19-CV-6648, 2020 WL 5260581, at *15 (E.D.N.Y. Aug. 10, 2020), *report and recommendation adopted*, 2020 WL 5259057 (Sept. 3, 2020).

II. SUMMARY OF THE STUDY FINDINGS

Between March 1, 2020, and March 1, 2021, the Author analyzed the complaints (the "Complaints") of 1,157 lawsuits (the "Lawsuits") that alleged the copyright infringement of a photograph in a United States district court.[157] The search terms "copyright /3 infring! and (photo! or image)" were used to identify the pool of relevant complaints within Bloomberg and LexisNexis. From that pool, only complaints that alleged the copyright infringement of a photograph or image in violation of 17 U.S.C. § 504 or that sought a declaratory judgment of non-infringement under 17 U.S.C. § 504 were included in the Study. Complaints that were later amended or transferred to another venue were only counted once in the Study using the most recent filing.

Once the pool of relevant complaints was identified, the Author used BloombergLaw to automatically code factors such as the case name, filing date, and district. Factors such as status of the parties, type of use, where the use occurred, and similarity of images were manually coded as explained later in the Article. Highlights from the Study are summarized below.[158]

A. Who Were the Plaintiffs Bringing the Lawsuits?

The Plaintiffs were classified as either a professional photographer, a stock photography agency, a non-professional photographer or "amateur," a non-stock photo business, or other.[159] Almost 94% percent of the Plaintiffs were classified as professional photographers or stock agencies.[160]

Individuals and businesses were classified as professionals if they offered photography services for a fee or advertised their images for sale or licensing. This category also included individuals who

[157] Eckhause, *supra* note 15. The Author attempted to identify every complaint filed during the Study Period that alleged the infringement of a copyrighted image, but some complaints may have been missed.

[158] The results of the Study are on file with the Author.

[159] For declaratory judgment actions, the defendant, who is the copyright holder of the image, was classified as a plaintiff while the plaintiff, who is the alleged infringer, was classified as the defendant for purposes of the Study results. Only three lawsuits in the Study were filed by plaintiffs seeking declaratory judgments of non-infringement. *See* Complaint at 1, Active Network LLC v. Adlife Mktg. & Commc'ns Co., Inc., No. 3:20-CV-01598 (N.D. Tex. dismissed Oct. 14, 2020); Complaint at 1, Krueger v. Adlife Mktg. and Commc'ns Co., Inc., No. 2:20-CV-07083, 2020 U.S. Dist. LEXIS 233624 (C.D. Cal. Dec. 10, 2020); Complaint at 1, Paul Rudolph Found., Inc. v. Paul Rudolph Heritage Found., No. 1:20-CV-08180, 2021 U.S. Dist. LEXIS 121138 (S.D.N.Y. Jun. 29, 2021).

[160] *See infra* Part II.A.

inherited the copyrights of professional photographers[161] and businesses that handle the licensing of a specific photographer's works. For example, the Duffy Archive Limited is the licensor of the photos of Brian Duffy,[162] who is celebrated for his photos of David Bowie.[163] If the complaint alleged that the Plaintiff was a professional photographer, the Author confirmed the professional status of the Plaintiff by conducting an internet search of the Plaintiff's name to determine if they had a website or social media page where they offered their services and products. Even if the Plaintiff was an unsuccessful photographer—meaning they did not make much money from their work—they were still classified as a professional if they offered to sell their services or images. Conversely, a Plaintiff was classified as a non-professional if they did not regularly advertise their images for sale or licensing or offer their services for a fee.

A Plaintiff was classified as a stock photography agency if it was a business that does not create photographs but instead compiles images from multiple photographers and offers them for sale or licensing to third parties.[164] A Plaintiff was classified as a non-stock photo business if it was a commercial entity that created an image to help advertise its products or services, not to sell the image itself.

A Plaintiff who did not fit into any of the above categories was classified as "other."

[161] *See*, *e.g.*, Complaint at 1–2, Thie v. Christopher, No. 2:21-CV-01718 (C.D. Cal. dismissed June 1, 2021).

[162] Complaint at 1, Duffy Archive Ltd. v. Caracol Broad., Inc., No. 1:20-CV-22818 (S.D. Fla. dismissed Sept. 8, 2020).

[163] *See* Federica Fiumell, *Brian Duffy David Bowie: Five Session*, JULIET (Nov. 3, 2016), https://www.juliet-artmagazine.com/en/brian-duffy-david-bowie-five-session [https://perma.cc/8PV3-N4LY].

[164] *See* Hong Luo & Julie Holland Mortimer, *Copyright Infringement in the Market for Digital Images*, 106 AM. ECON. REV. 140, 141 (2016) (describing stock photography agencies).

Table 1: Status of the Plaintiff[165]

Type of Plaintiff	Cases Filed	Percentage
Professional	907	78.39%
Stock Photo Agency	179	15.47%
Amateur	16	1.38%
Non-Stock Photo Business	37	3.20%
Other	18	1.56%

1. The Professional Photographers

The professional photographers in the Study specialized in a wide range of subject areas including photojournalism,[166] astrophotography,[167] travel,[168] outdoors,[169] hummingbirds,[170] aerial,[171] sports,[172] portrait,[173] and insects.[174] The Plaintiffs also included famous photographers like Penny Gentieu,[175] who is

[165] *See* Eckhause, *supra* note 15.
[166] Complaint at 2, Harbus v. Joongangilbo USA, Inc., No. 1:20-CV-2417 (E.D.N.Y. dismissed Dec. 16, 2020).
[167] Complaint at 2, Ayiomamitis v. Condé Nast Int'l Inc., No. 1:20-CV-6471, 2020 U.S. Dist. LEXIS 209327 (S.D.N.Y. Nov. 9, 2020).
[168] Complaint at 1, De Vleeschauwer v. The Arrangement Catalog, L.P., No. 3:20-CV-02052 (N.D. Tex. dismissed Dec. 11, 2020).
[169] Complaint at 2, Champlin v. Chapman Hall Realtors, Inc., No. 1:20-CV-03790 (N.D. Ga. dismissed Dec. 8, 2020).
[170] Complaint at 1, Elam v. Zazzle Inc., No. 2:20-CV-02167 (W.D. Tenn. dismissed Feb. 14, 2022).
[171] Complaint at 2–3, Davidson v. Here North Am., LLC, No. 9:20-CV-80983 (S.D. Fla. dismissed Sept. 14, 2020).
[172] Complaint at 1, Quan v. NBCUniversal Media, LLC, No. 8:20-CV-01386 (C.D. Cal. dismissed Oct. 2, 2020).
[173] Complaint at 3, Coupon v. AAF Nation, No. 3:20-CV-00617 (S.D. Cal. dismissed Dec. 9, 2020).
[174] Complaint at 1, Wild v. AAA Pest Prot., Inc., 2020 U.S. Dist. LEXIS 66800 (S.D. Fla. Apr. 15, 2020).
[175] Complaint at 3, Gentieu v. Dollar Gen. Corp., No. 20-CV-60475, 2021 U.S. Dist. LEXIS 3023 (C.D. Cal. Jan. 7, 2021).

celebrated for her photographs of babies,[176] Steve Sands,[177] "who is sometimes called New York's most notorious paparazzo,"[178] and celebrity portraiture photographer Mark Seliger.[179] Several well-known rock 'n' roll photographers brought lawsuits during the Study Period, including Dennis Morris,[180] who is known for his iconic photos of Bob Marley and the Sex Pistols,[181] and Mick Rock,[182] who was a "rock 'n' roll photographer as famous for his hedonistic lifestyle as for his iconic images of debauchery and excess."[183]

By far, the most prolific filer among the Plaintiffs was Larry Philpot, a self-proclaimed "renowned freelance photographer,"[184] who specializes in concert photography.[185] Philpot largely recycled the same complaint to file fifty-five lawsuits across the United States.[186] Unlike Morris and Rock, Philpot "has never been hired to photograph a concert or other event," and although he sells prints of his works, he estimates he has made "less than $100 total."[187]

A number of the lawsuits were brought by real estate and architectural photographers. Many of them were serial litigants. For

[176] About the Photographer (Gentieu, Penny), MUSEUM OF CONTEMP. PHOTOGRAPHY, https://www.mocp.org/detail.php?t=objects&type=browse&f=maker&s=Gentieu%2C+Penny&record=2 [https://perma.cc/474S-M4W3].

[177] *See*, *e.g.*, Complaint at 1–2, Sands v. What's Trending, Inc., No. 20-CV-2735, 2021 U.S. Dist. LEXIS 33503 (S.D.N.Y. Feb. 23, 2021).

[178] Alan Feuer, *The Rebel at the Velvet Rope*, N.Y. TIMES (Feb. 22, 2013), https://www.nytimes.com/2013/02/24/nyregion/steve-sands-celebrity-photographer-rebels-at-the-velvet-rope.html [https://perma.cc/G7XL-HPV9].

[179] Complaint at 3, Seliger v. Access Indus., Inc., No. 1:20-CV-07849 (S.D.N.Y. dismissed Mar. 9, 2021); *Photographer Mark Seliger on the Stories Behind His Iconic Images*, CHRISTIE'S, https://www.christies.com/features/Mark-Seliger-10483-7.aspx [https://perma.cc/HF2P-GW4L].

[180] Complaint at 2–3, Morris v. Literally Media Ltd., No. 2:20-CV-04687 (C.D. Cal. dismissed Dec. 1, 2020).

[181] *See* Angie Martoccio, *Bob Marley at 75: A Legend in Photos*, ROLLING STONE (Feb. 9, 2020), https://www.rollingstone.com/music/music-news/bob-marley-75-birthday-photographs-dennis-morris-948789 [https://perma.cc/9RMC-DZFQ]; Andy Greene, *Behind the Filth and the Fury: Rarely Seen Sex Pistols Photos*, ROLLING STONE (Aug. 21, 2014), https://www.rollingstone.com/music/music-lists/behind-the-filth-and-the-fury-rarely-seen-sex-pistols-photos-15389 [https://perma.cc/VKD2-227W].

[182] Complaint at 1, 3, Rock v. Enfants Riches Deprimes, LLC, No. CV 20-2172, 2020 U.S. Dist. LEXIS 259435 (C.D. Cal. June 30, 2020).

[183] Bob Morris, *Mick Rock Survives the '70s to Shoot Again*, N.Y. TIMES (Dec. 14, 2011), https://www.nytimes.com/2011/12/15/fashion/mick-rock-70s-photographer-has-new-exhibition.html [https://perma.cc/L8JD-TBMY].

[184] Philpot v. Emmis Operating Co., No. 1:18-CV-00816, 2019 U.S. Dist. LEXIS 112440, at *5 (W.D. Tex. July 8, 2019).

[185] Complaint at 1–2, Philpot v. Alpha Media USA, LLC, No. 3:20-CV-00717 (D. Or. dismissed Aug. 11, 2020).

[186] *See* Eckhause, *supra* note 15.

[187] Philpot v. WOS, Inc., No. 1:18-CV-339, 2019 U.S. Dist. LEXIS 67978, at *4–5 (W.D. Tex. Apr. 22, 2019).

instance, Affordable Aerial Photography, Inc. filed twenty-two lawsuits;[188] Alexander Stross, a photographer and real estate broker, brought sixteen lawsuits;[189] and Morgan Howarth, who specializes in interior and architecture photography, filed twenty lawsuits.[190]

Some of the photographers in the Study use specialized equipment to create unique images. For example, Andrew Paul Leonard of APL Microscopic, LLC is an electron micrographer who uses field emission scanning electron microscopes to capture stem cell images.[191] He is one of the few photographers who work in this "highly technical" area,[192] and his images of bone marrow stem cells are considered "unique and scarce."[193] Another photographer in the Study developed a "tethered helium balloon camera-rigging system," which allowed him to take aerial photographs but required that he analyze "weather conditions, sun position, wind speeds and direction, and the angle from which he wished to take the desired photograph" to determine the date and time of launch.[194] Paul Reiffer, who brought twenty-five lawsuits during the Study, uses a highly expensive and specialized digital camera system to create images of remote locations, like the Arctic Circle.[195]

Other photographers in the Study go to extreme measures to capture their shots. For example, David Oppenheimer, who brought nineteen lawsuits during the Study, is a travel, aerial, and concert photographer who described "leaning out of [a] doors-removed helicopter" to take an aerial photograph of Hyde Park in Chicago.[196] Jeff Werner, who brought ten lawsuits during the Study,[197] is known

[188] *See* Eckhause, *supra* note 15; *see*, *e.g.*, Complaint at 1, Affordable Aerial Photography, Inc. v. Svanstedt, No. 1:20-CV-22228 (S.D. Fla. dismissed Sept. 10, 2020).

[189] *See* Eckhause, *supra* note 15; *see, e.g.*, Stross v. Centerra Homes of Tex., No. 1:17-CV-676, 2021 U.S. Dist. LEXIS 219239, at *3 (W.D. Tex. Sept. 27, 2021).

[190] *See* Eckhause, *supra* note 15; *see, e.g.*, Howarth v. FORM BIB, LLC, No. 18-CV-7047, 2019 U.S. Dist. LEXIS 76534, at *1 (S.D.N.Y. May 6, 2019).

[191] Complaint at 6, APL Microscopic, LLC v. Pixels.Com, LLC, No. 1:20-CV-04735 (S.D.N.Y Sept. 28, 2021); *see also* Leonard v. Stemtech Int'l Inc., 834 F.3d 376, 382 (3d Cir. 2016).

[192] *Leonard*, 834 F.3d at 382.

[193] Complaint at 2, APL Microscopic, LLC v. Steenblock, D.O., Inc., No. 21-CV-00356, 2021 U.S. Dist. LEXIS 251072 (C.D. Cal. Nov. 9, 2021).

[194] Complaint at 14, Affordable Aerial Photography v. Douglas Elliman Fla., LLC, No. 9:20-CV-81985 (S.D. Fla. dismissed Feb. 15, 2022).

[195] *See* Eckhause, *supra* note 15; Complaint at 2, Reiffer v. Joyrides Tours, Inc., No. 3:20-CV-01484 (S.D. Cal. dismissed Mar. 4, 2021); *see also* Reiffer v. World Views LLC, No. 6:20-CV-786, 2021 U.S. Dist. LEXIS 38860, at *10 (M.D. Fla. Mar. 1, 2021) (noting Reiffer's "unique technique and challenges in creating" his works), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 66500 (M.D. Fla. Apr. 6, 2021).

[196] *See* Eckhause, *supra* note 15; Complaint at 2–3, Oppenheimer v. Zencity Inc., No. 1:20-CV-07719 (N.D. Ill. dismissed Mar. 18, 2021).

[197] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint at 2–3, Werner v. Novelty Media, No. 3:20-CV-00637, 2020 U.S. Dist. LEXIS 149530 (S.D. Cal. Aug. 18, 2020).

for photographing "all manner of death-defying antics," including dangerous stunts and exotic animals, and is the only photographer to be included in the Stuntworld Hall of Fame.[198]

2. The Stock Photography Agencies

The stock photograph agency Plaintiffs included celebrity news agencies like Backgrid, which "operates one of Hollywood's largest celebrity-photograph agencies that has earned a reputation of regularly breaking scoops on sought after celebrity news."[199] During the Study Period, Backgrid filed eighteen lawsuits against media outlets like Maxim, the men's magazine publisher,[200] and celebrities such as Justin Bieber[201] and his pastor Chad Veach.[202]

Other stock photography agencies that frequently filed lawsuits during the Study Period included Stockfood America, Inc., which allegedly is "the world's leading food image agency."[203] It brought twenty-seven lawsuits during the Study Period including lawsuits against bars and restaurants that allegedly used its photographs on their websites to advertise their businesses.[204] Minden Pictures, Inc., which specializes in nature and wildlife stock photographs and licenses its works to media outlets like National Geographic and also to corporations for advertising use,[205] filed twenty lawsuits during the Study Period.[206] Lickerish, Ltd., a "photographic syndication company that licenses photographic works on behalf of an array of

[198] *Incredible Stunts: Pictures by Jeffrey R Werner*, GUARDIAN (Sept. 25, 2008), https://www.theguardian.com/books/gallery/2008/sep/24/photography?picture=337945156 [https://perma.cc/KJ2N-S8JT]; Complaint at 3, *Werner*, 2020 U.S. Dist. LEXIS 149530 (No. 3:20-CV-00637).

[199] Complaint at 3, Backgrid USA, Inc. v. Maxim, Inc., No. 2:20-CV-04029, 2020 U.S. Dist. LEXIS 116772 (C.D. Cal. July 2, 2020).

[200] *See id.* at 4; Eckhause, *supra* note 15.

[201] Complaint at 2, Backgrid USA, Inc. v. Bieber, No. 2:20-CV-04685 (C.D. Cal. dismissed June 10, 2021).

[202] Complaint at 3, Backgrid USA, Inc. v. Veach, No. 2:20-CV-04483 (C.D. Cal. dismissed June 13, 2020).

[203] Complaint at 1, Stockfood Am., Inc. v. Absolute Rts., LLC, No. 20-CV-00239 (W.D. Tex. dismissed Apr. 4, 2020).

[204] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint at 4, Stockfood Am., Inc. v. Am. Dive Bars, LLC, No. 20-CV-04237, 2020 U.S. Dist. LEXIS 237546 (C.D. Cal. Oct. 19, 2020); Complaint at 4, Stockfood Am., Inc. v. Castaways Sports Bar & Grill LLC, No. 6:21-CV-00043 (M.D. Fla. dismissed Feb. 18, 2021).

[205] *See* Minden Pictures, Inc. v. John Wiley & Sons, Inc., 795 F.3d 997, 999–1000 (9th Cir. 2015); About Us, MINDEN PICTURES, https://www.mindenpictures.com/about-us [https://perma.cc/D93W-NYTJ].

[206] *See* Eckhause, *supra* note 15; *see*, *e.g.*, Complaint, Minden Pictures Inc. v. Ammoland, Inc., No. 20-CV-02276 (D.N.J. filed Mar. 2, 2020); Complaint, Minden Pictures Inc. v. Content IQ LLC, No. 1:20-CV-02109, 2020 U.S. Dist. LEXIS 116630 (S.D.N.Y. July 2, 2020); Complaint, Minden Pictures, Inc. v. Llerrah, Inc., No. 4:20-CV-00377 (E.D. Tex. dismissed Oct. 7, 2020).

internationally renowned photographers," filed twelve lawsuits.[207] Other stock photography agencies in the Study specialized in food and grocery-related photographs,[208] automobile images,[209] and sporting event photographs.[210]

3. The Amateurs, Non-Stock Photo Businesses, and Others

The Plaintiffs in the amateurs category tended to be individuals who created memorable scenes, like a fist-wielding baby that later became a popular meme,[211] or individuals who happened to be in the right place at the right time to capture a newsworthy event.[212] For example, Alex Cruz was walking to his girlfriend's apartment when he noticed a "big commotion."[213] Cruz grabbed his iPhone to take a photograph of police officers arresting accused terrorist Sayfullo Saipov.[214] A number of media outlets then licensed the photograph to illustrate articles on the capture of Saipov.[215] However, some companies did not, which led to Cruz filing a number of copyright infringement lawsuits, including three that were filed in the Study Period.[216]

The non-stock photo businesses were companies that created the photographs at issue for commercial purposes. Generally, these lawsuits were filed by a business against a competitor for using its images. For example, E-Z Line Pipe Support Company regularly creates images of its piping products to advertise them for sale, and it brought a copyright infringement lawsuit against one of its

[207] Complaint at 2, Lickerish, Ltd. v. Duowei News, Inc., No. 1:20-CV-07216 (S.D.N.Y. Apr. 4, 2021); Complaint at 2, Lickerish, Ltd. v. Shutterstock Inc., No. 1:20-CV-05384 (S.D.N.Y. dismissed Aug. 28, 2020); *see* Eckhause, *supra* note 15; *see also* Creative Photographers, Inc. v. El Universal Online, Inc., No. 19-CV-07261, 2019 U.S. Dist. LEXIS 230579, at *1–2 (C.D. Cal. Dec. 20, 2019) (noting that "Lickerish is a photographic syndication company that publicly distributes licensed celebrity photos").

[208] Complaint at 2, Adlife Mktg. & Commc'ns Co. v. Coborn's, Inc., No. 0:20-CV-01323 (D. Minn. dismissed Dec. 18, 2020).

[209] Complaint at 3, Evox Prods. LLC v. AOL Inc., No. 20-CV-02907, 2021 U.S. Dist. LEXIS 246753 (C.D. Cal. Oct. 21, 2021).

[210] Complaint at 2, Eclipse Sportswire v. Chat Sports, Inc., No. 2:21-CV-00098, 2021 U.S. Dist. LEXIS 108167 (C.D. Cal. Jun. 7, 2021).

[211] Complaint at 3–4, Griner v. King, No. 5:21-CV-04024 (N.D. Iowa Nov. 18, 2022), *appeal docketed*, No. 22-3623 (8th Cir. Dec. 20, 2022).

[212] *See*, *e.g.*, Complaint at 2, Cruz v. CBS Broad., Inc., No. 2:20-CV-01885 (E.D.N.Y. dismissed Aug. 7, 2020).

[213] Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

[214] *Id.*

[215] *Id.*

[216] *See* Eckhause, *supra* note 15; *see*, *e.g.*, Complaint at 1, Cruz v. Gray Television, Inc., No. 20-CV-05003 (D. Neb. dismissed May 20, 2020).

competitors for allegedly using one of its photographs in an online advertisement.[217]

The other category included social media influencers and individuals who took photographs of themselves for personal marketing purposes.[218] Individuals who took photos in furtherance of their commercial activities also were included in this category. For instance, Brian Totin is a real estate agent and former photojournalist who uses his photographic expertise to create real estate photos for advertising purposes, and he filed four lawsuits during the Study Period.[219]

B. Who Were the Defendants Being Sued?

The defendants in the Study (the "Defendants") were initially classified as either a business—meaning an entity organized under a state law like a corporation, LLC, and LLP—or an individual. The Study noted whether the Lawsuits were brought against businesses ("Business Defendants"), individuals, or both.

