

Mass Copyright Infringement Litigation: Of Trolls, Pornography, Settlement and Joinder

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Recently, a staggering number of copyright lawsuits have been filed by producers of pornographic videos against individuals who have allegedly illegally downloaded the videos via the BitTorrent Protocol. While the law should respect the legitimate protection of a producer's copyright interest, there is significant reason to question the legitimacy of these lawsuits. Mass copyright infringement lawsuits such as these present significant problems relating to IP address sufficiency, personal jurisdiction, and joinder.

This paper presents a comprehensive analysis of mass copyright infringement lawsuits. It first provides an overview of the BitTorrent protocol and the typical proceedings in mass copyright infringement lawsuits. The paper then addresses the myriad of problems that have been identified with such lawsuits. The second half of the paper examines how courts have dealt with mass copyright infringement, and presents results from a comprehensive analysis of jurisdictions and judges that have decided the question of whether joinder is proper in such cases. Amongst other things, this examination reveals that denial of joinder is the prevailing trend. When considered in conjunction with the identified problems associated with such lawsuits, judges that deny joinder thus appear to have solid foundational support.

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Table of Contents

I. Introduction.....	4
II. Mechanics of BitTorrent Technology.....	8
III. An Examination of the Mass Pornography Infringement Phenomena.....	12
A. Life Cycle of a Lawsuit.....	14
1. Gathering IP Addresses.....	14
2. The Complaint	15
3. Motion for Expedited Discovery	18
4. ISP Subpoena.....	19
5. Contact Between Plaintiff and Subscriber.....	21
B. Who Are the “Copyright Trolls”.....	28
C. Potential Problems With Mass Copyright Litigation.....	30
1. IP Address Sufficiency.....	31
2. Personal Jurisdiction	32
3. Proper Joinder.....	37
4. Questionable Litigation Incentives, Bad Behavior and Unequal Bargaining Power.....	41
IV. Dealing With Mass Copyright Infringement Litigation.....	45
A. What Courts Are Currently Doing.....	45
1. Current General Confused State.....	45
2. Judicial Consideration of Joinder.....	47
B. Recommendations.....	52
V. Conclusion.....	54

I. Introduction

Over the course of the past three years, a new type of copyright infringement case has been born. In federal courts all across the country, copyright infringement suits have been brought against 100,000 individuals for allegedly illegally downloading pornographic videos online via BitTorrent technology.² By early 2013, more than 200 such cases were docketed. Yet, despite the enormous number of such lawsuits, not a single case has yet reached a determination on the merits. Not only have the factual merits of these cases failed to be addressed by a Circuit Court of Appeals decision,³ no District Court judge has yet conducted a full analysis of the factual strength of such lawsuits. These numbers reveal the real purpose behind these copyright infringement cases. Instead of intending to pursue a legitimate copyright infringement case, these cases are filed in order to shame, coerce and threaten the defendants into settling their case by paying upwards of \$1000 to \$3000.⁴ The plaintiffs in these lawsuits are using all of the powers of the American justice system – including those of discovery, the threat of expensive litigation, high statutory damages, as well as the potential future shame and embarrassment of having one's name attached to a copyright infringement suit involving pornographic material – in order to harass and convince possibly completely innocent individuals to pay large settlement amounts.

² Zack Whittaker, *Mass US copyright lawsuits to reach 100,000 mark*, ZDNET (Jan. 31, 2011), <http://www.zdnet.com/blog/igeneration/mass-us-copyright-lawsuits-to-reach-100000-mark/7955>.

³ While this article was being written, the D.C. Circuit Court of Appeals held oral argument on April 14, 2014 in one of these such cases, on several of the issues addressed in this paper. See Corynne Mcsherry, *Prenda On Appeal: Copyright Troll Tactics Challenged in DC Circuit*, EFF DEEPLINKS BLOG (April 14, 2014), <https://www.eff.org/deeplinks/2014/04/prenda-appeal-copyright-troll-tactics-challenged-dc-circuit>. As of early May 2014, no decision in this case had been reached.

⁴ Sarah Jacobsson Purewal, *So, Your Being Sued for Piracy*, TECHHIVE (Jun. 16, 2011), http://www.pcworld.com/article/230515/So_Youre_Being_Sued_for_Piracy.html.

