

Trolls, Orphans, and Holdup

Tun-Jen Chiang

There is a large literature in patent law on the problem of patent trolls. There is a similarly large literature in copyright law on the problem of orphan works. What might be surprising is that these literatures rarely interact with each other. This lack of interaction should be surprising because the two problems are in fact one: Orphan works are a problem when users, being unable to find IP owners ex ante, refrain from use due to fear of holdup; patent trolls are a problem when users, being unable to find IP owners ex ante, go forward with use and are subsequently held up. The underlying problem is the same; the proposed solutions are often very similar; the debates surrounding the two topics, however, often diverge, in that there is much controversy in patent law about whether patent trolls are a problem at all while in copyright law the orphan works problem is widely acknowledged. Understanding the common source of two of the major topics of discussion in IP today may be helpful to moving both discussions forward.