Table 2: Status of the Defendant[220]

Who the Lawsuit Was Brought Against	**Cases Filed**	**Percentage**
Solely Business(es)	732	63.27%
Solely Individual(s)	39	3.37%
Both	386	33.36%

1. The Businesses

There were 1,813 Business Defendants in the Study because some Plaintiffs brought lawsuits against multiple entities. Business Defendants were further classified by their industries. A Defendant's

[217] Complaint at 1, E-Z Line Pipe Support Co. v. Piping Tech. & Prods., No. 3:20-CV-00176, 2021 U.S. Dist. LEXIS 83116 (S.D. Tex. Apr. 30, 2021).
[218] *See, e.g.*, Complaint at 2, Waidhofer v. Cloudflare, Inc., No. 2:20-CV-06979 (C.D. Cal. dismissed Oct. 13, 2021) (OnlyFans content creators).
[219] Totin v. Oxford Prop. Grp., No. 21-CV-3129, 2021 U.S. Dist. LEXIS 153189, at *1–2 (S.D.N.Y. Aug. 12, 2021); *see* Eckhause, *supra* note 15.
[220] *See* Eckhause, *supra* note 15.

industry was determined by looking at its website and doing a search on either Lexis, the United States Securities and Exchange Commission's EDGAR system, the Secretary of State's website, or ProQuest Business Market Research Collection. Businesses that engaged in news publishing (online, print, or broadcast) were classified as media Defendants. News was broadly defined to include reporting on current events, business, entertainment, sports, and politics. The Study further subcategorized the media Defendants into five groups: legacy news publishers, digital-native news organizations, television broadcasters, radio broadcasters, and cable. Legacy news publishers are the traditional print media companies that were started before the digital age, although most of them also now have a digital component.[221] Legacy news publishers include media companies like the *New York Times*, the *Wall Street Journal*, *Newsweek*, and the *Washington Post*.[222]

In contrast to the legacy news publishers, digital-native news outlets were born and raised on the internet.[223] Many of them traditionally aggregated content from other media companies and content creators.[224] However, more of them, like *BuzzFeed*, now are investing in creating their own journalism.[225] *Breitbart*, *Vox Media*, the *Drudge Report*, and the *HuffPost* are all examples of digital natives.[226]

In terms of the other media subcategories, television broadcasters included the traditional commercial broadcast television networks in the United States, which are ABC (the American Broadcasting Company), CBS (the Columbia Broadcasting System), NBC (the National Broadcasting Company), and Fox. The Study defined cable news networks as media companies devoted to television news broadcasts like CNN, Fox News Channel, MSNBC, and Bloomberg Television. Radio broadcasters included those companies that primarily transmit audio via terrestrial, satellite, and digital means, but also have websites in support of their business.

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[221] *See* Stan Diel, *New Media, Legacy Media and Misperceptions Regarding Sourcing*, 5 KOME 104, 105, 110 (2017).

[222] *Id.* at 109.

[223] *Id.*

[224] Lu Wu, *Did You Get the Buzz? Are Digital Native Media Becoming Mainstream?*, 6 INT'L SYMP. ON ONLINE JOURNALISM 131, 131 (2016).

[225] *Id.* at 132.

[226] Emily Bell, *Legacy Media Diverge from Digital Natives in Fight Against Facebook, Google*, COLUM. JOURNALISM REV. (July 11, 2017), https://www.cjr.org/tow_center/emily-bell-facebook-google-news-media-alliance-collective.php [https://perma.cc/48LW-MHE8]; *Matt Drudge*, BRITANNICA, https://www.britannica.com/biography/Matt-Drudge [https://perma.cc/4SJD-JRDX].

Retailers were defined as businesses that sell a variety of branded goods from different manufacturers. This category included grocery stores but excluded companies like Dolce & Gabbana, which solely sells its own brand of goods. Licensed real estate agents, realtors, or brokers were classified as realtor agency Defendants. This category excluded adjacent real estate fields like management companies and apartment finders. Among the realtor Defendants, a few of the major real estate companies were sued, such as Keller Williams Realty, Inc.[227] and Sotheby's International Realty, Inc.[228] However, the vast majority of realtor agencies were regional or local companies.[229] The Study also tracked whether the defendant was in the tourism, fashion, construction, restaurant/bar, or website development industry. The remaining Defendants were classified as coming from other industries.

The Defendants coming from other industries included Fortune 500 corporations like Walmart,[230] Proctor and Gamble,[231] and Delta Airlines.[232] However, the Defendants also consisted of many mom-and-pop businesses like Big Rob's Bail Bond Agency,[233] Nashville Pest Control, Inc.,[234] Grace Lakes Florist, Inc.,[235] and Redesign Right LLC.[236] None of these "other" Defendants were sued more than once during the Study Period.[237] Table 3 summarizes the percentage of Business Defendants that came from each industry.

[227] Complaint at 1, Begleiter v. Keller Williams Realty, Inc., No. 4:20-CV-00398 (W.D. Mo. dismissed Dec. 15, 2020).
[228] Complaint at 1, Luong v. Sotheby's Int'l Realty, Inc., No. 5:20-CV-3999 (N.D. Cal. dismissed Aug. 3, 2020).
[229] *See, e.g.*, Complaint at 4, Affordable Aerial Photography, Inc. v. Beachfront Realty, Inc., No. 1:20-CV-22220 (S.D. Fla. dismissed Nov. 2, 2020); Complaint at 4, Affordable Aerial Photography, Inc. v. United Realty Grp., Inc, No. 9:20-CV-80853 (S.D. Fla. dismissed Oct. 30, 2020); Complaint at 4, Nadeau v. Harding Realty, Inc., No. 1:21-CV-20715 (S.D. Fla. dismissed Aug. 26, 2021).
[230] Complaint at 2, Adlife Mktg. & Commc'ns Co., Inc. v. Wal-Mart.com USA, LLC, No. 2:20-CV-01711 (E.D.N.Y. dismissed July 31, 2020).
[231] Complaint at 3, Stockfood Am., Inc. v. Procter & Gamble Co., No. 2:21-CV-01286 (C.D. Cal. dismissed May 26, 2021).
[232] Complaint at 2, Lane v. Delta Air Lines, Inc., No. 1:20-CV-04542 (N.D. Ga. dismissed Mar. 30, 2021).
[233] Complaint at 2, Panoramic Stock Images, Ltd. v. Big Rob's Bail Bond Agency LLC, No. 4:21-CV-10083 (E.D. Mich. dismissed Dec. 8, 2021).
[234] Complaint at 2, Wild v. Nashville Pest Control, Inc., No. 3:20-CV-00849 (M.D. Tenn. dismissed June 6, 2021).
[235] Complaint at 2, Minden Pictures, Inc. v. Grace Lakes Florist, No. 2:20-CV-00510, 2020 U.S. Dist. LEXIS 184989 Inc. (M.D. Fla. Oct. 6, 2020).
[236] Complaint at 1–2, Howarth v. Redesign Right, LLC, No. 1:20-CV-00384 (E.D. Va. dismissed June 9, 2020).
[237] *See* Eckhause, *supra* note 15.

Table 3: Business Industries that Were Sued[238]

Industry	**Number of Defendants**	**Percentage**
Media	773	42.64%
Retailer	237	13.07%
Realtor Agency	100	5.51%
Tourism	56	3.09%
Fashion	46	2.54%
Construction	35	2.0%
Restaurant/Bar	15	< 1%
Website Developer	13	< 1%
Other	538	29.67%

2. The Individuals

Individuals were further categorized by the capacity in which they were sued. The Study noted whether an individual Defendant was sued as a principal, meaning that the Defendant was sued because of their role as the owner, founder, director, or officer of an organized business entity. The Study also observed when an individual was sued in a "doing business as" capacity. Other categories of individual Defendants were realtors (which included real estate agents and brokers); celebrities; attorneys; and content creators, which were defined as individuals who are trying to reach a large audience with curated content that is either hosted on their own website or on an existing social media platform like Instagram. This category included bloggers and social media influencers. Oftentimes, John

[238] *See* Eckhause, *supra* note 15.

Doe Defendants were unnamed principals, agents, or employees of the named Defendants.[239]

The only lawsuits brought against individuals for posting images to their personal social media accounts involved celebrities and, in one case, a content creator for OnlyFans who allegedly posted copyrighted images of herself to her OnlyFans account as well as her personal website and social media pages.[240]

Table 4: Status of Individuals Who Were Sued[241]

Status	**Number of Defendants**	**Percentage**
Does[242]	230	42.20%
Principal	156	28.62%
Realtor	82	15.05%
DBA	22	4.04%
Celebrity	20	3.67%
Content Creator	9	1.65%
Attorney	8	1.47%
Website Developer	4	< 1%
Other	14	2.57%

[239] *See, e.g.*, Complaint at 9, Bigelow v. Flyover Media, LLC, No. 2:21-CV-01806 (C.D. Cal. dismissed Aug. 16, 2021); Complaint at 23, Boffoli v. NetEase, Inc., No. 2:21-CV-00243 (C.D. Cal. dismissed Dec. 7, 2022); Complaint at 6, Perrine v. Captains Excursions, LLC, No. 3:21-CV-00079 (S.D. Cal. dismissed Aug. 3, 2021).

[240] Complaint at 4, Lock & Key Portraits & Boudoir/ Studio XO, LLC v. Tierney, No. 1:20-CV-00513 (D.R.I. dismissed Sept. 24, 2021).

[241] *See* Eckhause, *supra* note 15.

[242] Does were counted once in the number of Defendants even though the Complaint may have asserted claims against multiple Does.

3. Most Sued Defendants

Only seven Defendants were sued more than five times during the Study Period, and they almost all came from the media industry. Five of them were digital-native news outlets. The most-sued Defendant was Verizon Media, formerly Oath Inc., which had thirteen lawsuits brought against it.[243] Oath Inc., was founded in 2017[244] and until mid-2021 included digital media brands like AOL, Yahoo!, and TechCrunch.[245]

The second most-sued Defendant was BuzzFeed, Inc., which had seven lawsuits brought against it.[246] BuzzFeed, founded in 2006, focuses on digital media, and it gained fame for its pop culture articles and "listicles," which are "short, simple and topical articles structured as lists" like "7 Easy Dinners to Make This Week," although it now covers a wide range of topics including business and politics.[247] It acquired the *HuffPost* from Verizon Media in 2020.[248] Gannett Company was sued six times.[249] Gannett Company, founded in 1906, is the largest U.S. newspaper publisher, and its newspapers include *USA Today* as well as local papers in Detroit, Indianapolis, Milwaukee, Cincinnati, Nashville, Louisville, and many other cities.[250]

[243] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint, Evox Prods. LLC v. AOL, Inc., 522 F. Supp. 3d 727 (C.D. Cal. 2021) (No. 2:20-CV-02907).

[244] *See* Todd Spangler, *Tim Armstrong Unveils Oath: AOL-Yahoo Combo Is As Big As Netflix and Looking to Expand*, VARIETY (June 19, 2017), https://variety.com/2017/digital/news/tim-armstrong-aol-yahoo-oath-netflix-1202470016/ [https://perma.cc/3QUL-JNRG].

[245] Steve Kovach, *Verizon Sells Media Businesses Including Yahoo and AOL to Apollo for $5 Billion*, CNBC (May 3, 2021), https://www.cnbc.com/2021/05/03/verizon-sells-yahoo-and-aol-businesses-to-apollo-for-5-billion.html [https://perma.cc/T5PC-PFTG].

[246] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint at 2, Hunley v. BuzzFeed, Inc., No. 1:20-CV-08844, 2021 U.S. Dist. LEXIS 189420 (S.D.N.Y. Sept. 21, 2020).

[247] Wu, *supra* note 224, at 132–33, 142; *see also* Mirafuentes v. Estevez, No. 1:15-CV-610, 2015 U.S. Dist. LEXIS 166157, at *10–11 (E.D. Va. Nov. 30, 2015) (describing listicle).

[248] Ahiza García-Hodges, *BuzzFeed Acquires HuffPost as Digital Media Companies Join Forces*, NBC NEWS (Nov. 19, 2020, 2:51 PM), https://www.nbcnews.com/news/all/buzzfeed-acquires-huffpost-digital-media-companies-join-forces-n1248272 [https://perma.cc/ZJG2-LDHZ].

[249] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint, Michael Grecco Prods., Inc. v. Gannett Co., No. 1:21-CV-00909 (S.D.N.Y. dismissed June 10, 2021).

[250] *Gannett Co., Inc.*, BRITANNICA, https://www.britannica.com/topic/Gannett-Co-Inc [https://perma.cc/R93P-ZTVQ]; *About Us*, GANNETT, https://www.gannett.com/who-we-are/ [https://perma.cc/38FJ-7Y35]; *Brands*, GANNETT, https://www.gannett.com/brands/ [https://perma.cc/24ZK-FN82].

Several companies were sued five times[251] including Penske Media Corporation,[252] Blavity,[253] Barstool Sports,[254] and NetEase, Inc.[255] Penske Media Corporation was founded in 2003 and publishes numerous digital and print brands, including *Variety*, *Rolling Stone*, *WWD*, and *Deadline Hollywood*.[256] Blavity was launched in 2014, and it is a digital media company created to "economically and creatively support Black millennials across the African scape, so they can pursue the work they love, and change the world in the process."[257] Barstool Sports, founded in 2003, is a digital media company focused on sports and pop-culture.[258] The only non-media Defendant that was sued five times or more was NetEase, Inc., which is a Chinese internet technology company that mostly provides online games but also provides other content.[259]

C. Who Were the Attorneys Bringing the Lawsuits?

A handful of law firms dominated the filings in the Study. By far the most prolific filer of complaints was the Liebowitz Law Firm, PLLC, which filed 329 of the Lawsuits.[260] The other main firms filing copyright infringement lawsuits on behalf of photographers were SRIPLAW, Doniger/Burroughs Law Firm, Barshay Sanders PLLC/Sanders Law Group, and Higbee & Associates.[261]

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[251] Eckhause, *supra* note 15.

[252] *See, e.g.*, Complaint at 2, Seliger v. Penske Media Corp., No. 2:20-CV-08848, 2021 U.S. Dist. LEXIS 114441 (C.D. Cal. June 15, 2021).

[253] Complaint at 2, Mockingbird 38, LLC v. Blavity, Inc., No. 2:20-CV-11667 (C.D. Cal. dismissed Mar. 3, 2021).

[254] Complaint at 2, Sadowski v. Barstool Sports, Inc., No. 1:20-CV-01948, 2020 U.S. Dist. LEXIS 150149 (S.D.N.Y. Aug. 19, 2020).

[255] Complaint at 2, Hursey v. NetEase, Inc., No. 2:21-CV-00466 (C.D. Cal. filed Jan. 18, 2021).

[256] *About Penske Media Corporation*, PMC, https://pmc.com/about-us/ [https://perma.cc/YM6F-FH4V].

[257] Morgan DeBaun, *How Blavity Built the Leading Media Brand for Black Millennials*, THE FOUNDER HOUR, at 00:35, 23:05 (Mar. 22, 2021), https://podcasts.apple.com/us/podcast/the-founder-hour/id1308141699?i=1000513917440 (last visited Jan. 7, 2003).

[258] Jason Ankeny, *The Man Behind the 'Bible of Bro Culture,'* ENTREPRENEUR (Dec. 13, 2013), https://www.entrepreneur.com/article/229401 [https://perma.cc/L5ZA-YWTK].

[259] *Investor Relations Home*, NETEASE, https://ir.netease.com/ [https://perma.cc/5R7U-XD34].

[260] *See* Eckhause, *supra* note 15.

[261] *See* Eckhause, *supra* note 15.

Table 5: Law Firms[262]

Law Firm	Cases Filed	Percentage
Liebowitz Law Firm	330	28.52%
SRIPLAW	191	16.50%
Doniger/Burroughs	123	10.63%
Barshay Sanders/Sanders Law Group	51	4.40%
Higbee & Associates	38	3.28%
Other Firms	424	36.65%

D. What Did the Defendant Allegedly Infringe?

Over 96% of the Complaints attached images of the original image and the allegedly infringing one.[263] Visual comparisons were made of the images to determine whether the Defendant appeared to have copied the original image Some of the alleged infringers cropped[264] or altered the color of the original image.[265] Others superimposed text near the image.[266] Only 1% of the Lawsuits involved situations where the Defendant allegedly used the Plaintiff's photograph to create a derivative work such as an illustration[267] or new artwork.[268] Only one Lawsuit involved an allegedly infringing image that was different than the original photograph.

[262] *See* Eckhause, *supra* note 15.
[263] *See* Eckhause, *supra* note 15.
[264] *See, e.g.*, Complaint at 3, Ex. 2, Fotohaus, LLC v. Maestro Dev., LLC, No. CV 20-2613, 2020 U.S. Dist. LEXIS 108840 (C.D. Cal. June 20, 2020).
[265] *See, e.g.*, Complaint at 3, Ex. 3, Fotohaus, LLC v. Council on Tall Bldgs. & Urb. Habitat, No. 1:20-CV-05432 (N.D. Ill. dismissed Dec. 30, 2020).
[266] *See, e.g.*, Complaint at Ex. A, Ex. B, Terrell v. Wolf + Friends, LLC, No. 1:20-CV-01729 (E.D.N.Y. dismissed Dec. 27, 2020).
[267] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint at 3, CreaProducts, Inc. v. Sidelinx, LLC, No. 2:20-CV-00848 (D. Utah filed Dec. 2, 2020).
[268] *See, e.g.*, Complaint at Ex. A, Ex. C, Duffy Archive Ltd. v. Paul Gerben Fine Art, Inc., No. 1:21-CV-01017 (E.D.N.Y. dismissed July 7, 2021).

E. Where Did the Infringement Occur?

The Study also tracked whether the alleged use of the image occurred digitally on the internet, in print—including uses in circulars[269] and packaging[270]—on a product,[271] or in a television or movie broadcast. Some of the Complaints alleged multiple types of uses.[272]

The Study further noted if the alleged infringing image was posted to a prominent social media platform such as Pinterest, LinkedIn, Facebook, Instagram, Twitter, YouTube, or Tumblr.

Table 6: Where the Alleged Infringements Occurred[273]

Where Used	**Cases Filed**	**Percentage**
At least one use on Internet	1129	97.58%
At least one use in print	31	2.67%
At least one use on product	31	2.67%
At least one use on social media	182	15.73%
Other (television, movie)	4	< 1%

[269] *See, e.g.*, Complaint at 2, Adlife Mktg. & Commc'ns Co. v. John Herr's Vill. Mkt., Inc., No. 5:20-CV-01311 (E.D. Pa. dismissed June 5, 2020).

[270] *See, e.g.*, Complaint at 4, Backgrid USA, Inc. v. Euphoric Supply Inc., No. 3:20-CV-00914, 2020 U.S. Dist. LEXIS 154225 (S.D. Cal. Aug. 24, 2020) (alleging that the defendant used plaintiff's copyrighted photo of Kanye West on product packaging of a Kanye West figurine).

[271] *See, e.g.*, Complaint at 4–5, Coupon v. AAF Nation, No. 3:20-CV-00617 (S.D. Cal. dismissed Dec. 9, 2020) (alleging that a photograph of Donald Trump holding a dove was printed on t-shirts).

[272] *See, e.g.*, Complaint at 3, Stross v. Centerra Homes of Tex., No. 1:17-CV-676, 2021 U.S. Dist. LEXIS 219239 (W.D. Tex. Sept. 27, 2021).

[273] *See* Eckhause, *supra* note 15.

F. Where Were the Lawsuits Brought?

The table below lists the top five jurisdictions where cases were filed. Overall, 33% of the lawsuits were filed in jurisdictions within New York State, 23% were filed in jurisdictions within California, and 8.7% were filed in jurisdictions within Florida.[274] Jurisdictions within just four states (New York, California, Florida, and Texas) accounted for 72% of the filings.[275]

Table 7: Top Five Jurisdictions Where Lawsuits Were Filed[276]

Jurisdiction	**Cases Filed**	**Percentage**
Southern District of New York	267	23.07%
Central District of California	200	17.28%
Eastern District of New York	107	9.24%
Southern District of Florida	67	5.79%
Northern District of California	43	3.71%

G. Why Were the Images Being Used?

The Study also classified why the images were being used by the alleged infringer. The uses fell into six main categories: advertising goods or services, illustrating an article, creating content, visually enhancing a website, creating a product, and reappropriating images from the paparazzi.

[274] *See* Eckhause, *supra* note 15.
[275] *See* Eckhause, *supra* note 15.
[276] *See* Eckhause, *supra* note 15.

The most common use was to advertise or promote goods or products.[277] These lawsuits were brought almost entirely against non-media industry Defendants.[278] For example, Alexander Wild, a Curator of Entomology at the University of Texas at Austin and macrophotographer of insects,[279] brought seven lawsuits during the Study Period against pest control companies that allegedly displayed his insect photos on their websites to market services.[280] Several fashion brands were accused of infringing on paparazzi photos to showcase celebrities wearing their products.[281] For instance, a photographer sued the fashion brand Miaouxx when it posted on Instagram his photograph of model Emily Ratajkowski wearing Miaouxx clothing.[282] In other instances, celebrities were sued for using photos taken by the paparazzi to market the celebrity's own products.[283]

The next most common use was to illustrate an article.[284] The Defendants in these lawsuits were primarily media companies.[285] However, some non-media businesses used images to accompany articles on their websites.[286]

Many Defendants were alleged to have used an image to create content for their website or social media account. Unlike the previous category, the images were not used in connection with a news story, but instead contained minimal accompanying text. In some instances, the image was simply portrayed next to a caption like "Kendall Jenner, Heading to Cipriani in New York City,"[287] or "These

[277] *See infra* Table 8.

[278] *See* Eckhause, *supra* note 15.

[279] About Alex, ALEX WILD, https://www.alexanderwild.com/About-Alex-Wild [https://perma.cc/M8XX-EWHU].

[280] *See* Eckhause, *supra* note 15; *see, e.g.*, Complaint at 2–4, Wild v. Sci. Insect Pest Control LLC, No. 1:20-CV-00639 (D. Md. dismissed July 23, 2020).

[281] *See, e.g.*, Complaint at 2–3, Eva's Photography, Inc. v. Rachel Katz, LLC, No. 1:20-CV-04663, 2021 U.S. Dist. LEXIS 7554 (S.D.N.Y. Jan. 13, 2021) (alleging that jewelry designer used plaintiff's photo of model Gigi Hadid wearing defendant's jewelry to promote its brand).

[282] Complaint at 1–2, Vila v. Miaouxx, LLC, No. 20-CV-2401, 2021 U.S. Dist. LEXIS 1872 (S.D.N.Y. Jan. 6, 2021).

[283] *See, e.g.*, Complaint at 2–3, Brewer v. Sofia Vergara Enters., Inc., No. 1:20-CV-4865, 2021 U.S. Dist. LEXIS 30487 (S.D.N.Y. Feb. 18, 2021) (alleging that actress Sofia Vergara used copyrighted photo to market her clothing brand on Instagram).

[284] *See infra* Table 8.

[285] *See* Eckhause, *supra* note 15.

[286] *See, e.g.*, Complaint at 2, Cruz v. K2 Sols., Inc., No. 1:20-CV-01638 (E.D.N.Y. dismissed Aug. 31, 2020); *see also About*, K2 SOLS., https://k2si.com/k2-solutions [https://perma.cc/2EWV-D5KV].