Indeed, plaintiffs in such cases have even threatened to notify the neighbors and employers of defendants involved in such cases if they do not quickly agree to a settlement offer.⁵

A typical case of this type proceeds as follows. A copyright protection agency, usually affiliated with a small law firm, engages in limited monitoring of BitTorrent traffic engaged in the unauthorized sharing of a pornographic work. This monitoring results in a list of up to 2000 IP addresses that allegedly participated in sharing the file. Using this list of IP addresses, the copyright firm files a complaint in federal court against the unnamed “John Does” for copyright infringement. Once filed, the first action taken by the plaintiffs is to file a motion for expedited discovery in order to force the Internet Service Providers (ISPs) of the defendants to reveal the personal contact information of the Internet subscriber behind the identified IP addresses. Once the provided with this information, the plaintiff begins to reach out via phone, mail and email to the named defendants in order to persuade them to settle the case by paying a set amount of money. If a defendant pays to settle, he is quickly dismissed from the case. Once enough of the named defendants settle and are dismissed, the plaintiff typically drops the entire case against the remaining defendants.

There are significant reasons to believe that the plaintiffs behind these lawsuits do not earnestly intend to engage in a legitimate copyright infringement case, instead using the mechanism of the courts to coerce individuals into settling.⁶ Indeed, for the individuals behind these mass infringements lawsuits, filing and coercing settlements out of individuals has become

⁵ Joe Mullin, *New Prenda letter threatens to tell neighbors about porn accusations*, ARS TECHNICA (May 13, 2013), <http://arstechnica.com/tech-policy/2013/05/new-prenda-letter-threatens-to-tell-neighbors-about-porn-accusations/>.

⁶ *See On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 505 (N.D. Cal. 2011) “Plaintiff’s desire to enforce its copyright in what it asserts is a cost-effective manner does not justify perverting the joinder rules to first create the management and logistical problems discussed above and then offer to settle with Doe defendants so that they can avoid digging themselves out of the morass plaintiff is creating.”

a lucrative endeavor, with one noted lawyer claiming to have earned more than a few million dollars through this practice.⁷ There are several reasons why courts should be wary about being used in such fashion, including the importance of conserving court resources and protecting individuals from illegitimate lawsuits and coercive settlements.⁸ As courts across the country are beginning to realize, infringement cases that are filed against dozens of John Does can quickly become unmanageable for courts and allow plaintiffs to easily engage in their coercive settlement regime without even having to pay filing fees for each of the individuals against which the plaintiff is pursuing a settlement.⁹ Furthermore, unnamed John Doe defendants in such cases are in a particularly vulnerable position that courts should recognize and protect.¹⁰

This paper is one of the first to systematically investigate this problem of copyright porn trolls and examine how courts across the country have actually dealt with the issue on the ground.¹¹ The paper begins with a brief explanation of the technology involved in these cases,

⁷ Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made A 'Few Million Dollars' Pursuing (Sometimes Innocent) 'Porn Pirates'*, FORBES (Oct. 15, 2012), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.

⁸ Mike Masnick, *Another Judge Blasts Copyright Trolls*, TECHDIRT (Sep. 24, 2012), <http://www.techdirt.com/articles/20120923/22100820477/another-judge-blasts-copyright-trolls.shtml>.

⁹ On the Cheap, *supra* note 4, at 503 “There are also case manageability problems. This Court has already struggled with the logistical issues associated with keeping the identities of the moving Doe defendants sealed so that their privacy rights are protected. Such procedural hurdles will only become more problematic as this case moves forward.”

¹⁰ Corynee McSherry, *Mass Copyright Litigation: Another Court Gets It Right*, ELECTRONIC FRONTIER FOUNDATION (Aug. 3, 2011), <https://www.eff.org/deeplinks/2011/08/expendables-mass-copyright-litigation-another>.

¹¹ See also Fowler, Colin, *Catching Digital Pirates: The Witch Hunt of the 21st Century* (Jan. 1, 2012), available at <http://ssrn.com/abstract=1989268> [hereinafter Fowler, *Catching Pirates*]; Colman, Charles E., *Copyright, Shame, and Extortion: The Thriving Cottage Industry of Pornography-Related Infringement Lawsuits* (Oct. 5, 2012), available at <http://ssrn.com/abstract=2157714> [hereinafter Colman, *Copyright Extortion*]; LaFond, Jason R., *Two Billy Goats Gruff: Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation* (Oct. 29, 2011). Maryland Law Review End Notes, Forthcoming, available at <http://ssrn.com/abstract=1799555> [hereinafter LaFond, *Bill Goats*]; Balganes, Shyamkrishna, *The Uneasy Case Against Copyright Trolls* (Aug. 15, 2012). Southern California Law Review, Vol. 86, May 2013; U of Penn, Inst for Law & Econ Research Paper No. 12-32; U of Penn Law School, Public Law Research Paper No. 12-42, available at <http://ssrn.com/abstract=2150716> [hereinafter Balganes, *Uneasy Case*]; Sean B. Karunaratne, *The Case Against Combating Bittorrent Piracy Through Mass John*