[287] Complaint at Ex. B, Elatab v. Julia Von Boehm Inc., No. 1:20-CV-04543, 2021 U.S. Dist. LEXIS 40925 (S.D.N.Y. Mar. 4, 2021).

are the best tacos in San Antonio, according to Yelp."[288] A listicle—"an article in the form of a list"—fell into this category.[289] Listicles are often used by websites that earn money from advertisers based on the number of visits or clicks that the site gets.[290] To lure traffic to the site, and thus earn more money, these websites rely on eye-candy images with catchy captions. Breaking news photos and celebrity images especially help drive traffic to websites. Colloquially, these websites are referred to as *clickbait*, and they are known for trying to maximize revenue by relying on content created by third parties.[291]

Another common category of usage was visual enhancement—meaning the Defendant allegedly used the image to decorate a website. For example, this category included a case of a Bay Area financial planning business using a photograph of the Oakland Bay Bridge to enhance its website.[292] In another case, Dmitry Zhigalov, who specializes in aviation photography, sued an aviation consulting group for allegedly using one of his aircraft images as a prominent backdrop on the business's homepage.[293]

Less than 3% of the Lawsuits alleged that an image was used in the manufacturing of a product like a t-shirt or coffee mug.[294] For example, in *Rock v. Enfants Riches Deprimes*, the defendants allegedly manufactured apparel and throw pillows that bore the image of Lou Reed taken from a copyrighted photograph.[295] In another case, Christopher Boffoli, who created the "Big Appetites" series of miniature human figures pictured against food

[288] Complaint at 2, Jerstad v. LatinLife Inc., No. 1:20-CV-01598 (E.D.N.Y. dismissed May 17, 2021).

[289] Arika Okrent, *The Listicle as Literary Form*, U. CHI. MAG., Jan.–Feb. 2014, at 52, http://mag.uchicago.edu/arts-humanities/listicle-literary-form [https://perma.cc/FMH6-N2EP].

[290] *See, e.g.*, Complaint at 4–5, Michael Grecco Prods., Inc. v. Chip Chick Media Inc., No. 2:20-CV-03415 (E.D.N.Y. dismissed Oct. 26, 2020) (allegedly using image in a listicle entitled "8 Reasons Why I'll Never Watch Downton Abbey"); Complaint at 5–6, Werner v. Vibey.com, LLC, No. 3:20-CV-01655, 2021 U.S. Dist. LEXIS 8854 (S.D. Cal. Jan. 15, 2020) (allegedly using image in a listicle entitled "Incredible Parents Who Defied The Odds And Broke Pregnancy Records").

[291] *See* Tantaros v. Fox News Network, LLC, 2018 U.S. Dist. LEXIS 85102, at *10 n.8 (S.D.N.Y. May 18, 2018); Complaint at 5, *Werner*, 2021 U.S. Dist. LEXIS 8854 (S.D. Cal. Jan. 15, 2020).

[292] Complaint at Ex. 2, Reiffer v. Bleske & Assocs., Inc., No. 3:20-CV-01947 (N.D. Cal. dismissed Apr. 16, 2020).

[293] Complaint at 2–3, Ex. 4, Zhigalov v. Costillo, No. 4:21-CV-00087 (E.D. Tex. dismissed Oct. 28, 2021).

[294] *See infra* Table 8.

[295] Complaint at 3–4, Rock v. Enfants Riches Deprimes, LLC, No. CV 20-2172, 2020 U.S. Dist. LEXIS 259435 (C.D. Cal. June 30, 2020).

arrangements, alleged that Zazzle advertised and sold a postcard that featured one of his photographs.[296]

The final category was celebrity reappropriation—when celebrities reappropriate images taken by the paparazzi and use them on their own social media pages.[297] While this was a small category of the Lawsuits, celebrity reappropriation litigation is a growing trend.[298]

Table 8: Why the Images Were Used[299]

Why Used	**Cases Filed**	**Percentage**
Advertise	433	37.42%
Illustrate an Article	356	30.77%
Content	198	17.11%
Visually Enhance	130	11.24%
Product	26	2.25%
Celebrity Reappropriation	14	1.21%
Other (Set Decoration)	1	< 1%

H. How the Lawsuits Were Resolved

The Study also measured how the Lawsuits were resolved. The Administrative Office of the U.S. Courts (AO) compiles data on every case filed in a federal district court, including how the case was

[296] Complaint at 2–3, Boffoli v. Zazzle Inc., No. 2:20-CV-01083 (W.D. Wash. dismissed Aug. 28, 2020).

[297] *See, e.g.*, Complaint at 3–4, Backgrid USA, Inc. v. Bieber, No. 2:20-CV-04685 (C.D. Cal. dismissed June 10, 2021) (alleging that singer Justin Bieber posted a paparazzi photo of himself to his Instagram page); Complaint at 3–4, Backgrid USA, Inc. v. Veach, No. 2:20-CV-04483 (C.D. Cal. dismissed June 13, 2020) (alleging that celebrity pastor Chad Veach posted a paparazzi photo of himself with Justin Bieber to his Instagram page); Complaint at 3, Mitchell v. James, No. 2:20-CV-08188 (C.D. Cal. dismissed Feb. 25, 2021) (alleging that basketball player LeBron James used photo of himself on his Facebook page).

[298] *See infra* Part III.C.

[299] *See* Eckhause, *supra* note 15.

resolved.[300] However, a past study demonstrated that the AO's case disposition codes are imprecise and unreliable,[301] causing one commentator to note that "[t]he best source for accurate disposition data on settlement" is "actual court records."[302] Another shortcoming of the AO disposition codes is that they do not indicate whether the dismissal was with or without prejudice.[303]

Based on the foregoing, the Author determined case resolutions by reading the docket as obtained from Bloomberg Law. Settlement was the most difficult to code. Most cases that settle ultimately result in the plaintiff filing a motion for voluntary dismissal with prejudice or the parties filing a stipulated dismissal.[304] However, it cannot be assumed that every case that was voluntarily dismissed with prejudice was a settlement. Other reasons for filing a dismissal with prejudice include a defendant who is judgment-proof, a plaintiff who lacks financial resources to continue the lawsuit, or a plaintiff who determines the case lacks merit.[305] Therefore, cases were considered to be resolved via settlement if a "Notice of Settlement," was filed or if there was an entry in the docket mentioning settlement. With respect to voluntary dismissals with prejudice, the Author examined the court documents related to the motion to determine whether a settlement was mentioned. If so, the case resolution was coded as a settlement. Nonetheless, there may be some cases that the Study coded as voluntary dismissals with prejudice but actually terminated via settlements.[306]

Cases categorized as "other" included actions that were stayed pending arbitration or pursuant to a bankruptcy stay.

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[300] Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1456 (2003).

[301] *See* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 723–24 (2004); *see also* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 118 (2009) ("Relying exclusively on AO coding can be risky, especially with respect to disposition codes used to assess settlement.").

[302] Charles A. Brown, Note, *Employment Discrimination Plaintiffs in the District of Maryland*, 96 CORNELL L. REV. 1247, 1256 (2011).

[303] *Id.* at 1257.

[304] *See* Hadfield, *supra* note 301, at 723–24.

[305] 3 CALIFORNIA PRETRIAL CIVIL PROCEDURE PRACTICE GUIDE: THE WAGSTAFFE GROUP § 58-I (2022), LEXIS.

[306] *See* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 139 (2007).

Table 9: How the Lawsuits Were Resolved[307]

How Resolved	Cases Filed	Percentage
Settlement	568	49.09%
Voluntary Dismissal with Prejudice	266	23.00%
Voluntary Dismissal without Prejudice	126	10.89%
Default Judgment	80	6.91%
Judicial Dismissal	39	3.37%
Still Pending	34	2.94%
Offer of Judgment or Consent Judgment	17	1.47%
Summary Judgment	7	< 1%
Rule 12(b)(6) Motion to Dismiss	4	< 1%
Rule 12(c) Motion for Judgment on the Pleadings	1	< 1%
Trial	1	< 1%
Other	14	1.21%

III. TAKEAWAYS FROM THE LAWSUIT FINDINGS

This section discusses trends and insights gleaned from the Study findings.[308] In general, photography copyright infringement cases have been rising since 2015.[309] The increase is due to several factors, including advancements in reverse image search technology.[310] Not only is it easier for photographers to detect online infringement, but

[307] *See* Eckhause, *supra* note 15.
[308] A limitation of the Study is that it is a snapshot of lawsuits filed during a one-year period, which may not be reflective of image infringement lawsuits as a whole.
[309] LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 3.
[310] *See infra* Part III.A.5.

there are a number of companies that specialize in copyright monitoring services.[311] Also, a cottage industry of law firms that handle image infringement cases has developed.[312]

The number of copyright lawsuits filed during the Study Period was lower than the number filed the year before.[313] In part, this may be related to the pandemic, and it may be related to the suspension of Richard Liebowitz in several districts.[314]

A. The Majority of Lawsuits Are Being Brought by Professional Photographers and Agencies, Not Trolls

This section will examine the question of whether the photographers in the Study are copyright trolls. The Study showed that most image infringement lawsuits are being brought by stock photography agencies and professional photographers, not amateurs with iPhones.[315] Unfortunately, when these photographers and agencies—whose livelihoods depend on the licensing or sale of their images—bring lawsuits, they are frequently decried as trolls despite meritorious claims. Defendants in image infringement cases may label the accusing photographer a troll because "through either ignorance of the law or the lack of perspective, [some defendants] think what they did is okay and they are outraged at the idea of having to compensate the photographer."[316] For example, Vincent Khoury Tylor, who specializes in Hawaiian landscape photography, has prevailed in a number of copyright infringement lawsuits[317] and yet is often coined a troll.[318] A court in Australia awarded Tylor

311 *See infra* Part III.C.

312 *See infra* Part III.E.

313 *See* Tom McParland, *New Report Finds Declines in Copyright, Trademark Suits*, 37 ENT. L. & FIN. NEWSL. 3, 3 (2021).

314 *See id.*; *infra* Part III.E; LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 3.

315 *See supra* Part II.A.

316 Higbee, *supra*, note 1.

317 *See, e.g.*, Tylor v. Hawaiian Springs, LLC, No. 17-00290, 2019 U.S. Dist. LEXIS 111726, at *1, *23–24 (D. Haw. July 3, 2019) (granting Tylor's motion for partial summary judgment and finding defendant liable for infringing the copyright in three of Tylor's images); Tylor v. Welch, No. CV13-00458, 2014 U.S. Dist. LEXIS 52842, at *24–25 (D. Haw. Mar. 10, 2014) (recommending default judgment and an award to Tylor of $50,000 in statutory damages for copyright infringement of his images), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 50844 (D. Haw. Apr. 11, 2014); Tylor v. Smart Enter., Inc., No. 13-00289, 2013 U.S. Dist. LEXIS 180720, at *18 (D. Haw. Dec. 5, 2013) (granting default judgment and awarding $60,000 in statutory damages).

318 Matthew Chan, *Whatever Happened with the* Vincent K. Tylor v. Vermont Woods *Case?*, DEFIANTLY.NET (Sept. 16, 2015), https://defiantly.net/whatever-happened-with-the-vincent-k-tylor-v-vermont-woods-case/ [https://perma.cc/E5NR-8GZ5] (accusing Tylor of being a copyright troll).

almost $24,000 in damages and costs when a travel agent infringed one of his images and "refused to pay a licence fee or apologise for the breach."[319]

Photographers should not be described as trolls merely because they bring a lawsuit, even if it ultimately does not succeed.[320] The Copyright Act's objective of encouraging the creation of original works is furthered "by incentivizing plaintiffs to protect their copyrights."[321] One court has observed that the tendency to brand copyright owners as trolls "ignore[s] the rights of copyright owners to sue for infringement, and inappropriately belittle[s] efforts of copyright owners to seek injunctions and damages."[322]

Nor should photographers be classified as trolls simply because of the number of lawsuits they bring. Professional photographers create and copyright thousands of images each year.[323] Given that the misuse of images is a "pervasive problem in the internet era," especially for photographers,[324] it should not be surprising that photographers may be forced to bring multiple lawsuits to protect their works. Filing numerous lawsuits, by itself, does not automatically indicate that the lawsuits are being brought for improper purposes.

Whether the photographers in the Study are trolls is a complicated question because it depends on whose definition of trolling is used. The next subsections will apply the varying definitions of *troll* to the Plaintiffs in the Study and will conclude that with some exceptions, the Plaintiffs should not be classified as trolls.

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[319] Anne Barker, *Photographers Net Thousands in Compensation After Spike in Copyright Infringement Cases*, ABC NEWS (Aug. 17, 2015, 11:11 PM), https://www.abc.net.au/news/2015-08-15/copyright-infringement-nets-photographers-thousands-of-dollars/6695906 [https://perma.cc/KD5Z-4XY4].

[320] *See* Minden Pictures, Inc. v. John Wiley & Sons, Inc., No. C-12-4601, 2014 U.S. Dist. LEXIS 60901, at *26 (N.D. Cal. Apr. 29, 2014) (stating that labeling plaintiff as a copyright troll is "unhelpful and slightly disingenuous" and observing that "it is not the purpose of the Copyright Act 'to deter litigants from bringing potentially meritorious claims, even though those claims may be ultimately unsuccessful.'" (quoting Thompkins v. Lil' Joe Recs., Inc., No. 02-61161-CIV, 2008 U.S. Dist. LEXIS 29423, at *17 (S.D. Fla. Mar. 31, 2008))).

[321] *See* Epikhin v. Game Insight N. Am., No. 14-CV-04383, 2016 U.S. Dist. LEXIS 44170, at *27 (N.D. Cal. Mar. 31, 2016) (citing Perfect 10, Inc. v. Visa Int'l Serv. Ass'n. No. C 04-00371, 2005 U.S. Dist LEXIS 48013, at *16 (N.D. Cal. Aug. 12, 2005)).

[322] Malibu Media, LLC v. Does, 950 F. Supp. 2d 779, 780 n.1 (E.D. Pa. 2013).

[323] *See* Christine Suzanne Davik, *Unregistered Complaints*, 85 MO. L. R. 357, 371 (2020).

[324] Ward v. Consequence Holdings, Inc., No. 3:18-CV-1734, 2020 U.S. Dist. LEXIS 80499, at *8 (S.D. Ill. May 7, 2020).

1. Most of the Plaintiffs Are Creators, Not Non-Practicing Entities Like Most Trolls

The term *troll*[325] originated in patent litigation, where it was derisively used to describe a non-practicing entity plaintiff—a "small company who enforces patent rights against accused infringers in an attempt to collect licensing fees, but does not manufacture products or supply services based on the patents in question."[326] A key feature of a patent troll is its emphasis on enforcement of patents through litigation rather than the development of patentable technology.[327] Applying this definition of *troll* to copyrights, Professor Shyamkrishna Balganesh has defined a copyright troll as "an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest."[328] Professor Balganesh's definition focuses on the status of the litigating entity and whether it is "a creator, distributor, or indeed user of creative expression."[329]

An example of a copyright troll under this definition is Righthaven LLC, which bought up copyrights for the sole purpose of bringing litigation.[330] Under Righthaven's scheme, it recruited copyright owners, most of whom were newspapers, and identified potential instances of copyright infringement of their works.[331] Righthaven then took a partial assignment in the potentially infringing works for the purpose of bringing litigation and trying to negotiate quick settlements.[332] Initially, Righthaven's "'sue to settle' campaign" was successful, netting approximately $352,500 in awards.[333] However, it was later revealed that Righthaven's partial assignments only transferred a right to sue for infringement without any of the other

[325] The term *troll* has its roots in a well-known fairy tale: three billy goats encounter a greedy troll, who waits under a bridge and demands tolls from anyone wishing to cross. Intell. Ventures I LLC v. Cap. One Fin. Corp., 289 F. Supp. 3d 691, 704 (D. Md. 2017). It's worth noting that the troll merely lives under the bridge; he did not build it.

[326] Diagnostic Sys. Corp. v. Symantec Corp., No. 06-1211, 2009 U.S. Dist. LEXIS 53916, at *19 n.5 (C.D. Cal. June 5, 2009) (quoting InternetAd Sys., LLC v. Opodo Ltd., 481 F. Supp. 2d 596, 601 (N.D. Tex. 2007)).

[327] *See* Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 328 (2010).

[328] Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013).

[329] *Id.*

[330] *See* Righthaven LLC v. Hoehn, 716 F.3d 1166, 1168 (9th Cir. 2013).

[331] Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1111 (2015).

[332] *Id.*

[333] Ian Polonsky, Note, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 COLUM. J.L. & ARTS 71, 80 (2012).

associated exclusive rights of the copyright holder.[334] Holding only a "bare right to sue for infringement," which is not permissible under the Copyright Act, numerous courts found that Righthaven lacked standing to pursue the copyright infringement lawsuits.[335] It then became insolvent and was forced to sell its website in 2012 for a meager $3,300.[336]

Another example of a status-defined troll is Prenda Law, which one court nicknamed a "porno-trolling collective."[337] The named principals in the law firm formed two shell companies, AF Holdings LLC and Ingenuity 13 LLC, which acquired copyrights to several pornographic films.[338] These companies then brought over 100 multi-defendant "John Doe" copyright infringement lawsuits against unknown individuals whose IP addresses were allegedly used to download the films.[339] To save filing fees, Prenda Law often named thousands of John Doe defendants in one lawsuit.[340] After subpoenaing the internet service providers of the defendants' IP addresses, Prenda Law was able to ascertain the identities of the underlying subscribers.[341] Facing potentially large statutory damages and attorneys' fees to defend themselves—in addition to the stigma of being sued for downloading pornography—many defendants chose to settle.[342] It was a successful scheme that netted Prenda Law around $15 million in less than three years.[343]

Prenda Law also had little interest in litigating its cases beyond filing the complaint.[344] If a defendant tried to litigate the case, Prenda Law would dismiss its complaint.[345] None of the cases it filed went to trial, and the only judgments in its favor resulted from a defendant's default.[346] Eventually, courts detected the shakedown scheme, and two of the named principals of Prenda Law were

334 *See Righthaven*, 716 F.3d at 1168–69.
335 *Id.* at 1170; *see also* Righthaven LLC v. Pahrump Life, No. 2:10-CV-01575, 2011 U.S. Dist. LEXIS 90345, at *9 (D. Nev. Aug. 12, 2011) (collecting cases).
336 Polonsky, *supra* note 333, at 90.
337 *See* Ingenuity 13 LLC v. Doe, No. 2:12-CV-8333, 2013 U.S. Dist. LEXIS 64564, at *3–4 (C.D. Cal. May 6, 2013).
338 Ingenuity13 LLC v. Doe, 651 F. App'x 716, 718 (9th Cir. 2016).
339 AF Holdings, LLC v. Doe, 752 F.3d 990, 992–93 (D.C. Cir. 2014).
340 *See id.* at 992.
341 *Id.*
342 *See id.* (quoting *Ingenuity 13*, 2013 U.S. Dist. LEXIS 64564, at *6–7).
343 *AF Holdings*, 752 F.3d at 993.
344 *See Ingenuity 13*, 2013 U.S. Dist. LEXIS 64564, at *7.
345 *Id.*
346 *AF Holdings*, 752 F.3d at 993.

imprisoned on federal charges ranging from conspiracy to commit mail and wire fraud and conspiracy to launder money.[347]

Using Professor Balganesh's definition, the majority of Plaintiffs in the Study would not be deemed trolls.[348] For the most part, the Plaintiffs were enforcing copyrights in images that they had created or had licensed as part of their business as opposed to images that they had purchased from others for the purposes of bringing litigation.[349]

The one Plaintiff in the Study that comes closest to satisfying Professor Balganesh's definition of troll is Mockingbird 38, LLC, which brought thirty-two lawsuits during the Study Period.[350] According to its standard complaint, it is the "legal and rightful owners of photographs which it licenses to online and print publications," and it "has invested significant time and money in building its photograph portfolio."[351] While Mockingbird 38 alleges that it is a New York Limited Liability Company,[352] the New York Secretary of State has no records for the company. Mockingbird 38 began filing copyright infringement lawsuits on December 28, 2020, and ceased doing so less than two months later on February 16, 2021.[353]

Upon examining several of the copyright registrations associated with the lawsuits, they show that Mockingbird 38 acquired copyright registrations from photographers via a written transfer agreement.[354] The terms of the transfer agreements are not known. Randy Taylor, Mockingbird 38, LLC, is listed as the contact person for rights and permissions, and his email address is listed as pps@pictureprotectionservice.com.[355] Randy Taylor is the co-founder

[347] *See* United States v. Hansmeier, 988 F.3d 428, 432–33, 433 n.3 (8th Cir. 2021).

[348] *See* Balganesh, *supra* note 328, at 732.

[349] *See* Eckhause, *supra* note 15.

[350] *See* Eckhause, *supra* note 15.

[351] *See, e.g.*, Complaint at 3, Mockingbird 38, LLC v. Terezowens.com, LLC, No. 2:21-CV-00043 (C.D. Cal. dismissed Apr. 14, 2021); Complaint at 2, Mockingbird 38, LLC v. Sell It Social, LLC, No. 1:21-CV-00013 (S.D.N.Y. dismissed Nov. 16, 2021); Complaint at 2–3, Mockingbird 38, LLC v. Eternal Lifestyle, Inc., No. 1:21-CV-20005 (S.D. Fla. dismissed Feb. 25, 2021).

[352] Complaint at 2, Mockingbird 38, LLC v. Eternal Lifestyle, Inc., No. 1:21-CV-00013 (S.D.N.Y. dismissed Nov. 16, 2021).

[353] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/party/651939/1?print=true [https://perma.cc/D89X-2RNM] (running search for Cases in Copyright Library and Party: Mockingbird 38, LLC).

[354] *See, e.g.*, U. S. Copyright Office, Registration No. VA0002209365 ("Copyright Claimant: Mockingbird 38, LLC, Transfer: By written agreement"); U. S. Copyright Office, Registration No. VA0002190731 (same).

[355] *See, e.g.*, U. S. Copyright Office, Registration No. VA0002190731.

of Picture Protection Service (PPS), which was formerly known as the Copyright Defense League.[356]

According to its website, PPS helps "major rights holders . . . from picture libraries and photo agencies to media businesses, publishers, and other large companies—to protect their image assets by enforcing their copyrights against unauthorized online commercial uses by US and Canadian infringers."[357] Like other services described below, PPS conducts online searches to find infringements of its clients' photographs.[358] Clients then determine which infringements they want to legally pursue, and PPS refers them to "a recommended law firm, which specializes in copyright."[359] PPS is paid on a contingency basis, and it touts that "[i]n a few short years," it has "settl[ed] over 500 cases (with zero jury trials)" and "recoup[ed] $5+ million in gross settlement revenue."[360]

Nowhere on PPS's website is there a portfolio of images available for licensing purposes. However, the photographers and agencies that transfer their copyrights to PPS may license their images on other websites.[361] Accordingly, Mockingbird 38 fits the classic definition of a troll because it is "focused on the enforcement, rather than the active development or commercialization" of the images in its portfolio.[362] Additionally, the average time to termination of Mockingbird's cases was about ninety-seven days, and most of its cases were settled or voluntarily dismissed with or without prejudice.[363] A lack of interest in litigating a dispute if a quick settlement is not reached can be another marker of a troll.[364]

However, to the extent that Mockingbird 38 is acting as a surrogate for the photographers or stock photo agencies that transfer their

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[356] *Copyright Defense League Rebrands as Picture Protection Service*, Cision PR Newswire (Apr. 1, 2016, 8:00 AM), https://www.prnewswire.com/news-releases/copyright-defense-league-rebrands-as-picture-protection-service-574246951.html [https://perma.cc/R6VW-ZRSC] (noting that "Picture Protection Service was originally founded in New York in 2011 as Copyright Defense League by Randy Taylor" and others).

[357] *Who We Are*, Picture Prot. Serv., http://www.pictureprotectionservice.com/who.html [https://perma.cc/YZ3A-XMQM].

[358] *What We Do*, Picture Prot. Serv., http://www.pictureprotectionservice.com/what.html [https://perma.cc/XQT9-XVEE].

[359] *Id*.

[360] *Why We Do It*, Picture Prot. Serv., http://www.pictureprotectionservice.com/why.html [https://perma.cc/8G5M-QKR4]; *see What We Do*, *supra* note 358;

[361] *See, e.g.*, Shannon Watts, Getty Images, https://www.gettyimages.com.au/photos/shannon-watts [https://perma.cc/PMM8-M6Q8] (showing Shannon Watts's images available for licensing); U. S. Copyright Office, Registration No. VA0002209365.

[362] *See* Chien, *supra* note 327, at 332.

[363] *See* Eckhause, *supra* note 15.

[364] Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2013) (describing this tactic as "bottom feed[ing]").

copyrights to it and is simply assisting these parties in protecting their images, labeling Mockingbird 38 as a copyright troll could be considered "unhelpful and slightly disingenuous."[365] Photographers who prefer to concentrate on creating new photographs but also want to protect their existing copyrights may be outsourcing the dirty business of litigation to Mockingbird 38.

2. The Plaintiffs Are Not Bringing Multi-Defendant John Doe Lawsuits Like Most Trolls

Professor Matthew Sag, who has done significant research on copyright trolls, argues that trolls should be defined by their conduct, not their status.[366] In his article, "Copyright Trolling, An Empirical Study," he defined "[t]he paradigmatic troll" as someone who "plays a numbers game[,] in which [he or she] 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."[367] One of the principal plaintiffs in that article was Malibu Media, a producer of adult videos.[368] Between 2012 and 2018, Malibu filed 7,183 cases, mostly against John Doe defendants.[369] From 2018 to 2020, it filed an additional 1,737 cases against John Doe subscribers.[370] Malibu frequently named multiple John Doe defendants in a single action to keep filing costs low.[371] Sag noted that because Malibu produced the pornographic films at issue in its lawsuits, it would not qualify as a troll under the status definition of trolling.[372] Sag argued that parties like Malibu should be classified as trolls because "[m]ulti-defendant John Doe litigation should be considered copyright trolling whenever it is motivated by a desire to turn litigation into an independent revenue stream."[373]

Courts also have been critical of Malibu for "aggressively suing for infringement," and "seek[ing] quick, out-of-court settlements which, because they are hidden, raise serious questions about misuse of

365 *See* Minden Pictures, Inc. v. John Wiley & Sons, Inc., No. C-12-4601, 2014 U.S. Dist. LEXIS 60901, at *26 (N.D. Cal. Apr. 29, 2014).
366 Sag, *supra* note 331, at 1105.
367 *Id.* at 1108.
368 *See* Shyamkrishna Balganesh & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 IOWA L. REV. ONLINE 43, 44, 51–55 (2016).
369 Strike 3 Holdings, LLC v. Doe, 351 F. Supp. 3d 160, 163 (D.D.C. 2018); *see also* Sag, *supra* note 331, at 1131.
370 LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 13.
371 *See* Sag, *supra* note 331, at 1116, 1131–32.
372 *See id.*, at 1105.
373 *Id.*

court procedure."[374] One court condemned Malibu for "us[ing] the federal courts only to obtain identifying information in order to coerce fast settlements."[375] Malibu also was criticized because it rarely litigated the cases to trial, and many cases were dismissed before a summons was even issued, which are hallmarks of trolling.[376] Malibu's trolling campaign finally came to an end in 2020[377] after the California Secretary of State suspended its corporate status because of failure to meet "its tax obligations."[378]

Strike 3 Holdings, LLC, now has taken over as the leading copyright plaintiff[379]—or troll, as one court has called it.[380] Between 2018 and 2020, it filed 4,185 lawsuits against mostly John Does, and in 2021 it filed over 700 cases.[381] Strike 3, like Malibu, holds copyright registrations in pornographic films, and it files lawsuits against John Does, identified by their IP addresses, who have allegedly downloaded the videos.[382] One court complained that, "Strike 3 floods this courthouse (and others around the country) with lawsuits smacking of extortion. It treats this Court not as a citadel of justice, but as an ATM. Its feigned desire for legal process masks what it really seeks: for the Court to oversee a high-tech shakedown."[383]

The Plaintiffs in the Study differed in several ways from Strike 3 Holdings and Malibu Media.[384] The most obvious being that the Lawsuits do not involve pornographic images, and therefore there was no shame factor that would cause a Defendant to settle quickly. Also, the Plaintiffs are different from Malibu and Strike 3 because of whom they sue. Malibu and Strike 3 went after anonymous John Doe

[374] *E.g.*, Malibu Media, LLC v. Doe, No. 15 Civ. 4369, 2015 U.S Dist. LEXIS 87751, at *10 (S.D.N.Y. July 6, 2015).

[375] *Id.* at *11 (citing Malibu Media, LLC v. Ramsey, No. 1:14-CV-718, 2015 U.S. Dist. LEXIS 151273, at *11 (S.D. Ohio May 26, 2015)).

[376] *See Ramsey*, 2015 U.S. Dist. LEXIS 151273, at *6–7.

[377] LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 13 (noting that Malibu ceased filing complaints in 2020).

[378] Ernesto Van der Sar, *California Suspended 'Copyright Troll' Malibu Media's Corporate Status*, TORRENT FREAK (Mar. 30, 2021), https://torrentfreak.com/california-has-suspended-copyright-troll-malibu-medias-corporate-status-210330/ [https://perma.cc/8E34-ATT3].

[379] *See* LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 13.

[380] Strike 3 Holdings, LLC v. Doe, 351 F. Supp. 3d 160, 161 (D.D.C. 2018).

[381] LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021, *supra* note 1, at 13.

[382] *See Strike 3*, 351 F. Supp. 3d at 163.

[383] *Id.* at 166.

[384] Although Strike 3 Holdings filed numerous lawsuits during the Study Period, it was not classified as a Plaintiff because its lawsuits stemmed from pornographic movies, not photographic photographs.

defendants—the owners of the internet subscriber accounts associated with the IP addresses that were used to download their videos.[385] However, they often lacked proof that the John Doe subscriber was the one who actually downloaded the video.[386] In contrast, the Lawsuits named specific Defendants and usually provided concrete examples of the alleged infringements by attaching pictures of the original image and the infringing image as it appeared on the Defendant's website or other materials.[387] This fact distinguishes the Plaintiffs from Strike 3, which files complaints that often "are devoid of facts sufficient to show it is entitled to relief from the named John Doe/IP subscriber."[388] Moreover, the Lawsuits generally did not name more than ten John Does, and the Doe Defendants were typically defined as "the agent, affiliate, officer, director, manager, principal, alter-ego, and/or employee of the" named defendants.[389] Furthermore, unlike Malibu and Strike 3, the photographer Plaintiffs did not target individuals who used their images for non-commercial uses.[390]

3. Most Plaintiffs Care About Deterrence, Unlike Most Trolls

Given that the purpose of copyright litigation should be to make the copyright holder whole and deter future infringement, another legal commentator has defined trolls as those that bring lawsuits for the purpose of "generating revenue rather than deterring future infringement of the work."[391] Design Basics, LLC, falls into this category of copyright troll.[392] It holds copyright registrations for thousands of single-family-home floor plans, but litigation earnings

[385] *See, e.g.*, *Strike 3*, 351 F. Supp. at 161; Malibu Media LLC v. Duncan, No. 4:19-CV-02314, 2020 U.S. Dist. LEXIS 20905, at *2 (S.D. Tex. Feb. 4, 2020).

[386] *E.g.*, *Malibu*, 2020 U.S. Dist. LEXIS 20905, at *2–3.

[387] *See supra* Part II.D.

[388] Strike 3 Holdings, LLC v. Doe, No. 18-2674, 2019 U.S. Dist. LEXIS 184513, at *20 (D.N.J. Oct. 24, 2019).

[389] *See*, *e.g.*, Complaint at 2, Stross v. Deep Focus, No. CV 21-01261, 2021 U.S. Dist. LEXIS 50855 (C.D. Cal. Mar. 18, 2021) (naming 10 Does). *But see* Complaint at 1, Grossman Enters. LLC v. Hubbard Broad., Inc., No. 20-CV-3023, 2021 U.S. Dist. LEXIS 15488 (S.D.N.Y. Jan. 26, 2021) (naming 100 John Does).

[390] *See infra* Part III.D.

[391] Elif Sonmez, *Copyright Troll or Ugly Rights Holder? The Spread of Troll-Tactics and Solutions to the Abuse of the Courts and Degradation of the Copyright Protection Scheme*, 19 INTELL. PROP. L. BULL. 137, 140 (2015).

[392] Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1097 (7th Cir. 2017) (referring to Design Basics as being like "the proverbial troll under the bridge" that "tr[ies] to extract rents from market participants who must choose between the cost of settlement and the costs and risks of litigation").

have become "a principal revenue stream" for it.[393] Design Basics is not concerned with deterring infringement because it routinely sends mass mailings containing its floor plans to home builders in addition to maintaining a website where its floor plans are easily accessible.[394] Its employees then scour the internet for infringing uses and are paid a percentage of the net recovery if they find an infringement claim.[395] One court referred to Design Basic's business model as an "Intellectual Property Shake-down."[396]

Like Design Basics, Prenda Law was accused of setting honeytraps.[397] Prenda Law often uploaded its adult films to BitTorrent sites and then laid in wait for unsuspecting viewers to download the videos.[398] Its goal was not to legitimately license its videos to viewers—or deter infringement; instead, it sought to actively encourage infringement as a means to earning income.[399]

Some defendants and courts accuse photographers of using litigation as a side hustle to supplement their photography income.[400] Indeed, some of the photographers admit this themselves. Michael Grecco, who filed sixteen lawsuits during the Study Period,[401] has confessed to having developed such "a lucrative business from suing online infringers" that he spends more time enforcing his copyrights than he does in making photographs.[402] Similarly, Eric Bowers, who filed fifteen lawsuits during the Study Period,[403] has conceded that using reverse image service companies to "quickly monetize copyright infringements has become a vital part of my own business, and it can make all the difference in keeping the lights on during the occasional slow period in business."[404] This has led to one defendant accusing

393 *Id.* at 1096–97.
394 *See id.* at 1106.
395 *Id.* at 1097.
396 *Id.* at 1096.
397 *See* Ingenuity 13 LLC v. Doe, No. 2:12-CV-8333, 2013 U.S. Dist. LEXIS 64564, at *1 (C.D. Cal. May 6, 2013).
398 *Id.* at *6.
399 *See id.* at *6–7.
400 Oppenheimer v. Griffin, No. 1:18-CV-00272, 2019 U.S. Dist. LEXIS 222849, at *18 (W.D.N.C. Dec. 31, 2019) ("[N]umerous filings suggest that the Plaintiff's course of conduct is to seek 'copyright infringement damages not to be made whole, but rather as a primary or secondary revenue stream.'" (quoting ME2 Prodss, Inc. v. Ahmed, 289 F. Supp. 3d 760, 764 (W.D. Va. 2018))).
401 *See* Eckhause, *supra* note 15; *see*, *e.g.*, Complaint, Michael Grecco Prods., Inc. v. Wrap News, Inc., No. 2:20-CV-10017 (C.D. Cal. dismissed Mar. 4, 2021).
402 Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L.R. 263, 303 (2019).
403 *See* Eckhause, *supra* note 15.
404 Eric Bowers, *ImageRights for Copyright Enforcement—the Better Alternative to DIY Infringement Management*, ASMP: STRICTLY BUS. BLOG (Feb. 3, 2016),

Bowers of bringing a "shakedown troll case[]" because, among other reasons, Bowers hired an attorney to allegedly "run[] up legal fees," and did not accept settlement offers for $350 and then $1,000.[405] Nonetheless, the court dismissed these arguments in a footnote, noting that a $350 settlement offer "is, of course, less than the filing fee paid by plaintiff" and "these arguments are irrelevant to the validity of Plaintiff's copyright infringement claim."[406]

What distinguishes photographers like Bowers and Grecco from Design Basics is their motivation. Many of the Plaintiffs have expressed their goal of bringing lawsuits to deter future infringement. For example, Michael Grecco, "dedicates his time and money to finding instances of copyright infringement and subsequently enforcing his rights under the Copyright Act." [407] Grecco also is a member of the Advocacy Committee of the American Photographic Artists, which "fights for the rights of image creators."[408] Similarly, Jeff Sedlik, who is the President and CEO of the PLUS Coalition, the global standards body for the licensing of visual artworks, is an advocate for the protection of photographers' copyrights.[409] Even PPS, the affiliate of Mockingbird 38, has proclaimed that its goal in detecting and enforcing copyright infringements is to "deter future cases of theft."[410]

Whether image takers do not understand copyright law or believe that everything on the internet is free, many simply do not want to pay to use images unless ordered by a court to do so. As paparazzo Steve Sands explained, unauthorized users of his images are "trying to put photographers like me out of business . . . . [T]hey don't want to buy our pictures, but they'll steal them."[411] Thus, photographers, like Sands who filed eight lawsuits during the Study Period,[412] often must turn to the courts to enforce their rights, and they should not

https://www.asmp.org/strictly-business-blog/imagerights-copyright-enforcement-better-alternative-diy-infringement-management/ [https://perma.cc/B6QC-AGYH].

[405] Bowers v. Taylor Payton & Assocs., No. 4:19-0144, 2019 U.S. Dist. LEXIS 230301, at *6 n.3 (W.D. Mo. Dec. 26, 2019).

[406] *Id.*

[407] Michael Grecco Prods. v. Valuewalk, LLC, 345 F. Supp. 3d 482, 493 (S.D.N.Y. 2018).

[408] *Id.*

[409] *See PLUS Board of Directors: Jeff Sedlik*, https://www.useplus.com/aboutplus/coalition_dir_detail.asp?cid=104202457633 [https://perma.cc/U9X2-YZHF]; *see also* Navarro v. P&G, No. 1:17-CV-406, 2021 U.S. Dist. LEXIS 43140, at *11 (S.D. Ohio Mar. 8, 2021) (describing PLUS Coalition's work).

[410] *Who We Are*, *supra* note 357.

[411] Justin Peters, *Why Every Media Company Fears Richard Liebowitz*, SLATE (May 24, 2018, 5:52 AM), https://slate.com/news-and-politics/2018/05/richard-liebowitz-why-media-companies-fear-and-photographers-love-this-guy.html [https://perma.cc/8GMD-KDWT].

[412] *See* Eckhause, *supra* note 15.

be demonized for doing so. One court has noted that photographers are "in a difficult and competitive profession," which is made harder by defendants who take their images without payment and fail "to muster any defense or explanation."[413] In such a situation, the court concluded that the "defendant must stand liable" for its actions.[414] If the practice of taking images from the internet without a license becomes widespread, photographers may no longer desire to enter the profession. As Yunghi Kim explained after discovering one of her images, which would have licensed for $14,000, being used on various websites, "No industry survives with giving their product away."[415] If photographers do abandon the profession, society may lose the unique, high-quality images taken by those who are willing to risk their own lives to photograph death-defying stunts or to invest in developing the technology to photograph bone marrow cells. While we will still have billions of iPhone snaps, the United States Constitution's goal of "promot[ing] the Progress of . . . useful Arts" will be undermined.[416]

However, a few of the photographers in the Study do seem driven by the desire to generate revenue as opposed to prevent infringement of their work. Professor Chip Stewart has written about a new form of copyright trolling involving an older version of the Creative Commons licenses (CCL).[417] For example, Larry Philpot has brought 148 lawsuits[418] regarding "monetarily worthless images" that he posted to sites like Wikimedia Commons and Flickr.[419] Philpot made the images available for free use under a CCL that requires attribution.[420] However, when users commit a technical violation of the attribution requirement, Philpot claims copyright infringement because he uses an older version of the CCL that automatically

[413] Sadowski v. Roser Commc'ns Network, Inc., No. 6:19-CV-592, 2020 U.S. Dist. LEXIS 10266, at *13–14 (N.D.N.Y. Jan. 22, 2020).
[414] *Id.* at *14.
[415] Sara Lewkowicz, *Social Media Creates Copyright Problem*, REPS. COMM., https://www.rcfp.org/journals/news-media-and-law-fall-2013/social-media-creates-copyrigh/ [https://perma.cc/QH4Y-4A2D].
[416] *See* Philpot v. L.M. Commc'ns II, Inc., No. 17-CV-173, 2020 U.S. Dist. LEXIS 85901, at *2 (E.D. Ky. May 15, 2020) (alteration in original) (quoting Fogerty v. Fantasy, Inc., 510 U.S. 517, 525 (1994)).
[417] Stewart, *supra* note 1, at 337–38.
[418] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/party/140559/1 [https://perma.cc/2UF8-R2P4] (running search for Cases in Copyright Library and Party: Larry Philpot).
[419] *E.g.*, Philpot v. WOS, Inc., No. 18-CV-339, 2019 U.S. Dist. LEXIS 67978, at *30–32 (W.D. Tex. Apr. 22, 2019).
[420] *Id.* at *5.

terminates upon noncompliance.[421] For example, one user was sued for attributing a photo to "Flickr/BehindTheMusic," which is "a social media account owned and controlled by Philpot" as opposed to "Photo by Larry Philpot, www.soundstagephotography.com."[422] Absent settlement, Philpot typically files a lawsuit seeking $150,000 in statutory damages for willful infringement[423] even though he is "rarely paid in money for his photography, sells very few prints of his work, and loses money on this photography work almost every year."[424]

Philpot's conduct has led one court and many commentators to brand Philpot a copyright troll.[425] Another court observed that Philpot "is more in the business of litigation (or threatening litigation) than selling his product or licensing his photograph to third parties."[426] Philpot's tactics also fly in the face of Creative Commons' mission "to promote an ethos of sharing, public education, and creative interactivity . . . . [by] expand[ing] 'the range of creative work available for others to legally build upon and share.'"[427] Additionally, it is telling that some of Philpot's images are still available on Wikimedia Commons for use pursuant to the older-version Creative Commons Attribution 2.0 license[428] instead of the newer version (Attribution 4.0 International (CC BY 4.0)), which automatically reinstates when an attribution violation has been cured in a timely fashion.[429]

Marco Verch—who filed seven complaints during the Study[430]—deploys a scheme similar to that of Philpot.[431] Verch posts his images

[421] *See* Stewart, *supra* note 1, at 337; *WOS*, 2019 U.S. Dist. LEXIS 67978, at *2.

[422] Philpot v. Emmis Operating Co., No. 18-CV-816, 2019 U.S. Dist. LEXIS 180125, at *10–11 (W.D. Tex. June 25, 2019).

[423] Philpot v. Emmis Operating Co., No. 18-CV-816, 2019 U.S. Dist. LEXIS 112440, at *5 (W.D. Tex. July 8, 2019).

[424] *WOS*, 2019 U.S. Dist. LEXIS 67978, at *30–31.

[425] *Emmis*, 2019 U.S. Dist. LEXIS 112440, at *5 (noting that Philpot "use[s] the courts as a blunt object with which to coerce nuisance value settlements from unsuspecting parties"); *e.g.* Stewart, *supra* note 1, at 345.

[426] Philpot v. L.M. Commc'ns II, Inc., No. 17-CV-173, 2020 U.S. Dist. LEXIS 85901, at *9 (E.D. Ky. May 15, 2020) (citing Malibu Media, LLC v. Doe, No. 15 Civ. 4369, 2015 U.S. Dist. LEXIS 87751, at *4 (S.D.N.Y. July 6, 2015)).

[427] Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 388 (2005).

[428] *See, e.g.*, Search Media: Willie Nelson Photo Philpot, WIKIMEDIA COMMONS, https://commons.wikimedia.org/w/index.php?search=willie+nelson+photo+philpot&title=Special:MediaSearch&go=Go&type=image [https://perma.cc/85MT-CJX3].

[429] *See Attribution 4.0 International*, CREATIVE COMMONS, https://creativecommons.org/licenses/by/4.0/legalcode [https://perma.cc/7DYQ-GDNL] (Section 6(b)(1)).

[430] *See* Eckhause, *supra* note 15.

[431] Stewart, *supra* note 1, at 337.

on sites like Flickr, where viewers are advised that they may use "his Flickr pictures without payment" under the older Creative Commons Attribution 2.0 license.[432] Like Philpot, when users republish the image without proper attribution, Verch seeks payment sometimes demanding $150,000 in damages.[433] Verch's tactics resulted in Wikipedia banning him from the platform in 2018 because they claimed that he was uploading images "with the purpose of causing harm to re-users."[434] Like Design Basics, Verch and Philpot have been accused of seeding their images on the internet with the hope that someone will use the images and improperly attribute them, thus becoming a litigation target. If deterrence was their goal, they would not make their images freely available on websites and would give users the opportunity to remedy the attribution violation instead of suing them.

4. Some Plaintiffs Are Opportunists, Using Copyright Litigation to Obtain Licensing Fees

Some of the Plaintiffs in the Study, notably the paparazzi photographers, are best categorized as copyright opportunists, rather than trolls. Professor Jeanne Fromer described a copyright opportunist as "a creator, owner, or distributor of a plausibly copyrighted work that currently has low licensing value, but the rightsholder is seeking to use copyright law to increase that value, typically through litigation."[435] Like trolls, they view lawsuits as the principal avenue to getting paid for their work.[436] However, unlike trolls, they are motivated by a desire to create and protect their photographs, which promotes the Copyright Act's ultimate goal of progressing the useful arts.[437]

As examples of copyright opportunists, Professor Fromer cited photographers who sue celebrities for posting paparazzi images to their personal social media accounts.[438] As discussed later, these

[432] Chad O'Carroll, Sophie Lamotte & Bill Goodwin, *Automated Image Recognition: How Using 'Free' Photos on the Internet Can Lead to Lawsuits and Fines*, COMPUTERWEEKLY.COM. (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/7KTD-5NRZ].

[433] *See id.*

[434] *Id.*

[435] Jeanne C. Fromer, *The New Copyright Opportunist*, 67 J. COPYRIGHT SOC'Y U.S.A. 1, 2 (2020).

[436] *Id.* at 2–3.

[437] *See id.*

[438] *Id.* at 8.

celebrity appropriation cases are a growing trend.[439] With the rise of social media, photographers are seeking to monetize this new market for their works.[440] They also are attempting to reclaim income lost because of the decline of print media and its replacement by social media.[441] Professor Fromer concludes that "these are new copyright opportunists rather than the same old ones long present in copyright law."[442] As such, they should be "welcome[d] in courts to develop copyright right law so long as courts" consider not only traditional copyright policy and principles but also "economic and technological realities."[443]

5. Are Reverse Image Search Companies Trolls?

Image infringement cases begin when a photographer detects an unauthorized use, and many photographers are turning to reverse image search companies to help them police the internet. Although photographers could conduct reverse image services themselves using search engines like Google or Bing,[444] some photographers have complained that the process of searching and sending takedown notices under the Digital Millennium Copyright Act (DMCA)[445] is never-ending and expensive.[446] For example, Backgrid, the celebrity photo agency, allegedly sends thousands of takedown notices a year.[447] As a result, many photographers are turning to one-stop-

439 *See infra* Part III.C.

440 *See* Fromer, *supra* note 435, at 8–9.

441 *See id.* at 9.

442 *Id.* at 14.

443 *Id.* at 17–18.

444 *See* Free Speech Sys., LLC v. Menzel, 390 F. Supp. 3d 1162, 1170 (N.D. Cal. 2019) ("'Google reverse image search' . . . purportedly allows a user to use the search engine to 'instantaneously identify all the places on the Internet that image is used . . . .'" (quoting Erez Rosenberg, *An Audio-Visual Notice of Use Database: A Solution to the Orphan Works Problem in the Internet Age*, 22 UCLA ENT. L. REV. 95, 121 (2014))).

445 *See* 17 U.S.C. § 512(c). This section of the DMCA provides a safe harbor provision under which service providers can "avoid copyright infringement liability for storing users' content if—among other requirements—the service provider 'expeditiously' removes or disables access to the content after receiving notification from a copyright holder that the content is infringing." Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2015).

446 *See* Reed v. Ezelle Inv. Props., 353 F. Supp. 3d 1025, 1029 (D. Or. 2018) (noting that photographer did "not have the time or financial resources to stop the widespread copyright infringement of his photographs"); *see also* Nancy E. Wolff & Mikaela I. Gross, *Copyright Protection of Images Online*, 9 LANDSLIDE 18, 20 (2017) ("The current scale and pace of infringements is difficult for large licensing companies to police and manage, let alone individual photographers whose works are being used without permission."); Ulaby, *supra* note 11 (photographer complaining that "[a]s fast as I can, I send what are called DMCA takedown notices" but the infringements "come right back up within a week").

447 Complaint at 2, Backgrid USA, Inc. v. Tumblr, Inc., No. 1:20-CV-03167 (S.D.N.Y. dismissed Mar. 3, 2021).

shop reverse image search companies—or image protection firms—that not only trawl the internet for infringing uses but also can help the photographers file takedown notices, negotiate and settle claims, or find a law firm to file a lawsuit.[448]

Some of the prominent players in this industry are Pixsy, ImageRights International, Inc., and PicRights Ltd.[449] The law firm of Higbee & Associates has gotten into the game as well.[450] It offers "free reverse image search" services so that potential clients can "see who is stealing" their work and "get paid."[451] Pixsy boasts that it monitors 110,000,000 images daily and has managed over 120,000 copyright infringement cases.[452] Photographers can take advantage of Pixsy's limited free monitoring service or upgrade to a monthly subscription that includes features like sending takedown notices.[453] Once a photographer uploads images for monitoring, Pixsy sends email alerts when it detects a use of the image.[454] The photographer then decides whether to file a takedown notice, submit the claim to a Pixsy case manager for resolution, hire legal counsel, or do nothing.[455] Photographers can submit unlimited cases to Pixsy for free, and they only pay a 50% service fee to Pixsy if it is successfully able to recover damages.[456]

When a photographer submits a case for resolution to Pixsy, a case manager, who is not an attorney, sends a letter via email to the user.[457] The letter warns the recipient that copyright infringement is a strict liability offense and that "damages can range up to $150,000 not including expenses and costs."[458] But the letter fails to mention that the range for non-willful infringement statutory

[448] *See e.g.*, PICRIGHTS, https://www.picrights.com [https://perma.cc/S3QJ-DGUR].

[449] *See* Steven Melendez, *Here Come the Copyright Bots for Hire, with Lawyers in Tow*, FAST CO. (Feb. 21, 2018), https://www.fastcompany.com/40494777/here-come-the-copyright-robots-for-hire-with-lawyers-in-tow [https://perma.cc/4AA7-EA7R] (describing use of copyright tracking services).

[450] *See A Trusted Name in Copyright Law*, HIGBEE & ASSOCS., https://www.higbeeassociates.com/copyright/enforcement.html [https://perma.cc/TRK3-DQMU].

[451] *Id.*

[452] Monitor, PIXSY, https://www.pixsy.com/monitor/ [https://perma.cc/B5EW-DZCF]; About, PIXSY, https://www.pixsy.com/about/ [https://perma.cc/HY46-DREG].

[453] *See* Monitor, PIXSY, *supra* note 452.

[454] *Id.*

[455] *See Resolve Copyright Infringement Claims*, PIXSY, https://www.pixsy.com/resolve/ [https://perma.cc/FLK6-54FK].

[456] *Id.*

[457] *See, e.g.*, Pixsy Unauthorized Use of Photograph Letter, CLASS L. GRP., https://www.classlawgroup.com/wp-content/uploads/Pixsy-Copyright-Extortion-Lawsuit-Demand-Letter.pdf [https://perma.cc/U3PH-B7K6].

[458] *Id.*

damages is $750 to $30,000, and that innocent infringement damages can be as low as $200.[459] The letter then offers a license for the past usage and an additional one-year period.[460] An invoice is attached with online payment options and a deadline for payment.[461] Ignoring the letter may result in Pixsy sending additional demand letters and ultimately escalating the matter to an attorney. In the United States, Pixsy's typical demand is at least $750,[462] although some users have been successful in negotiating a lower cost license.[463] The letter also explains how Pixsy calculated the licensing rate.[464]

PicRights operates in a fashion similar to Pixsy. PicRights' stated goal "is to resolve copyright claims quickly and fairly—without having to escalate the claim to our outside legal partners."[465] Its resolution process begins with a compliance officer, who is not an attorney, sending a letter to "ascertain" whether the user has a license for the image.[466] If not, PicRights demands compensation for the past use.[467] Unlike Pixsy, PicRights does not explain how it calculated the compensation rate nor does it mention the range of statutory damages available in copyright infringement lawsuits.[468]

PicRights' practices have sparked some unauthorized users to seek declaratory judgments of noninfringement.[469] For example, AvSport LLC, through its member and manager—"a retired professor and certificated flight instructor"—had "prepar[ed] to use [Associated Press images] in educational materials used in free safety seminars provided to pilots as part of" a proficiency program.[470] PicRights sent a letter initially demanding $1150.00 for the unauthorized use but then lowered its demand to $690.[471] After AvSport claimed fair use, the matter was pursued by Higbee & Associates, which sent a letter threatening that, "[i]f forced to go to court to resolve the matter, our

459 *See* 17 U.S.C. § 504(c)(1)–(2).
460 Pixsy Unauthorized Use of Photograph Letter, *supra* note 457.
461 *Id*.
462 O'Carroll et al., *supra* note 432.
463 *See* Darren Heitner, *What Are Your Options if You Get a Pixsy Unauthorized Use of Image Letter*, HEITNER LEGAL (Feb. 23, 2022), https://heitnerlegal.com/2022/02/23/what-are-your-options-if-you-get-a-pixsy-unauthorized-use-of-image-letter [https://perma.cc/GT78-LHU6].
464 *See* Pixsy Unauthorized Use of Photograph Letter, *supra* note 457.
465 *Claims*, PICRIGHTS, https://picrights.com/claims/ [https://perma.cc/GQ42-TVJV].
466 *E.g.*, Complaint at Ex. A, AvSport LLC v. Associated Press, No. 20-CV-00871 (C.D. Cal. dismissed May 28, 2021).
467 *See id.*
468 *See id.*
469 *E.g.*, *id.* at 1; Complaint at 1, Am. Hellenic Educ. Progressive Ass'n v. PicRights Ltd., No. 19-CV-01814 (N.D. Ohio dismissed Jan. 14, 2020).
470 Complaint at 1, 4, *AvSport*, No. 20-CV-0087.
471 *See id.* at 6–7.

client will ask for the maximum justifiable damages," and demanded $2,300 to resolve the issue.[472] This resulted in AvSport seeking a declaratory judgment of noninfringement.[473] The Associated Press ("AP") responded by filing a motion for judgment on the pleadings alleging there was no fair use because AvSport was a for-profit flight school offering pilot training, flight tours, and other services for a fee, and that the AP images were used in part to promote its business.[474] After that motion was denied, the parties stipulated to dismissal of the action with prejudice which suggests that a settlement was reached, although its terms are unknown.[475]

Likewise, the American Hellenic Educational Progressive Association ("AHEPA"), a "[n]onprofit fraternal beneficiary society," filed a declaratory judgment action against PicRights and its client Agence France-Presse ("AFP").[476] AHEPA initially challenged whether AFP even had valid copyright registrations and, in any event, claimed that AHEPA had innocently infringed the images and it was shielded from liability under the fair use doctrine.[477] Ultimately, the parties settled, agreeing that judgment should be entered for AFP and against AHEPA, and AHEPA agreed to pay AFP damages in an undisclosed amount.[478]

While photographers are often criticized for using reverse image services, some copyright infringement defendants argue that a plaintiff's failure to hunt the internet for instances of infringement should bar them from recovery under the statute of limitations.[479] However, courts have routinely rejected the argument that plaintiffs have a "duty to troll for infringements."[480]

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[472] *Id.* at 7–8.

[473] *Id.* at 12.

[474] Notice of Motion and Motion for Judgment on the Pleadings at 2–3, 11, *AvSport LLC*, No. 20-CV-00871 (C.D. Cal. dismissed May 28, 2021).

[475] *See* Stipulation of Dismissal With Prejudice at 1, *AvSport LLC*, No. 2:20-CV-00871 (C.D. Cal. dismissed May 28, 2021).

[476] Complaint at 1, Am. Hellenic Educ. Progressive Ass'n v. PicRights Ltd., No. 19-CV-01814 (N.D. Ohio dismissed Jan. 14, 2020).

[477] *Id.* at 6.

[478] Stipulated Final Judgment and Order at 2, *Am. Hellenic*, No. 19-CV-01814; Joint Stipulation and Order for Dismissal with Prejudice at 1, *Am. Hellenic*, No. 19-CV-01814.

[479] *See, e.g.*, Starz Ent., LLC v. MGM Domestic Television Distrib., LLC, 510 F. Supp. 3d 878, 882, 888 (C.D. Cal. 2021).

[480] Beasley v. John Wiley & Sons, Inc., 56 F. Supp. 3d 937, 946 (N.D. Ill. 2014) ("[C]opyright holders have no general duty to troll for infringements." (citing Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983))); *see also* MacLean Assoc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 780 (3d Cir. 1991) (holding that a copyright owner is not subject to a "never ending obligation to discover whether anyone to whom he ever supplied his [copyrighted material] would copy it"); Scholz Design Inc. v. Bassinger Bldg. Co., No. 05-71602, 2006 U.S.

A limitation of this Study is that the Author was unable to analyze the who, what, where, why, and how of reverse search image companies' practices. Because these are private companies, their records are not publicly available, so there is no feasible way to study who they target, how the images are being used, or how the matters are resolved. Therefore, it is unknown whether these companies are pursuing legitimate claims of infringement or targeting innocent victims who may have meritorious defenses like fair use, but who are coerced into settling quickly to make the potential legal problem disappear. If the latter situation is true, then these companies fit the definition of a troll who "targets . . . 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."[481]

B. Licensing Practices in the Media Industry Are Changing Because of Born-Digital Media Companies

Given that media outlets are one of the primary licensors of copyrighted images, it is not surprising that it was the most sued industry.[482] However, the Study exposed a rift in licensing practices between the legacy media companies and the born-digital ones. Except for Gannett, the most-sued media Defendants were all born-digital companies,[483] and these companies are no strangers to copyright infringement lawsuits. According to a search done on Docket Navigator, Verizon Media (formerly Oath Inc.) was sued forty-seven times for copyright infringement since January 1, 2017.[484] Meanwhile, Buzzfeed was sued thirty-three times [485] and Barstool Sports, Inc. was sued thirty-three times.[486] In contrast, the New York Times Company was only sued six times during the same

Dist. LEXIS 79955, at *5 (E.D. Mich. Oct. 23, 2006) ("Plaintiff does not have a duty to scour the area for potentially infringing designs.").

[481] Sag, *supra* note 331, at 1108.

[482] *See supra* Part II.B.1.

[483] *See supra* Part II.B.3.

[484] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/binder/511838/1 [https://perma.cc/NP4K-TZ59] (running search for Cases in Copyright Library and Party: Oath, Inc. or Oath Holdings Inc.).

[485] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/binder/511840/1[https://perma.cc/B86L-HSMT] (running search for Cases in Copyright Library and Party: Buzzfeed, Inc. or Buzzfeed).

[486] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/party/183307/1 [https://perma.cc/2L9P-8WM5] (running search for Cases in Copyright Library and Party: Barstool Sports, Inc.).

period for copyright infringement,[487] and the Washington Post Company was sued twice.[488] While many media and communication scholars have researched the differences between legacy and digital-native media outlets' business models and audiences,[489] this article also exposes the differences in how they license copyrighted photographs.

Legacy newspapers are accustomed to licensing images because, before the digital age, they had no choice. When newspapers sought to print photographs, they needed to have the negatives. This meant that legacy newspapers hired their own staff photographers—in which case the newspaper owned the copyright to the photograph as a work for hire—or licensed photographs from freelance photojournalists or entities like the Associated Press.[490] As a result, legacy newspapers have robust licensing practices and standards.[491] For example, Hearst Communications has an in-house department of copyright and media attorneys who are familiar with the publishing industry's licensing practices and assist in clearing images.[492] Even as legacy news organizations move their publications online, their licensing practices from the days of print have remained in place.[493] Legacy newspapers also are familiar with standard copyright licensing practices because they vigorously defend their own copyrights in the content they have created, including photographs.[494]

Conversely, digital-native publications largely started as companies that recycled content from other news outlets and creators.[495] Their business model is based on free content that is supported by digital advertising, which means that their revenue is

[487] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/party/93870/1 [https://perma.cc/P3JE-AC9L] (running search for Cases in Copyright Library and Party: The New York Times Company).

[488] *See* DOCKET NAVIGATOR, https://search.docketnavigator.com/copyright/party/41290/1 [https://perma.cc/5BD5-XSRJ] (running search for Cases in Copyright Library and Party: The Washington Post Company).

[489] *See, e.g.*, *Digital News Fact Sheet*, PEW. RSCH CTR. (July 27, 2021), https://www.journalism.org/fact-sheet/digital-news/ [https://perma.cc/Q9M5-7BC3].

[490] *See* Mathieson v. Associated Press, No. 90 Civ. 6945, 1992 U.S. Dist. LEXIS 9269, at *1 (S.D.N.Y. June 24, 1992).

[491] *See* Peters, *supra* note 411 (noting that "the most respectable online publications have subscriptions to photo agencies [like Getty Images and Reuters] that house a constantly updated database of news images").

[492] Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 420 (S.D.N.Y. 2018).

[493] *See id.*

[494] *See*, *e.g.*, *Obtaining and Using Times Content*, N.Y. TIMES, https://help.nytimes.com/hc/en-us/articles/115014891408-Obtaining-and-using-Times-content [https://perma.cc/PQ8B-PVYD].

[495] *See* Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMMC'NS L.J. 55, 69–70 (2018).

driven by the number of clicks their sites receive.[496] Some born-digital publications have shoe-string budgets with little money for licensed photographs.[497] Other online outlets even instruct their third-party contributors to copy images from Google to illustrate their articles.[498]

Given that this new crop of online media companies grew up under the *Perfect 10* server test, embedding is an accepted and encouraged practice.[499] Some online journalists may not appreciate the difference between embedding a link to an image and right-click copying it. Also, because of the focus on producing late-breaking news under tight deadlines, they may rush to publish an image that has not been cleared. The journalists who work at online media companies also skew younger,[500] meaning that they, too, were taught that embedding was permissible under the server test.

Not surprisingly, a number of born-digital media companies were accused during the Study Period of copying images from another media outlet that had properly licensed the image to use on its own website. For example, photographer David McGlynn regularly licenses his works to the *New York Post*,[501] a legacy print daily tabloid newspaper, and he brought several lawsuits during the Study Period alleging that digital-native publications had copied his images from the *New York Post* to reuse on their media platforms.[502] Recycling

[496] *See*, *e.g.*, Michael Grecco Prods., Inc. v. Valuewalk, LLC, 345 F. Supp. 3d 482, 494 (S.D.N.Y. 2018) (describing how news outlet website earns advertising revenue from website traffic).

[497] *E.g.*, Peters, *supra* note 411 (describing how the editor in chief of one digital media outlet has "acknowledged that he does not have a budget for photographs and that out of more than 3,000 photographs he has posted alongside online articles over the past 12 years, he has 'paid someone once or twice to use a photograph'"); *see also* Barcroft Media, Ltd. v. Coed Media Grp., LLC, 297 F. Supp. 3d 339, 347 (S.D.N.Y. 2017) (stating that the chief executive officer of an online media company "testified that the company 'would never pay a substantial fee to license any image for its [w]ebsites, which earn little revenue and have consistently been in the red'").

[498] *See Michael Grecco Prods.*, 345 F. Supp. 3d at 495 (noting that a digital news outlet instructed contributors to "download [images] from Google" for articles without mentioning copyright laws (alteration in original)).

[499] *See supra* Part I.B.

[500] *See* Elizabeth Grieco, *10 Charts About America's Newsrooms*, PEW RSCH. CTR. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/10-charts-about-americas-newsrooms/ [https://perma.cc/424S-2Q5A].

[501] *See* McGlynn v. Cools, Inc., No. 19-CV-03520, 2020 U.S. Dist. LEXIS 116761, at *2 (S.D.N.Y. July 1, 2020).

[502] *See, e.g.*, McGlynn v. Cube N.Y. Inc., No. 20 Civ. 4546, 2021 U.S. Dist. LEXIS 69503, at *1 (S.D.N.Y. Apr. 9, 2021) (alleging that digital media company used a photograph that McGlynn originally licensed to the *New York Post* to illustrate its article without authorization).

images from other media websites generally is not fair use unless the photograph itself is newsworthy.[503]

C. Lawsuits Involving Celebrities Reappropriating Their Images Are on the Rise

There is a growing trend among paparazzi to sue celebrities when they post their photos to social media.[504] LeBron James, Khloe Kardashian, Ariana Grande, and Justin Bieber have all been sued by celebrity photographers.[505] Celebrities may feel entitled to use photos of themselves, but celebrities do not own the copyrights in images taken by others.[506] Celebrities also may be motivated to post paparazzi pictures to retaliate against the photographer. By making the image freely available on their social media page, they devalue the image to other media outlets because it is less exclusive. Posting their own images also helps celebrities control the context in which their image is portrayed.[507] Meanwhile, street style photographers have been posting the hashtag #NoFreePhotos with their images.[508] These photographers complain that fashion influencers have been using their copyrighted photos on social media to satisfy their content obligations to brands that pay them to wear their styles.[509]

Although this type of lawsuit was not statistically significant in the Study, celebrity reappropriation lawsuits receive a disproportionate

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[503] *See supra* Part I.C.; *see also* Mango v. BuzzFeed, Inc., 356 F. Supp. 3d 368, 371 (S.D.N.Y. 2019) (stipulating to liability for copyright infringement for copying an image that had been licensed to a different media outlet).

[504] *Jennifer Lopez is Being Sued for Copyright Infringement over Instagram Post of Herself*, FASHION L., (Oct. 9, 2019), https://www.thefashionlaw.com/jennifer-lopez-is-being-sued-for-copyright-infringement-over-instagram-post-of-herself [https://perma.cc/GQ2E-L8DF] (discussing trend); *see also* Fromer, *supra* note 435, at 8 (same).

[505] Fromer, *supra* note 435 at 8; Complaint at 3, Mitchell v. James, No. 2:20-CV-08188 (C.D. Cal. dismissed Feb. 25, 2021) (alleging that basketball player LeBron James used photo of himself on his Facebook page); *see also* Complaint at 3–4, Backgrid USA, Inc. v. Bieber, No. 2:20-CV-04685 (C.D. Cal. dismissed June 10, 2021) (alleging that singer Justin Bieber posted a paparazzi photo of himself to his Instagram page).

[506] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (holding that photographers are the authors and owners of the copyrights in photographs that they take).

[507] *See* Kate Dwyer, *Emily Ratajkowski Is Selling an NFT at Christie's*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/04/23/style/emily-ratajkowski-nft-christies.html?searchResultPosition=1[https://perma.cc/AHH3-3AAN] (model complaining that images of models' bodies are "being misused, and used for profit in ways they didn't consent to").

[508] Elizabeth Paton, *Street-Style Photographers Unite to Proclaim #NoFreePhotos*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/fashion/milan-fashion-week-street-style-photographers.html [https://perma.cc/MT93-Y4ZL].

[509] *Id.*

amount of media attention.[510] While celebrities accuse the paparazzi of harassing celebrities and invading their privacy,[511] at the end of the day, most celebrities end up settling this type of lawsuit.[512]

D. Your Mother Isn't Being Sued for Posting Your Wedding Photographs on Facebook

It also is interesting to note which individuals are not being sued. Despite one commentator's fears that because of increased image infringement litigation her mother would be sued for posting her wedding photos to social media,[513] the Study found no cases brought against individuals using images for personal reasons, other than lawsuits against celebrities who posted their images to social media.[514] Even with respect to celebrities, the photographs at issue often were used to promote themselves or their brands.[515] Although "life event" photography—pictures that document special occasions like weddings, new babies, and graduations—is a sizable segment of the photography industry, there were no claims in the Study involving these types of photographs. Also, given how common it is to share images on social media, it was surprising that less than 16% of the Lawsuits specifically alleged that the Defendant posted a copyrighted photo to social media.[516]

Mathew Higbee of Higbee & Associates has stated that his firm's strategy is only to pursue commercial users "so we can presume there

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[510] *See, e.g.*, Robert Hart, *Dua Lipa the Latest Celeb Sued for Posting Photo of Herself on Social Media*, FORBES (July 9, 2021), https://www.forbes.com/sites/roberthart/2021/07/09/dua-lipa-the-latest-celeb-sued-for-posting-photo-of-herself-on-social-media/?sh=6dd1125c300c [https://perma.cc/XS97-V4FW]; Elizabeth Vulaj, *Insight: Celebrities and Paparazzi Battle It Out over Social Media Copyright*, BLOOMBERG L. (July 22, 2020), https://news.bloomberglaw.com/ip-law/insight-celebrities-and-paparazzi-battle-it-out-over-social-media-copyright [https://perma.cc/RRH7-8EHA]; Maria Puente, *Jennifer Lopez Sued by Paparazzi Agency for Copyright Infringement*, USA TODAY (Oct. 7, 2019), https://www.usatoday.com/story/entertainment/celebrities/2019/10/07/jennifer-lopez-sued-paparazzi-copyright-infringement/3900908002/ [https://perma.cc/ZTF6-3FBP].

[511] *E.g.*, Kelly-Leigh Cooper, *Why Celebrities Are Being Sued over Images of Themselves*, BBC NEWS (Feb. 6, 2019), https://www.bbc.com/news/world-us-canada-47128788 [https://perma.cc/84ND-DHPN] (quoting Khloe Kardashian complaining that paparazzi "can legally stalk me and harass me and then on top of it all I can't even use the pictures of myself they take LOL").

[512] Meaghan Kent, Katherine Dearing & Danae Tinelli, *Keeping Up with Copyright Infringement: Copyright, Celebrities, Paparazzi, and Social Media*, IPWATCHDOG (Oct. 30, 2019), https://www.ipwatchdog.com/2019/10/30/keeping-copyright-infringement-copyright-celebrities-paparazzi-social-media/id=115456/ [https://perma.cc/AS6H-UL7Q].

[513] *See* Ulaby, *supra* note 11.

[514] *See supra* Part III.C.

[515] *See supra* Part III.C.

[516] *See supra* Part II.E.

is both an increased level of sophistication as well as an expectation that a business will be liable for getting things wrong."[517] Certain photographers and agencies also have made similar statements. For example, Christopher Sadowski has announced that, "[g]enerally speaking, [he] does not pursue claims against non-commercial entities. He considers non-commercial sites to include those that do not sell goods or promote services, display advertising or solicit contributions or subscriptions."[518] The chief operating officer of Pixsy similarly has stated that, "'[w]e will pursue cases of commercial use—we certainly don't pursue matters of noncommercial use.'"[519] Likewise, PPS, the affiliate of Mockingbird 38, claims that "[i]nfringements are filtered so that only relevant, 'actionable,' commercial infringers remain (e.g., no kids using images for their social media pages)."[520]

Also, the Study revealed that bloggers, despite their reported misuse of images, were not frequent targets of copyright infringement lawsuits. Indeed, one report found that 49% of people who used images without permission were bloggers or social media users, yet relatively few of the lawsuits in the Study were brought against a social influencer site or blog site.[521] In most cases, the sites appeared to be commercialized to make money from advertising, referring products, or selling goods or services.[522]

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[517] Higbee, *supra* note 1.

[518] *Christopher Sadowksi Enforces His Copyrights*, HIGBEE & ASSOCS., https://www.higbeeassociates.com/copyright/clients/Christopher-Sadowski-Copyright-Letter-Lawsuits.html [https://perma.cc/SLQ8-73GG].

[519] Melendez, *supra* note 449.

[520] *What We Do*, *supra* note 358.

[521] *The State of Image Theft in 2016*, *supra* note 6; Eckhause, *supra* note 15.

[522] *See*, *e.g.*, Complaint at 2–3, Stockfood Am., Inc. v. Scott-Hamilton, No. 2:20-CV-07380 (C.D. Cal. dismissed Nov. 30, 2020) (alleging blogger used photograph on website without authorization); *see also Shop*, HEALTHY VOYAGER, https://healthyvoyager.com/products-page/ [https://perma.cc/58VJ-YPDL] (selling books and travel booking services). *But see* Complaint at 1–2, August Image, LLC v. AOC Brands, LLC, No. 2:20-CV-02553 (E.D. Pa. Sept. 20, 2021) (suing lifestyle blogger); *Staying Creative, Authentic and Alive with Higbee & Associates Trolling AOC*, ANNE OF CARVERSVILLE, https://anneofcarversville.com/fashion/2020/4/19/surviving-continued-trolling-by-higbee-associates [https://perma.cc/EZK5-U2CY] (claiming that blogger's website "has turned its nose up at advertising platforms for a decade, isn't an affiliate of any online retailer and failed miserably trying [to] raise money from readers, [so] there is no reliable revenue stream on this website").

E. A Handful of Law Firms Dominate Image Infringement Case Filings

Around 63% percent of the Lawsuits were filed by just five law firms—Liebowitz Law Firm, PLLC, SRIPLAW, Doniger/Burroughs Law Firm, Barshay Sanders PLLC/Sanders Law Group, and Higbee & Associates.[523] These firms are often criticized for the volume of cases that they file, but they have taken advantage of scalable efficiencies to build niche practices. For example, given the homogenous nature of the cases, law firms often can recycle demand letters and pleadings, which enables them to take on a large volume of low-value infringement claims. Higbee & Associates has created a "scalable workflow[]" by building their "own software to create processing efficiency," which Mathew Higbee touts "makes it really easy and super efficient for [clients] to work with us."[524] Typically, the law firms take these cases on a contingent fee basis, whereby they receive between 33% to 50% of any settlement or court award in addition to other costs.[525] Clients who have an image infringement claim are naturally attracted to firms that specialize in the area and offer no upfront fees. Law firms should not be demonized as copyright trolls just because they have chosen to specialize in a certain area of law and have become successful in doing so. Moreover, in one poll, two-thirds of intellectual property attorneys reported that they would not take a copyright case valued at less than $30,000.[526] Thus, there is a need for attorneys who are willing to handle low-value photograph cases.

Several of the firms that specialize in filing copyright infringement lawsuits have been accused of being copyright trolls, most notably Richard Liebowitz.[527] He has been described as the "scourge of the media industry, the shame of many in the copyright bar, and the salvation of the underpaid photographer."[528] Liebowitz, who also is a

[523] *See supra* Part II.C.

[524] Higbee, *supra* note 1.

[525] Alicia Calzada & Mickey Osterreicher, *Suing for Copyright Infringement? 10 Things to Consider*, NPAA (Mar.–Apr. 2018), https://nppa.org/magazine/copyright-infringement-10-things-consider [https://perma.cc/DX49-2E4U].

[526] Michael Zhang, *Why Photographers Need a Copyright Small Claims System*, PETAPIXEL (June 11, 2016), https://petapixel.com/2016/06/11/photographers-need-copyright-small-claims-system [https://perma.cc/WFB5-ESZL].

[527] McDermott v. Monday Monday, LLC, 17-CV-9230, 2018 U.S. Dist. LEXIS 28664, at *8 (S.D.N.Y Feb. 22, 2018); *see also* Mike Masnick, *Mathew Higbee Cuts and Runs When Finally Challenged on a Questionable Shakedown*, TECHDIRT (June 10, 2019), https://www.techdirt.com/blog/?tag=michael+grecco [https://perma.cc/C282-LBEC] (accusing Higbee & Associates of being "one of the more active copyright trolls around these days").

[528] Peters, *supra* note 411.

photographer, views himself as the savior of photographers. His professed goal is to "give back" to "hardworking photographers" by "really helping them with the problem of copyright infringement."[529]

In pursuit of that goal, Liebowitz has filed over 2,000 copyright infringement cases involving photographs since 2016.[530] The number probably would be higher but for the fact that the grievance committee for the Southern District of New York—where Liebowitz files most of his cases—ordered his interim suspension in November 2020.[531] The suspension came because of a scathing opinion by Judge Furman on June 26, 2020, which condemned, among other things, Liebowitz's repeated violations of court orders and "repeated lies to the Court."[532] Judge Furman ordered a mix of monetary and non-monetary sanctions against Liebowitz and his firm, including over $100,000 in fines,[533] which were upheld by the Second Circuit Court of Appeals.[534] The court further ordered Liebowitz to serve a copy of the opinion and order on every one of Liebowitz's current clients and file a copy on the docket of each of his pending cases.[535] On November 3, 2021, Liebowitz was indefinitely suspended from the practice of law in the State of New York.[536] Courts in other jurisdictions, such as the Northern District of California, also have suspended him.[537] Since then, the Liebowitz Law Firm reportedly has been acquired by the Sanders Law Group.[538]

For the most part, Liebowitz's downfall does not stem from bringing frivolous lawsuits,[539] but rather his shoddy discovery and

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[529] *See id.*

[530] Bill Donahue, *2nd Circ. Won't Pause Harsh Sanctions Against Liebowitz*, LAW360 (July 27, 2020), https://www.law360.com/articles/1295789/2nd-circ-won-t-pause-harsh-sanctions-against-liebowitz [https://perma.cc/9T4A-S6Z3].

[531] *See* Blake Brittain, *'Copyright Troll' Liebowitz Suspended from Manhattan Court*, BLOOMBERG L. (Dec. 1, 2020), https://news.bloomberglaw.com/ip-law/copyright-troll-liebowitz-suspended-from-manhattan-court?context=article-related [https://perma.cc/P8G3-8N63].

[532] Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368, 2020 U.S. Dist. LEXIS 112368, at *37–38 (S.D.N.Y. June 26, 2020).

[533] *Id.* at *80–82.

[534] Liebowitz v. Bandshell Artist Mgmt., 6 F.4th 267, 293 (2d Cir. 2021).

[535] *Usherson*, 2020 U.S. Dist. LEXIS 112368, at *81.

[536] *In re* Liebowitz, 155 N.Y.S.3d 440, 450 (N.Y. App. Div. 2021).

[537] *See* Alison Frankel, *Oft-Sanctioned 'Copyright Troll' Victimized Client, Says New Malpractice Suit*, REUTERS (Oct. 26, 2020), https://www.reuters.com/article/legal-us-otc-liebowitz/oft-sanctioned-copyright-troll-victimized-client-says-new-malpractice-suit-idUSKBN2772VT [https://perma.cc/C7R6-QF9G].

[538] Tyler Maulsby & Edward H. Rosenthal, *Could This Really Be the End? Liebowitz Law Firm Ends Operations!* FRANKFURT KURNIT KLEIN + SELZ (Mar. 21, 2022), https://ipandmedialaw.fkks.com/post/102hlts/could-this-really-be-the-end-liebowitz-law-firm-ends-operations [https://perma.cc/E34G-7DV8].

[539] *See, e.g.*, Ward v. Consequence Holdings, Inc., No. 3:18-CV-1734, 2020 WL 2219070, at *3 (S.D. Ill. May 7, 2020) (stating that "Liebowitz's conduct in this case has been irresponsible,

office management practices,[540] inexperience as an attorney,[541] an overburdened docket of cases, and the fact that he "has no compunction about lying, even under oath."[542] For example, in *Berger v. Imagina Consulting, Inc.*,[543] Liebowitz lied about the date of his grandfather's death to excuse missing a court conference.[544]

Unfortunately, Liebowitz's antics have tainted the reputation of not just his firm, but other firms specializing in image infringement cases and the photographers who bring these cases. Joel Rothman of SRIPLAW complained that "I've devoted my career to a practice that, in a short period of time, this guy has made a shambles of."[545] He further surmised that because of Liebowitz, the judiciary is dubious about the merits of all image infringement claims.[546]

F. Based on the Complaints, Fair Use Seems Unlikely in Many of the Lawsuits

It is notoriously difficult to predict in advance whether a fair use defense will be successful.[547] However, using photos to advertise goods and services, which was the most common purpose for using images during the Study, generally will not be considered fair use.[548] In such instances, the image is being used for commercial purposes, and by failing to take advantage of the robust licensing system for images, the user is adversely impacting that market. Also, photographs are usually considered creative, and the Study found

unreasonable, and detrimental to the fair administration of justice, harming both [the defendant], the Court, and even his own client, who has lost his opportunity to advance what appears to have been a meritorious claim"). *But see* Konangataa v. Am. Broad. Cos., Nos. 16-CV-7382, 16-CV-7383, 16-CV-7472, 2017 WL 2684067, at *2 (S.D.N.Y. June 21, 2017) (holding that "no reasonable lawyer with any familiarity with the law of copyright could have thought that [the use of work at issue] was anything but fair").

[540] *See, e.g.*, Janik v. SMG Media, Inc., No. 16 Civ. 7308, 2018 U.S. Dist. LEXIS 4567, at *45 (S.D.N.Y. Jan. 10, 2018) (concluding that "the Liebowitz Law Firm made a total hash of discovery, requiring multiple court conferences").

[541] *See, e.g.*, Sadowski v. Roser Commc'ns Network, Inc., 6:19-CV-592, 2020 U.S. Dist. LEXIS 10266, at *13 (N.D.N.Y. Jan. 22, 2020) (noting Liebowitz has only been licensed since 2015).

[542] Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368, 2020 U.S. Dist. LEXIS 112368, at *56–57 (S.D.N.Y. June 26, 2020).

[543] Berger v. Imagina Consulting, Inc., No. 18-CV-8956, 2019 U.S. Dist. LEXIS 213321 (S.D.N.Y. Nov. 1, 2019).

[544] *See id.* at *3–8.

[545] Frankel, *supra* note 537.

[546] *Id.*

[547] *See* Noah J. Wald, *Painting Independent Artists into a Corner with Broad Strokes of 512(f) Liability: The Potential Harm of an Overreaching Objective Standard*, 4 BERKELEY J. ENT. & SPORTS L. 116, 133 (2015).

[548] *See supra* Parts I.C, II.G.

that in most cases, the entire image is being used.[549] Therefore, all four factors will typically weigh against fair use in advertising cases. For similar reasons, using an image to visually enhance a website generally will not be considered fair use when it is done by a commercial entity because it is customary for businesses to pay licensing fees to use photographs to illustrate their websites.[550]

Given that news reporting is one of the named fair use factors under the Copyright Act, using an image to illustrate an article has a greater chance of being found to be fair use.[551] There were examples in the Study of news reporting that fell into the fair use category and those that were deemed infringing.[552] To qualify as fair use, generally the article must be about the image as opposed to merely depicting the events or people described in the story.[553] In most of the news reporting lawsuits in the Study, the Defendant appeared to be using the image as a visual aid or to entice viewers to read the article.[554] Indeed, articles with images get 94% more total views.[555] The reason for this is that images can quickly communicate a story in a way that otherwise would take thousands of words. Studies have shown that readers' eyes are drawn to images first, then text.[556] Also, photographs are not language dependent, and they can help a reader determine whether to read an accompanying article. Because there is a ready market for the licensing of images for editorial purposes, defendants who used photographs as visual aids or to increase website traffic have weak fair use defenses unless the use was transformative.

G. Other Not So Surprising Findings

Over 97% of the Lawsuits alleged that the Defendant was using the copyrighted image online, which shows that the internet contributes

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[549] *See supra* Parts I.C, II.D.

[550] *See* Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 265 (4th Cir. 2019).

[551] *See supra* Part I.C.

[552] *Compare* Boesen v. United Sports Publ'ns, No. 20-CV-1552, 2020 U.S. Dist. LEXIS 203682, at *1–2 (finding defendant's use of image to report on tennis player's retirement was fair use), *with* Incredible Features, Inc. v. Backchina, LLC, No. CV 20-943, 2021 U.S. Dist. LEXIS 250121, at *3–6, 12 (rejecting defendant's news reporting fair use claim), *and* Wood v. Oberserver Holdings, LLC, 2021 U.S. Dist. LEXIS 127484, at *4, *13 (same).

[553] *See supra* Part I.C.

[554] Eckhause, *supra* note 15.

[555] Sam Hollingsworth, *7 Reasons Why Content Needs Amazing Images, Videos & Visuals*, SEJ (Oct. 5. 2018), https://www.searchenginejournal.com/why-content-needs-amazing-images-videos-visuals/268911/#close [https://perma.cc/9HP9-H7PM].

[556] *See id.*

to the infringement problem.[557] Prior to the birth of the digital age, copyright infringement lawsuits involving the duplication of an image were rare because they required the infringer to physically obtain the negative or slide of the image.[558] If there was direct reproduction, it often was done with a photocopier.[559] Copyright infringement cases in the pre-internet world sometimes involved clients who used the photograph beyond the scope of a license[560] or who obtained the negative from a third party who was not authorized to reproduce it.[561]

Another unsurprising takeaway is that over 59% of the Lawsuits were filed in the Southern District of New York, the Central District of California, the Eastern District of New York, the Southern District of Florida, and the Northern District of California.[562] The Southern District of New York saw the most image infringement filings in part because of the immense number of claims filed by the Liebowitz Law Firm.[563] Image infringement lawsuits also are occurring most frequently in the areas with the most copyright registration filings. According to a study from 2013, the Los Angeles/Long Beach/Anaheim, California area had the greatest total of copyright registrations with the U.S. Copyright Office for visual material, which includes photographs.[564] The next highest amount of copyright registrations for visual material came from the New York/New

[557] *See supra* Part II.E.

[558] *See, e.g.*, Elbe v. Adkins, 812 F. Supp. 107, 108 (S.D. Ohio 1991) (finding that the defendant had made counterfeit photographs from the proofs that the plaintiff had loaned him).

[559] *See*, *e.g.*, Epic Metals Corp. v. Condec, Inc., 867 F. Supp. 1009, 1013–14 (M.D. Fla. 1994) (holding that defendant committed copyright infringement when it made a copy of its competitor's photographs from a sales brochure); Curtis v. Gen. Dynamics Corp., No. C89-566S, 1990 U.S. Dist. LEXIS 17333, at *27–28 (W.D. Wash. Sept. 26, 1990) (finding copyright infringement where the defendant photocopied a photograph of a wheelchair and used it to develop an advertisement).

[560] *See, e.g.*, Gerig v. Krause Publ'ns, Inc., 58 F. Supp. 2d 1261, 1268 (D. Kan. 1999); Childers v. High Soc'y Mag., Inc., 557 F. Supp. 978, 982 (S.D.N.Y. 1983); Marshall v. New Kids on Block P'ship, 780 F. Supp. 1005, 1007 (S.D.N.Y. 1991).

[561] *See, e.g.*, Psihoyos v. Nat'l Examiner, No. 97 Civ. 7624, 1998 WL 336655, at *1 (S.D.N.Y. June 22, 1998) (finding copyright infringement where defendant news outlet obtained a slide of a photograph from a third party); Blackman v. Hustler Mag., Inc., 620 F. Supp. 792, 795–96 (D.D.C. 1985) (finding copyright infringement where magazine published photographer's photographs after refusing to return them), *aff'd in part, rev'd in part*, 800 F.2d 1160 (D.D.C. 1986) (on issue of damages).

[562] *See supra* Part II.F.

[563] *See* LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021*, supra* note 1, at 3.

[564] Dotan Oliar, Nathaniel Pattison, & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2234 (2014).

Jersey/Connecticut area.[565] And the third highest number of registrations was from Miami, Florida.[566]

IV. SOLUTIONS TO PREVENTING COPYRIGHT INFRINGEMENT AND TROLLING

Although copyright infringement and trolling will never be eliminated, there are measures that can be taken to mitigate their frequency. Ultimately, photographers should attempt to turn potential infringers into licensed customers through education and easy and affordable licensing. Additionally, photographers should learn lessons from the music industry's fight against infringement. For example, photographers should not view lawsuits or demand letters as education. Also, photographers should embrace working with the social media platforms instead of trying to sue them out of existence. In terms of combatting trolling, Congress and courts should limit the use and amount of statutory damages and attorneys' fees, and defendants should shield themselves from trolls by offering Rule 68 judgments and moving for cost bonds.

A. The Photography Industry Needs to Educate the Public and Specific Industries About Copyright Law

Based on the Study, it appears that the public lacks a general understanding of copyright law. This is consistent with past research by Hong Luo and Julie Holland Mortimer that found that digital image infringers frequently are unaware that their actions constitute infringement or that they need to pay for images they find on the internet.[567] Also, infringers tend to be unaware of the image's price when they copy it.[568]

There are several common misunderstandings about copyright law.[569] First, some internet users believe that all images found on Google are free for the taking.[570] However, images do not lose

[565] *Id.*

[566] *Id.*

[567] *See* Luo & Mortimer, *supra* note 164, at 142 (finding that 85% of the recipients of a settlement request letter during their study period claimed "that they [were] either unaware of the infringement, or that the infringement [was] the result of hiring a third party to design the website on which infringement occurred")

[568] *See id.*

[569] *See generally* GREENBERG & REZNICKI, *supra* note 191, at 31 (citing common myths about copyright law).

[570] *See* Linda Wagar, *Local Businesses Encounter Download Danger, Learn 'Free Photos' Could Cost Them Thousands*, FOX4 NEWS (Nov. 16, 2020, 11:21 AM), https://fox4kc.com/news/problem-solvers/local-businesses-encounter-download-danger-learn-

copyright protection or enter the public domain when photographers post them to the internet.[571] Nor should users assume that by posting an image, a photographer is granting an implied license for others to copy it.

Another area of confusion is that people think they can copy images if they are not directly making a profit from them.[572] Many people have heard of the fair use defense, but they do not understand how the defense works or that commercial use is just one part of the first factor.[573] There is no automatic defense to copyright infringement when a defendant uses an image but does generate revenue from it.

A third myth is that if an image does not bear a copyright registration notice, it is not copyrighted.[574] But in the United States works first published on or after March 1, 1989, are not required to display a copyright notice.[575]

Now that the CCB is accepting claims, some fear there will be a boom of image infringement cases by photographers.[576] An onslaught of copyright infringement claims has the potential to bring photographers negative publicity and public backlash, much like the scorn the Recording Industry Association of America (RIAA) received when it brought thousands of infringement lawsuits in the early 2000s.[577] While photography organizations are educating their

free-photos-could-cost-them-thousands [https://perma.cc/7TCW-P2VS] (explaining that a defendant thought his use of an image from the internet was permissible because "[i]t was a free picture from Google, free"); *see also* Deborah Peckham & Brooke Penrose, *Our Top 5 Copyright Misconceptions Debunked!*, JDSUPRA, https://www.jdsupra.com/legalnews/our-top-5-copyright-misconceptions-1387811/ [https://perma.cc/JXC2-3LBD] (explaining that one top myth about copyright law is that images found on the internet are in the public domain and can be freely used).

[571] *See supra* Part I.A.

[572] *See* GREENBERG & REZNICKI, *supra* note 191, at 22.

[573] *See McGucken Photo Infringement*, VONDRAN LEGAL, https://www.vondranlegal.com/mcgucken-photo-infringement?preview=true&site_id=1628 [https://perma.cc/B2CJ-SGMA] (explaining that one common question that copyright defendants pose is, "I thought maybe this was a 'fair use' of [the client's] work?"); *see also supra* Part I.C.

[574] *See* Wagar, *supra* note 570 (explaining that a small business owner thought her use of a copyrighted image was permissible because "[i]t was our understanding that it was okay to share those images because they did not have a copyright stamp"); *see also* HansThomas, *Higbee & Associates Review: Sued for Copyright Case When I Was Willing to Settle . . . Mean & Wasteful!*, COMPLAINTS BD. (May 12, 2022), https://www.complaintsboard.com/higbee-associates-sued-for-copyright-case-when-i-was-willing-to-settle-mean-wasteful-c797630 [https://perma.cc/GZ7K-7YTM] (complaining about a demand letter "because I found the photo online and it did not have the copyright symbol on it").

[575] *See* 17 U.S.C. § 401(a); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 749 & n.56 (2013) (book review).

[576] *See* PATRY, *supra* note 11.

[577] *See infra* Part IV.B.

constituents about the CASE Act,[578] they also should be launching an educational and public relations campaign designed towards image users. The campaign should explain how copyright law applies to photographs and the ways in which consumers can license images. Photography organizations should partner with the Copyright Office to develop educational programs about proper image usage.

The educational campaign also needs to put a face on the problem so that infringers understand that image infringement is not a victimless crime. While the music industry ran anti-piracy commercials, viewers saw these efforts as benefitting the greedy record labels as opposed to starving artists.[579] Photographers should emphasize the independent, freelance nature of their profession and explain that image piracy is hurting individuals, not big corporations.

The campaign also should put image takers on notice of the potential to be caught and emphasize that licensing images is not only the right thing to do, but also cheaper in the long run. Moreover, the campaign should describe the benefits of high-quality images, so that users understand the value in paying for such images.

The Study further found that the real estate industry is impacted by the lack of knowledge of copyright law.[580] Therefore, photography organizations should target educational campaigns towards realtors. Also, all fifty states require that realtors be licensed, and many of the states have continuing education requirements.[581] Photographers should lobby for state real estate commissions to require copyright education as part of the licensing program and continuing education requirements.

As the Study found that five out of the seven most-sued Defendants were born-digital media companies,[582] this is an industry that also needs outreach programs and education. The Associated Press Stylebook, which is a comprehensive reference manual for journalists, is a staple in the media industry and has a chapter devoted to media law.[583] With regard to copyright, the AP Stylebook notes that, "[p]robably of greatest concern to reporters and editors

[578] *See* Maddrey, *supra* note 13.
[579] *See infra* Part IV.B.
[580] *See supra* Part II.B.1.
[581] *See Continuing Educational Requirements,* NAT'L ASS'N OF REALTORS, https://www.nar.realtor/education/continuing-education-requirements [https://perma.cc/A8KF-LFT8].
[582] *See supra* Part II.B.3.
[583] THE ASSOCIATED PRESS STYLEBOOK (55th ed. 2020). The *AP Stylebook* "provides fundamental guidelines for spelling, language, punctuation, usage and journalistic style" and "is the definitive resource for journalists." *APStylebook.com User Guide*, AP STYLEBOOK, https://www.apstylebook.com/user_guide [https://perma.cc/G4PH-FNBF].

are the copyrights in photographs and videos used to illustrate a news report."[584] However, the AP Stylebook was initially created for print media,[585] and its standards need to be updated in the internet age with more guidelines for the use of digital images.

The Study also revealed that businesses need to monitor the images being placed on their websites by third-party web designers. Several of the lawsuits in the Study stemmed from images being used on websites that were built by web developers.[586] Although most businesses do not design their own websites and select accompanying images, businesses nonetheless can be held liable for infringement that occurs on their web pages.[587] Therefore, it is important that businesses hire reputable web designers and, if possible, include an indemnification clause in their hiring agreement.

B. Photographers Should Not Use Lawsuits as Educational Campaigns

Based on lessons the music industry learned in its fight against piracy, photographers should not view lawsuits as education. In the late 1990s and early 2000s, the music industry was faced with widespread piracy.[588] Peer to peer ("P2P") networks like Napster had just been born, and consumers discovered that they could use these networks to share music files and download illegal copies.[589] The music industry faced a precipitous decline in sales.[590]

The music industry's initial strategy for fighting infringement was simple: sue, sue, sue. They began their scorched earth litigation strategy by starting with the P2P networks platforms that enabled the infringement. Napster, which pioneered the concept of online music sharing, was the record labels' first victim.[591] A court-ordered

[584] THE ASSOCIATED PRESS STYLEBOOK, *supra* note 583, at 495.
[585] *See APStylebook.com User Guide*, *supra* note 583.
[586] *See, e.g.*, Complaint at 2, 4, Adlife Mktg & Commc'ns Co. v. Vistamont Farms, LLC, No. 2:20-CV-00332 (W.D. Pa. dismissed July 21, 2020) (suing company that allegedly displayed copyrighted image on its website and the web developer who allegedly designed the website).
[587] *See supra* Part I.B; *see also* Radabaugh v. Clay Turner Realty Grp., LLC, No. CV 120-058, 2022 U.S. Dist. LEXIS 6163, at *4 (S.D. Ga. Jan. 12, 2022) (awarding damages against a business that had failed "to check whether their third-party web developer used a copyrighted image without permission").
[588] *See* João Pedro Quintais & Joost Poort, *The Decline of Online Piracy: How Markets—Not Enforcement—Drive Down Copyright Infringement*, 34 AM. U. INT'L L. REV. 807, 811–12 (2019).
[589] *See id.* at 811–13.
[590] *See id.* at 813.
[591] *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1029 (9th Cir. 2001).

injunction effectively shut down the company.[592] Buoyed by their initial courtroom success, the record labels continued to pursue P2P networks, and in short order, they took down Aimster,[593] Grokster,[594] Limewire,[595] and other platforms.[596] But the music labels then realized that they had a Whac-a-Mole problem. As soon as they sued one company out of business, another one popped up to take its place.[597] The music industry also found it difficult to stop the emergence of P2P networks outside of the United States.[598]

Because the battles against the P2P networks were not ending the digital piracy war, the music industry then shifted their focus to the individuals who were illegally downloading music and file sharing. In 2003, the RIAA, which is a trade organization that represents the major music companies in the United States,[599] began a five-year campaign against individual file sharers.[600] They considered this to be an educational campaign[601] and paired it with outpourings from musicians explaining how it was important to pay for music.[602]

Ultimately, the RIAA sued over 35,000 individuals,[603] including many sympathetic users like grandparents, a homeless person, a

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[592] Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 84 NOTRE DAME L. REV. 331, 334 (2008).

[593] *In re* Aimster Copyright Litig., 334 F.3d 643, 645, 656 (7th Cir. 2003).

[594] *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).

[595] *See* Arista Records LLC v. Lime Grp. LLC, 715 F. Supp. 2d 481, 494, 507 (S.D.N.Y. 2010).

[596] *See* Steven Seidenberg, *The Record Business Blues*, ABA J. (June 1, 2010), https://www.abajournal.com/magazine/article/the_record_business_blues [https://perma.cc/K3BF-2VSG].

[597] *See id.*

[598] *See* Danwill David Schwender, *Reducing Unauthorized Digital Downloading of Music by Obtaining Voluntary Compliance with Copyright Law Through the Removal of Corporate Power in the Recording Industry*, 34 T. JEFFERSON L. REV. 225, 249 (2012).

[599] *See About RIAA*, RECORDING INDUS. ASSOC. OF AM., https://www.riaa.com/about-riaa/ [https://perma.cc/GUF7-DJ3Y].

[600] *See Statement from the RIAA on File-Sharing*, WALL ST. J. (June 25, 2003, 2:56 PM), https://www.wsj.com/articles/SB105656559944720700 [https://perma.cc/GNR4-8H66] ("Starting tomorrow, the Recording Industry Association of America (RIAA) will begin gathering evidence and preparing lawsuits against individual computer users who are illegally offering to 'share' substantial amounts of copyrighted music over peer-to-peer networks."); David M. Mitchell, C. Patrick Scott, & Keneth H. Brown, *Did the RIAA's Prosecution of Music Piracy Impact Music Sales?*, 46 ATL. ECON. J. 59, 60 (2018).

[601] *See Statement from the RIAA on File-Sharing*, *supra* note 600 ("In making the announcement, the music industry cited its multi-year effort to educate the public about the illegality of unauthorized downloading . . . .").

[602] *See, e.g.*, Frank Ahrens, *Music Industry Sues Online Song Swappers*, WASH. POST (Sept. 9, 2003), https://www.washingtonpost.com/archive/politics/2003/09/09/music-industry-sues-online-song-swappers/4c91a4e0-8948-424c-98c7-c84e0c3af3c6/ [https://perma.cc/TJ7L-NQDC].

[603] *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELEC. FRONTIER FOUND. (Dec. 19, 2008), https://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes [https://perma.cc/K9DT-7QBB]; *see also* ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FIVE YEARS LATER 1 (2008), https://www.eff.org/files/eff-riaa-whitepaper.pdf

fully disabled widow, children, and at least one dead person.[604] The RIAA also sent over 5,000 "'pre-litigation' letters" to college students offering a "reduced" settlement of around $3,000 if the student paid within twenty days of receipt of the letter.[605] Otherwise, the RIAA threatened to file a lawsuit seeking at least $750 per song.[606] Given the high cost of hiring an attorney and defending oneself in federal court, few individuals fought back.[607] Instead, they avoided the risk of litigation and opted to pay quick settlements,[608] which ranged between $3,000 and $11,000.[609] Meanwhile, a single mother, who shared twenty-four songs online, chose to go to trial and was hit with a $1.92 million judgment, which was eventually reduced to $222,000.[610]

In the end, the litigation strategy did not work. While the litigation war cost the RIAA over $17 million in attorneys' fees in 2008, it recovered less than $400,000 that year and, more than that, it badly damaged its public image.[611] Research from the time shows that the RIAA did meet its goal of educating people about the illegality of downloading music as a result of the lawsuits.[612] However, the lawsuits did not stop the infringement.[613] The litigation campaign

[https://perma.cc/3SUL-6CLG] [hereinafter ELECTRONIC FRONTIER FOUNDATION, FIVE YEARS LATER].

[604] *See* Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 146 (2006); ELECTRONIC FRONTIER FOUNDATION, FIVE YEARS LATER, *supra* note 603, at 5; Eric Bangeman, *RIAA Escapes Sancations, Drops Case Against Homeless Man*, ARS TECHNICA (Apr. 18, 2008, 1:05 PM), https://arstechnica.com/tech-policy/2008/04/riaa-escapes-sanctions-drops-case-against-homeless-man/ [https://perma.cc/H2TM-3RAW].

[605] ELECTRONIC FRONTIER FOUNDATION, FIVE YEARS LATER, *supra* note 603, at 7–8.

[606] *Id.*

[607] *See* David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED (Sept. 4, 2008, 2:55 PM), https://www.wired.com/2008/09/proving-file-sh/ [https://perma.cc/VBQ4-RGUX].

[608] *See id.*; LEE HUNNEWELL, INTERNET PIRACY 14 (2008).

[609] ELECTRONIC FRONTIER FOUNDATION, FIVE YEARS LATER, *supra* note 603, at 5.

[610] *See* Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 312–13 (2020); Dave Itzkoff, *Woman Fined $1.92 Million for Music Piracy*, N.Y. TIMES: ARTSBEAT BLOG (June 19, 2009, 11:50 AM), https://archive.nytimes.com/artsbeat.blogs.nytimes.com/2009/06/19/woman-fined-192-million-for-music-piracy/ [https://perma.cc/45Z6-WP55].

[611] *See* Jason Krause, *Chinks in the Recording Industry's Armor: Association Losing Face, May Soon Lose Ground in File-Swapping Fight*, 2 No. 37 ABA J. E-REP. 3 (2003) ("But perhaps the biggest problem the RIAA faces is that these suits have created bad public relations for the organization."); Debra Cassens Weiss, *$17M for Legal Fees Is Money Well Spent, RIAA Says*, ABA J. (July 29, 2010, 11:00 AM), https://www.abajournal.com/news/article/17m_for_legal_fees_is_money_well_spent_riaa_says [https://perma.cc/4W5M-S3B9].

[612] *See* Schwender, *supra* note 598, at 251 (noting that "[t]he RIAA claims the suits more than doubled consumer awareness of copyright law").

[613] *Id.*

was considered a bullying strategy[614] that alienated and angered music fans—who ultimately are the music industry's customers. The "music purchasing public perceived the RIAA's litigation strategy as heavy handed and subsequently purchased less music."[615] Moreover, the litigation spurred some people to find alternative ways to pirate music[616] and stick it to the record companies.

Some studies have shown that deterrence lawsuits do not work in the long run.[617] While there is some benefit from making consumers aware that their actions are illegal, people perceive the risk of being caught and suffering consequences as low.[618] "The RIAA's experience with its lawsuits [] echoed the general experience with such deterrence-based strategies: they are enthusiastically pursued but not necessarily effective."[619]

While photographers, for the most part, are not suing individuals, they are suing their potential customers—the companies that rely on images for their businesses. The photography industry's focus should be on converting infringers into licensors through educational means and through easy licensing. If photographers use lawsuits as an educational tool, they may face the same type of public backlash that the RIAA received.

C. Photographers Should Not Use the Threat of Statutory Damages to Make Ridiculous Demands

While many are sympathetic to the plight of freelance photographers who routinely have their images copied from the internet, photographers provoke outrage when they send demand letters threatening to seek damages up to $150,000 for the infringement of an image that would normally license for less than $100. As explained above, the maximum amount of statutory damages for willful infringement is rarely awarded in image

614 Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 977 (2008) ("Many critics allege that this campaign is unfair and paint the RIAA as mean and a bully."); STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION 188 (2009) (quoting former Electronic Frontier Foundation lawyer Jason Schultz as saying, "If your goal is to intimidate people and get them to freak out and write checks, then yeah, it's a great strategy").

615 Mitchell et al., *supra* note 600, at 61.

616 *See* Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 604 (2009).

617 *See* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 661–62 (2006).

618 *Id.* at 663.

619 *Id*. at 661.

infringement cases.[620] By making unrealistic demands that are divorced from the value of the image, photographers are driving a wedge between themselves and their potential customers, who may perceive them as copyright bullies.[621] Additionally, photographers are setting themselves up for trolling claims for "seek[ing] disproportionate remedies."[622]

Cease-and-desist letters are useful tools for fighting infringement, but if they are misused, they instead can hinder the resolution process. As previously mentioned, Pixsy's standard demand letter warns the recipient that "damages can range up to $150,000 not including expenses and costs" without explaining that they also could be as low as $200.[623] Vondran Legal cautions on its website that, "[o]nce we are forced to file suit we will be seeking the full amount of damages possible, which under the law could be as high as $150,000 per willful infringement."[624] Such scare tactics result in outrage and disbelief. Given that many of the images at issue would license for less than $1,000, businesses and individuals often feel they are being extorted or are victims of a shakedown.[625] This in turn causes some potential infringers to become angry and want to fight back. Alternatively, some recipients may feel that the cease-and-desist letter is a hoax or will not take the letter seriously because of the perceived ridiculousness of asking $150,000 for a one-time usage of a photograph.[626] Nonetheless, federal courts generally do not consider

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620 *See supra* Part I.D.

621 *See, e.g.*, *The Getty Images Demand Letter—Copyright Bully vs. You*, KELLEY KELLER, (Jan. 6, 2016), http://kelleykeller.com/the-getty-images-demand-letter-fighting-the-copyright-bully [https://perma.cc/UK48-YFZS].

622 Sag, *supra* note 331, at 1114.

623 *See supra* Part III.A.5.

624 *McGucken Photo Infringement*, *supra* note 573.

625 *See, e.g.*, u/joeypatches, *Copyright Image: "$1,000.00 Payable to Firm"?*, REDDIT (Sept. 22, 2015), https://www.reddit.com/r/legaladvice/comments/3lxw2o/copyright_image_100000_payable_to_firm [https://perma.cc/B9PU-WRJE] (describing a non-profit music blog that received a Higbee & Associates demand letter and questioning whether the letter was "a scam"); *Picrights*, TRUSTPILOT (Mar. 10, 2022), https://www.trustpilot.com/review/picrights.com [https://perma.cc/5LGN-CQPP] (review complaining, "New scam in town. These guys surf the internet and find pictures on websites and then google them to find out where else they are. Then they send you a threatening letter to scare you into paying . . . ."); Kingkendall, *Topic: Creative Commons Photos on Facebook, Twitter, etc.*, EXTORTIONLETTERINFO (Dec. 6, 2018, 11:40 PM), https://www.extortionletterinfo.com/forum/getty-images-letter-forum/creative-commons-photos-on-facebook-twitter-etc/30 [https://perma.cc/ZVC9-A4TR] (calling a demand letter from "copyright troll" Marco Verch a "scam"); *see also McGucken Photo Infringement*, *supra* note 573 (noting that a frequent complaint of recipients of their demand letter is, "I feel like this is extortion or entrapment").

626 *See*, *e.g.*, Complaint at Ex. A, Krueger v. Adlife Mktg. & Commc'ns Co., No. 2:20-CV-07083, 2020 U.S. Dist. LEXIS 233624 (C.D. Cal. dismissed Dec. 10, 2020) (showing alleged infringer's response to a demand letter for $2,525: "Would $26 get it done? No, but seriously, your email

sending a demand letter threatening litigation to be criminal extortion.[627]

After sending a cease-and-desist letter, the firms typically will contact the alleged infringer and try to begin negotiations.[628] Higbee & Associates allegedly demanded around $2,000 to $20,000 in the pre-complaint stage.[629] However, once it has filed a lawsuit, its typical demand reportedly rises to around $10,000 to $65,000.[630] Barshay Sanders PLLC, now known as the Sanders Law Group, allegedly demands around $2,500 to $10,000 in the pre-complaint stage.[631] Once litigation is commenced, its typical demand reportedly shoots up to $15,000 to $50,000 with some exceptions in either direction.[632]

The Liebowitz Law Firm has been criticized for not sending cease-and-desist letters, but instead engaging in a sue first, negotiate later strategy.[633] According to one opposing attorney, Liebowitz's "whole scheme seems to be: He throws out a demand of something between $25,000 or $30,000 to start, and basically is negotiating down from there."[634]

However, it is unfair to demonize photographers because they seek some sort of statutory damages. According to the 2019 American Intellectual Property Law Association annual economic survey, in cases where less than $1 million is at stake, the median cost to pursue copyright litigation through appeal is $500,000.[635] But for the potential of statutory damages and attorneys' fees, it would never make economic sense to bring a copyright infringement claim for a photograph that licenses for less than $1,000, and low-value works, like some photographs, would have meaningless rights under the

was hilarious because I'm sure you're not used to dealing with people that have the means and the knowledge to defend themselves against your nonsense").

627 *See* Sosa v. DIRECTV, Inc., 437 F.3d 923, 939–40 (9th Cir. 2006) ("[W]e do not believe the Hobbs Act imposes liability for threats of litigation where the asserted claims do not rise to the level of a sham."); *see also* I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265, 267 (8th Cir. 1984) (holding threats of baseless litigation cannot constitute extortion under the Hobbs Act).

628 *See*, *e.g.*, Complaint at Ex. A, *Krueger*, 2020 U.S. Dist. LEXIS 233624 (No. 2:20-CV-07083) (showing email negotiations between alleged infringer and Copyright Division of Higbee & Associates).

629 Higbee & Associates, COPYRIGHT DEMAND LETTER, https://copyright-demand-letter.com/higbee-associates-copyright/ [https://perma.cc/QM46-TX64].

630 *Id.*

631 Sanders Law PLLC, COPYRIGHT DEMAND LETTER, https://copyright-demand-letter.com/sanders-law-firm-copyright/ [https://perma.cc/9YUE-37BF].

632 *Id.*

633 *See* Peters, *supra* note 411.

634 *Id.*

635 AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, AIPLA 2019 REPORT OF THE ECONOMIC SURVEY 50 (2019).

Copyright Act. In awarding statutory damages, one court has noted "a professional photographer has a right to earn his living without going to court to redress other parties' casual abuse of the fruits of his labor, and thus deterrence is a substantial concern."[636] However, as discussed below, photographers should be judicious as to the amount of statutory damages they seek.[637]

Instead of threatening alleged infringers, photographers may be better off taking a softer approach by acknowledging that the copying may have been an inadvertent mistake. Studies by Hong Luo and Julie Holland Mortimer found that stock photo agency demand letters were more effective when they were conciliatory and informed the infringer that they would be given a fee reduction if they settle.[638] Their studies showed that when the settlement letter stated that the agency "underst[ood] this unlicensed use may have been unintentional" and informed the infringer of the discount, the probability of settling in the first thirty days rose by 12% and the amount of the settlement increased by over 80%.[639] Further, the settlement rate increased by up to 18% and the amount of settlement by 130% when a deadline was imposed.[640] A later study by Luo and Mortimer found that informing infringers of cheaper licensing options led to a fourteen-fold increase in licensing of the image.[641]

Besides taking a conciliatory tone and setting a deadline for resolution, demand letters should attach a copyright registration for the work and proof that the image has been licensed in the past and for how much. This helps legitimize the demand being made. Understandably, photographers will seek more than their standard licensing rate once an image has been infringed because of the time and expense of pursuing the infringement. However, the letter should explain this to the recipient.

The bottom line is that just because photographers could theoretically receive statutory damages up to $150,000 does not mean they should use that as a threat. Less aggressive tactics may lead to faster and more lucrative settlements.

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636 Sadowski v. Roser Commc'ns Network, Inc., No. 6:19-CV-592, 2020 U.S. Dist. LEXIS 10266, at *5–6 (N.D.N.Y. Jan. 22, 2020).

637 *See infra* Part IV.C.

638 *See* Hong Luo & Julie Holland Mortimer, *Copyright Enforcement: Evidence from Two Field Experiments*, J. ECON. & MGMT. STRATEGY 499, 499 (2017).

639 *See id.* at 501, 506.

640 *See id.* at 501.

641 Hong Luo & Julie Holland Mortimer, *Infringing Use as a Path to Legal Consumption: Evidence from a Field Experiment,* J. ECON. & MGMT. STRATEGY 1, 7 (2019).

D. Photographers Should Partner with Social Media Platforms to Monetize Their Work

The biggest takeaway from the music industry's fight against piracy is, "If you can't beat 'em, join 'em." According to one record industry executive, companies need to buy into "technological advancement to secure a way of conducting business going forward."[642] The major shift in music piracy came when the recording industry started working with the innovative platforms that were changing the way music was consumed and stopped trying to run them out of business.[643] Music piracy rates began to decrease when consumers had easy, affordable, and legal ways to buy music online, first through the iTunes Music Store,[644] and later through streaming services like Spotify and Pandora.[645] Meanwhile, YouTube created a Content ID system that detects copyrighted music and then allows the copyright owner to choose between "mak[ing] money from it;" "leav[ing] it up and track[ing] viewing statistics;" or "block[ing] it from YouTube altogether."[646] In 2017, copyright owners in the music industry elected to monetize 95% of YouTube Content ID claims.[647]

Like the music industry in 2001, photographers need to revamp their business models and find ways to partner with social media platforms to monetize their usage of images in mutually beneficial ways. Unfortunately, based on the Study, the photographers have not learned this lesson yet.

During the Study, two copyright infringement lawsuits were filed against social media platforms. For example, professional travel photographer Blaine Harrington III filed a class action on behalf of himself and all others similarly situated against Pinterest.[648] Among many in the photography community, Pinterest[649] is public enemy

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642 *See* Lauren Berg, *Universal Music's GC Touts Innovation over Litigation Alone*, LAW360 (Nov. 9, 2020), https://www.law360.com/articles/1327286/universal-music-s-gc-touts-innovation-over-litigation-alone [https://perma.cc/985H-DT2U].

643 *See* Quintais & Poort, *supra* note 588, at 820.

644 KNOPPER, *supra* note 614 at 186.

645 Quintais & Poort, *supra* note 588, at 823.

646 GOOGLE, HOW GOOGLE FIGHTS PIRACY 24–25 (2018), https://services.google.com/fh/files/newsletters/how_google_fights_piracy.pdf [https://perma.cc/6X8K-VW2Q].

647 *Id.* at 25.

648 *See* Complaint at 2, Harrington v. Pinterest, Inc., No. 20-CV-05290 (N.D. Cal. dismissed Sept. 19, 2022).

649 Pinterest "is an online platform that allows users to create their own virtual image boards or 'boards,' by 'pinning' images to their boards . . . . from other sources on the internet." *See*

number one.[650] Photographers routinely complain that Pinterest not only provides the tools for its users to brazenly copy their images but that it also encourages them to do so.[651] They assert that Pinterest's business model is built on rampant copyright infringement in order to lure users to its sites.[652] Moreover, they allege that Pinterest monetizes the infringements through paid advertisements.[653] Ultimately, the court dismissed with prejudice Harrington's cause of action in his second amended complaint for violation of the Digital Millennial Copyright Act ("DMCA"), 17 U.S.C. § 1202(b)). While the court granted Harrington leave to amend, the parties stipulated to stay the case pending resolution of the appeal in a similar lawsuit that photographer Harold Davis brought against Pinterest. In that case, the court dismissed Davis's contributory infringement claim on March 9, 2021, because Davis failed to allege adequately that Pinterest had the requisite knowledge of infringement to sustain the claim.[654]

The other lawsuit involving a major social media platform was brought by celebrity stock photo agency Backgrid against Tumblr and its parent company Automattic, Inc.[655] In its Complaint, Backgrid analogized Tumblr to Napster and claimed that just like "the infamous Napster file-sharing service grievously injured the music industry by allowing users to upload unauthorized music files for unlicensed public distribution," Tumblr "allow[s] and encourage[s] their users to upload and share Backgrid's photographs without regard to copyright law, and even provide a tool for their users to do so."[656] Backgrid further alleged that like Napster, "the success of Tumblr's and Automattic's business models depends on massive copyright infringement to draw users to their websites."[657] The lawsuit settled and was dismissed on March 3, 2021, before any resolution was reached on the merits of Backgrid's claims.[658]

Davis v. Pinterest, Inc., No. 19-CV-07650, 2021 U.S. Dist. LEXIS 44173, at *1 (N.D. Cal. Mar. 9, 2021).

[650] Complaint at 2, *Harrington*, No. 20-CV-05290 (alleging that "[a]lthough 'Pinners' and advertisers may love Pinterest, it is the bane of copyright owners whose federally registered images are misused by and through Pinterest").

[651] *E.g.*, *Davis*, 2021 U.S. Dist. LEXIS 44173, at *2–3.

[652] *See id.*

[653] *Id.* at 2.

[654] *Davis*, 2021 U.S. Dist. LEXIS 44173, at *11.

[655] Complaint at 7, Backgrid USA, Inc. v. Tumblr, Inc., No. 1:20-CV-03167 (S.D.N.Y. dismissed Mar. 3, 2021).

[656] *Id.* at 2.

[657] *Id.*

[658] Docket Entry Nos. 36, 40, *Backgrid USA* (No. 1:20-CV-03167).

While social media platforms like Pinterest and Tumblr are hated by photographers, they are beloved among consumers. Rather than drive them out of business and risk public backlash, photographers should consider how to partner with them to get their fair share of the pie.

E. Photographers Need to Create Easier Ways to Find and License Their Images

The Study exposed that consumers may not understand that images generally need to be licensed for commercial use. However, even if they did, the process for licensing images is fragmented.[659] If someone does find an image on the internet that they would like to use, they must reach out to the photographer to negotiate a license. This is assuming that the photographer can be identified from the image. During their research, Luo and Mortimer found that legal options for purchasing content matter, as "even small frictions or inconveniences may be sufficient to deter licensing and, potentially, lead to copyright infringement."[660] In its efforts to fight online piracy, Google notes that, "[e]asy access to convenient, legitimate music, videos, and other media is one of the most effective weapons to fight infringement."[661]

Unlike the photography industry, the music industry has banded together in certain areas to enforce rights, facilitate licensing, and collect royalties. For example, the right of public performance of musical works is the corollary to the right of public display of photographs.[662] Subject to some statutory exceptions, when a business, like a nightclub or retailer, plays music over loudspeakers, the business needs to obtain a public performance license.[663] Performing Rights Organizations (PROs) issue public performance licenses for songs in their catalog, monitor public performances of their music, and collect and distribute performance royalties to the

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[659] *Global Photography Services Market Outlook 2019–2023 with Getty Images, Hammerhead Interactive, Shutterfly, StudioAlice Co, and Summit Portraits Dominating—ResearchAndMarkets.com*, BUSINESSWIRE (June 21, 2019), https://www.businesswire.com/news/home/20190621005380/en/Global-Photography-Services-Market-Outlook-2019-2023-with-Getty-Images-Hammerhead-Interactive-Shutterfly-StudioAlice-Co-and-Summit-Portraits-Dominating---ResearchAndMarkets.com [perma.cc/CG33-NU3C] ("The [photography] market appears to be fragmented with many players occupying the market share.").

[660] Luo & Mortimer, *supra* note 641, at 1.

[661] GOOGLE, *supra* note 646, at 10.

[662] *See* 17 U.S.C. § 106.

[663] *See* Broad. Music, Inc. v. Prana Hosp., Inc., 158 F. Supp. 3d 184, 191–94 (S.D.N.Y. 2016).

copyright owners.[664] A business can obtain a blanket license that authorizes it to publicly perform any of the songs in the PRO's catalog.[665] "[T]he blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions" which made "thousands of individual negotiations[] a virtual impossibility" and "a difficult and expensive reporting problem for the user and policing task for the copyright owner."[666]

In the United States, there are four main PROs: ASCAP (American Society of Composers, Authors, and Publishers) and BMI (Broadcast Music Incorporated), which together handle the vast majority of the performing rights blanket licenses, and SESAC and GMR (Global Music Rights).[667] The PROs' monitoring and enforcement actions have cultivated an understanding among businesses of the need to license music. The photograph industry could benefit from creating a collecting society similar to the PROs to issue licenses, enforce their rights, and help establish norms around licensing.

Additionally, the Mechanical Licensing Collective (MLC), which is a nonprofit organization created under the Orrin G. Hatch–Bob Goodlatte Music Modernization Act,[668] has developed a centralized copyright database to store musical ownership information, including the identity and location of the copyright owners of musical compositions.[669] The public is able to access and search this database for free.[670] Meanwhile, several private companies are attempting to use blockchain technology to build databases for photographs.[671] This would allow consumers to find photographs and negotiate directly with the photographer.[672] However, unlike the MLC which creates a one-stop database of licensing information, these private databases are decentralized.[673] While the middleman in the licensing process will be cut out, consumers still may need to search across a spectrum of registers to locate a photographer. A centralized

664 *See* Radio Music License Comm., Inc. v. Glob. Music Rts., LLC, No. CV 19-3957, 2020 U.S. Dist. LEXIS 243374, at *2–3 (C.D. Cal. Jan. 2, 2020).
665 *See* United States v. Am. Soc'y of Composers, 627 F.3d 64, 68 (2d Cir. 2010).
666 Broad. Music, Inc. v. Columbia Broad. Sys., Inc, 441 U.S. 1, 20 (1979).
667 *Radio Music License Comm.*, 2020 U.S. Dist. LEXIS 243374, at *2.
668 Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).
669 *See About Us*, THE MLC, https://www.themlc.com/our-story [https://perma.cc/4EFN-6YBH].
670 *Id.*
671 *See, e.g.*, *Introducing YouPic Blockchain*, YOUPIC, https://youpic.com/blockchain [https://perma.cc/EC4Y-95SW].
672 *See Introducing YouPic Blockchain*, *supra* note 671.
673 *Id.*

approach, like the MLC is taking, may be the better and easier solution.

F. Congress, Courts, and Defendants Can Take Steps to Prevent Trolling

Despite the trolling tactics of some Plaintiffs in the Study, courts often must concede that the plaintiff has a meritorious claim of copyright infringement.[674] Because the court cannot dismiss the claim, one solution to combat trolling is to limit the food source. Copyright trolls—and the law firms and reverse image search companies that enable them—feed on damage awards. As one court has recognized, "if every 'troll' lawsuit were litigated through summary judgment to recover $750, there would be little incentive to continue to bring those actions."[675] Damages could be limited in several ways.

1. Limit Statutory Damages

The most obvious solution is to reform statutory damages. However, Congress has not heeded the call from scholars and commentators to limit or eliminate statutory damages.[676] Statutory damages do play a useful role when the cost of calculating damages exceeds the cost of actual damages or when actual damages are hard to quantify.[677] They also serve an important deterrent effect, especially when the work has a low licensing value.[678] At the same time, courts also recognize cases of innocent infringement and use their discretion to award $200 where the infringer "was not aware

[674] *E.g.*, Philpot v. L.M. Commc'ns II, Inc., No. 5:17-CV-173, 2020 U.S. Dist. LEXIS 85901, at *5 (E.D. Ky. May 15, 2020) (holding that "Plaintiff's copyright infringement claim was clearly meritorious"); Verch v. Sea Breeze Syrups, Inc., No. 19 CV 5923, 2020 U.S. Dist. LEXIS 152357, at *15–16 (E.D.N.Y. Aug. 20, 2020), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 237715, at *2 (E.D.N.Y. Dec. 17, 2020) (granting default judgment on infringement claim).

[675] Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 65 n.8 (E.D.N.Y. 2021).

[676] Brad A. Greenberg, *Copyright Trolls and the Common Law*, 100 IOWA L. REV. BULL. 77, 83 & n.48 (citing Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 505–506 (2009)); *see generally*, Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. REV. 400 (2019); James DeBriyn, Note, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 106–10 (2012).

[677] Depoorter, *supra* note 676, at 414.

[678] Sadowski v. Render Media Inc., No. 17-CV-9045, 2020 U.S. Dist. LEXIS 42517, at *10 (S.D.N.Y. Mar. 10, 2020) (recognizing the need to award "significant" statutory damages in an image infringement case to deter the defendant and other would-be infringing parties, and collecting cases where statutory damages were awarded for the purpose of deterrence).

and had no reason to believe that his or her acts constituted an infringement of copyright."[679]

However, statutory damages should not be an undue windfall to the photographer, and defendants should be shielded from outrageous demands. Professor Pamela Samuelson and members of the Copyright Principles Project have suggested that Congress or courts should establish "guidelines for awarding statutory damages in a consistent, reasonable, and just manner."[680] With respect to photograph cases, guidelines should factor in the standard licensing rate for the photograph, the number of times the images were used,[681] whether defendant continued to use the image after receiving a cease and desist letter,[682] how many images were used,[683] and whether the image was used for personal or commercial reasons. The status and size of the business also should be taken into account. Courts have noted that they "must strike a balance between deterring other incidents of piracy by . . . [d]efendants and others, and not making the award such that it will put a small business out of business."[684] To prevent outlier cases, Congress should consider lowering the range of statutory damages available for low-value photograph cases.

In the absence of legislative reform, courts—most notably in the Southern District of New York—have been creating their own guidelines for awarding statutory damages in photography cases.[685] One factor that some courts consider is the plaintiff's motivation in bringing the lawsuit and whether the plaintiff has engaged in copyright trolling.[686] In such instances, the courts award minimum

[679] *See* 17 U.S.C. § 504(c)(2).

[680] Pamela Samuelson & Members of the CPP, Symposium, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1220 (2010).

[681] *See* Verch v. Sea Breeze Syrups Inc., No. 19 CV 5923, 2020 U.S. Dist. LEXIS 152357, at *10–11 (E.D.N.Y. Aug. 20, 2020) (noting single use of an image), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 237715, at *2 (E.D.N.Y. Dec. 17, 2020).

[682] *See* Radabaugh v. Clay Turner Realty Grp., LLC, No. CV 120-058, 2022 U.S. Dist. LEXIS 6163, at *4 (S.D. Ga. Jan. 12, 2022) (awarding $1,200 in statutory damages where the defendant had "hired a third-party web developer that used Plaintiff's photograph on its website" and "immediately removed the photograph" when it learned of the lawsuit).

[683] Dermanksy v. Tel. Media, LLC., No. 19-CV-1149, 2020 U.S. Dist. LEXIS 44475, at *2, *11 (limiting statutory damages in single-image infringement case).

[684] J & J Sports Prods., Inc. v. Arboleda, No. 6:09-CV-467, 2009 U.S. Dist. LEXIS 99768, at *19 (M.D. Fla. Oct. 5, 2009); *see also* Joe Hand Promotions, Inc. v. Skaf, No. 19-CV-3391, 2020 U.S. Dist. LEXIS 47169, at *23 (E.D.N.Y. Mar. 17, 2020) (quoting J & J Sports Prods., Inc. v. Mar Y Las Estrellas Rest. Corp., No. 17-CV-1190, 2018 U.S. Dist. LEXIS 164454, at *18 (E.D.N.Y. Sept. 25, 2018)).

[685] *See supra* Part I.D.

[686] Oppenheimer v. Williams, No. 2:20-CV-4219, 2021 U.S. Dist. LEXIS 170057, at *6 (D.S.C. Sept. 8, 2021) ("Courts routinely factor a copyright plaintiff's status as a copyright troll into their damages calculus.").

statutory damages.[687] For example, in *Oppenheimer v. Griffin*, the court awarded photographer David Oppenheimer minimum statutory damages based on its finding that "Oppenheimer files copyright claims 'as a revenue stream' rather than for the purpose of being made whole."[688] However, in *Oppenheimer v. Williams*, the court clarified that it did "not find that Oppenheimer is a 'copyright troll'" but ordered the production of evidence of past copyright cases and demands and the revenue he derived from both his photography business and his litigation proceeds.[689] Some courts also consider settlement agreements to be relevant when determining damages in intellectual property cases.[690]

2. Limit or Fail to Award Attorneys' Fees

As noted, the court has discretion under the Copyright Act to award attorneys' fees and costs to the prevailing party.[691] While awarding attorneys' fees in low-value cases "opens the courthouse doors to parties who would otherwise not be incentivized to bring such claims," courts also recognize that "allowing attorney's fees in every case where a plaintiff brings a successful infringement claim would incentivize that plaintiff to bring as many other claims as possible."[692] When the plaintiff appears to be engaged in trolling, rejects reasonable settlement offers, or fails to notify the defendant of the infringement before filing suit,[693] courts should refuse to award attorneys' fees. For example, in several cases involving Larry

[687] *See* ME2 Prods., Inc. v. Ahmed, 289 F. Supp. 3d 760, 764 (W.D Va. Jan. 29, 2018) (citing Malbu Media, LLC v. [Redacted], No. PWG-14-261, 2017 U.S. Dist. LEXIS 22976 (Feb. 15, 2017)).

[688] Oppenheimer v. Griffin, No. 1:18-CV-00272, 2019 U.S. Dist. LEXIS 222849, at *18 (W.D.N.C. Dec. 31, 2019), *appeal dismissed*, 2020 U.S. App. LEXIS 9919 (4th Cir. Mar. 23, 2020); *Williams*, 2021 U.S. Dist. LEXIS 170057, at *7 (quoting *Griffin*, 2019 U.S. Dist. LEXIS 222849, at *7).

[689] *See Williams*, 2021 U.S. Dist. LEXIS 170057, at *9.

[690] *E.g., id.* at *10 (ordering the disclosure of Oppenheimer's past settlement agreements because they were relevant as to damages); Oppenheimer v. Scarafile, No. CV 2:19-3590, 2021 U.S. Dist. LEXIS 240711, at *8 (D.S.C. Aug. 26, 2021) (ordering Oppenheimer to "produce a list . . . of lawsuits he has initiated to claim copyright infringement of any of his photographs," including "whether each litigation resulted in a settlement and, if so, the settlement value and terms"); *see also* Smith v. NBC Universal, No. 06 Civ. 5350, 2008 U.S. Dist. LEXIS 13280, at *17 (S.D.N.Y. Feb. 22, 2008) ("[E]vidence of the settlements and their amounts are relevant to a determination of the amount of statutory damages . . . .").

[691] *See supra* Part I.D.

[692] Philpot v. L.M. Commc'ns II, No. 5:17-CV-173, 2020 U.S. Dist. LEXIS 85901, at *10–11 (E.D. Ky. May 15, 2020).

[693] *E.g.*, Radabaugh v. Clay Turner Realty Grp., LLC., No. CV 120-058, 2022 U.S. Dist. LEXIS 6163, at *6–7 (S.D. Ga. Jan. 12, 2022) (refusing to award attorneys' fees where plaintiff did not contact the defendant before filing the lawsuit).

Philpot, courts have rejected his request for attorneys' fees because they did not want to "incentivize [Philpot's] improper motivations" for lawsuits in light of his "questionable litigation history."[694]

3. Use Offers of Judgments and Seek Cost Bonds

There are several ways that a defendant can protect itself against copyright trolls. First, defendants should consider making a Rule 68 offer of judgment. Under Rule 68, if the defendant makes a timely pretrial offer of settlement that the plaintiff rejects, and if "the judgment . . . finally obtain[ed] is not more favorable than the . . . offer, the offeree must pay the costs incurred after the offer was made."[695] The purpose of Rule 68 is to promote settlement and encourage plaintiffs to accept reasonable offers.[696] During the Study Period, Rule 68 offers of judgments were used several times. For example, the defendant in *Simon J. Burchett Photography, Inc. v. Seeking Alpha, Inc.*,[697] made a Rule 68 offer of judgment of $2,500 which the plaintiff accepted.[698]

If a defendant is hit with a dubious claim of copyright infringement, the defendant should consider moving for a cost bond. If granted, the court would require the plaintiff to post security to ensure that it will be able to pay any costs, such as attorneys' fees, that might be charged against it at the end of the case.[699] In several cases brought by Richard Liebowitz, the court required the plaintiff to post a cost bond.[700] Finally, the best way to avoid trolling claims is to use licensed images.

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694 *L.M. Commc'ns II*, 2020 U.S. Dist. LEXIS 85901, at *12; *see also* Philpot v. Emmis Operating Co., No. 1:18-CV-00816, 2019 U.S. Dist. LEXIS 112440, at *4, *7 (W.D. Tex. July 8, 2019) (describing Philpot and his attorney as "trolls" and declining to award attorneys' fees in a "dispute . . . entirely . . . of Philpot and his counsel's own making").

695 FED. R. CIV. P. 68(d).

696 Payne v. Milwaukee Cnty., 288 F.3d 1021, 1024 (7th Cir. 2002) ("Rule 68 is designed to provide a disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer.").

697 Simon J. Burchett Photography, Inc. v. Seeking Alpha, Inc., No. 1:20-CV-07634 (S.D.N.Y. Oct. 22, 2020).

698 Judgment, *Simon J. Burchett Photography*, No. 1:20-CV-07634; *see also* Judgment, Stross v. HiConsumption LLC, No. 2:20-CV-09438 (C.D. Cal. Apr. 5, 2021) (accepting $25,000 offer of judgment); Judgment, Fotohaus LLC v. Aae Holdings Inc., No. 1:20-CV-00988 (M.D.N.C. June 4, 2021) (accepting $9,000 offer of judgment).

699 *See* Sadowski v. Ziff Davis, LLC, No. 20-CV-2244, 2020 U.S. Dist. LEXIS 107790, at *3 (S.D.N.Y. June 19, 2020).

700 *E.g.*, *id.* at *12 (imposing cost bond of $20,000); Mondragon v. Nosrak LLC, 500 F. Supp. 3d 1175, 1180 (D. Colo. 2020) (granting motion for cost bond of $3,500 considering the "dubious origins and merit of this case").

V. CONCLUSION

The purpose of this Article was to explore the who, what, where, why, and how of image infringement litigation. In terms of who is involved in these cases, the Study found that lawsuits were mostly brought by professional photographers or agencies looking to make a living, not amateurs with smartphones looking to make a buck. The majority of Defendants who were sued were companies, and over 40% of them came from the media industry.[701] Attorneys who specialize in image infringement brought most of the cases, with just five firms filing 63% of the lawsuits.[702]

As to what was happening in these lawsuits, the majority of Lawsuits alleged the copying of an image with minimal alterations.[703] The internet was where the infringement allegedly occurred in 97% of the cases, and 64% of the Lawsuits were brought in three of the most populous states—California, New York, and Florida.[704] Settlement was how just under half of the Lawsuits were resolved.[705]

The reasons why the Defendants were using the images fell into several categories, and in over 50% of the cases they were being used to advertise goods or services, visually enhance a website, or create a product.[706] At first blush, most of these uses would not qualify as fair use. For media industry Defendants, illustrating an article was the predominant use.[707] Also, it is notable that Defendants generally are not being sued for posting images to social media accounts for non-commercial purposes.[708] The few cases that were brought against individuals for their social media posts involved celebrities or bloggers.[709]

In terms of when the infringement occurred, this Study was limited to lawsuits filed between March 1, 2020, and March 1, 2021. However, the Author has continued to track and analyze all copyright infringement complaints filed since March 1, 2021, that allege the infringement of an image. In future research, the Author will examine whether the CCB, which began accepting claims in June 2022, changes the who, what, where, and why of image infringement

[701] *See supra* Parts II.B, II.B.1.
[702] *See supra* Part III.E.
[703] *See supra* Part II.D.
[704] *See supra* Parts II.E, II.F.
[705] *See supra* Part II.H.
[706] *See supra* Part II.G.
[707] *See supra* Part II.G.
[708] *See supra* Part III.D.
[709] *See supra* Part III.C.

litigation.[710] The Author also intends to compare the cases filed before the CCB with those filed in the United Kingdom's Intellectual Property Enterprise Court's Small Claims Track.

This Article further posed the question of whether these lawsuits are being brought by copyright trolls out to make a quick buck or legitimately aggrieved photographers trying to protect their copyrighted works and livelihood. After studying 1,157 lawsuits, the Author concludes that while there are some bad actors, the photography industry does not have a trolling problem. Instead, the Author observed that consumers do not seem to understand their obligation to license images, and the process for doing so is fragmented. Many users seem to think that because digital images are freely used on the internet, they must be free for the taking. As a result of this mistaken belief, image infringement is on the rise, which has led photographers to use the courthouse to force users to pay for licenses. While photographers may have meritorious claims, Congress and courts should reign in excessive statutory damages. Also, photographers should be focused on educating consumers and creating easy and affordable ways to license their products. If a picture is worth a thousand words, then it should be worth a licensing fee.

[710] *See Copyright Claims Board to Begin Accepting Claims Later This Month*, U.S. COPYRIGHT OFFICE: NEWSNET (June 2, 2022), https://www.copyright.gov/newsnet/2022/966.html [https://perma.cc/6PG4-GR8P].