BitTorrent. Part III of the paper then provides an in-depth exploration of the issue of copyright porn trolls in federal courts. The paper looks at the typical steps involved in a copyright porn troll lawsuit, from the first steps of discovering an IP address to filing a complaint in federal court and attempts to convince defendants to settle. The paper then examines the individuals involved in these type of lawsuits, both plaintiffs and defendants. Part V of the paper explores how courts across the country are dealing with these types of cases, including an examination of which federal jurisdictions and federal judges have allowed these cases to proceed after an examination of the issue of joinder and which have not. Overall, the data reveals that more courts across the nation have concluded that joinder is not proper in mass copyright litigation lawsuits.¹² An examination of how judges have ruled on joinder issues involved in these cases reveals a remarkable amount of consistency. Only four of the examined judges issued contradicting opinions. Additionally, such data reveals that judges are not more or less likely to find joinder permissible based on the number of times they rule on the issue. Judges thus do not appear to be adopting a flexible approach to the issue of joinder, finding it less appropriate the more they are presented with mass copyright infringement cases.

The paper concludes by offering several suggestions as to how courts should address these concerns in the future. American courts should not ignore the issue of copyright infringement. Copyright protection provides an important incentive for authors and other creators to engage in creative endeavors for the greater benefit of society.¹³ However, courts should not allow individuals to be taken advantage of. The substantial weight of the American judicial

Doe Copyright Infringement Lawsuits, 111 Mich. L. Rev. 283, 284 (2012) [hereinafter Karunaratne, *The Case Against*].

¹² As discussed *infra*, these conclusions are based on data gathered between 2006 and Feb. 28, 2013.

¹³ See U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

system should not be employed in order to engage in so-called “settlement shakedown” efforts.¹⁴ Courts should therefore not grant permissive joinder in such cases.

II. Mechanics of BitTorrent Technology

Understanding the technology at issue in each of these cases is fundamentally important to properly position the legal arguments that courts are forced to address. Furthermore, plaintiffs in mass BitTorrent suits have placed a significant emphasis on the nature of the underlying technology in order to advance their complaints and address concerns relating to proper joinder and personal jurisdiction.¹⁵ Courts have therefore paid a significant amount of attention to explaining the underlying technology, and, for the most part, have showcased a careful understanding of the nature of BitTorrent technology, regardless of the outcome of the particular motion.¹⁶

BitTorrent is a protocol that facilitates and supports the sharing of computer data files over the Internet.¹⁷ A protocol is a “set of rules or procedures for transmitting data between electronic devices, such as computers.”¹⁸ The protocol was designed in 2001 and has since grown to represent as much as 70% of all Internet traffic.¹⁹

¹⁴ See Julie Samuels, *Judge Shuts Down Another Mass Copyright Case, Characterizes Lawsuits as “Massive Collection Scheme”*, EFF DeepLinks Blog, <https://www.eff.org/deeplinks/2011/09/judge-shuts-down-another-mass-copyright-case>.

¹⁵ See, e.g. *Malibu Media, LLC v. John Does 1-35*, 2:12-CV-178-FTM-99, 2012 WL 4513050 (M.D. Fla. Aug. 15, 2012) report and recommendation adopted, 2:12-CV-00178-FTM-UA, 2012 WL 4604544 (M.D. Fla. Oct. 2, 2012).

¹⁶ See Section IV.A, *infra*.

¹⁷ See Clive Thompson, *The BitTorrent Effect*, WIRED (Jan. 2005), <http://archive.wired.com/wired/archive/13.01/bittorrent.html>.

¹⁸ See Protocol, Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/410357/protocol>.

¹⁹ See Hendrik Schulze and Klaus Mochalski, *Internet Study 2008/2009*, ipoque, <http://www.ipoque.com/sites/default/files/mediafiles/documents/internet-study-2008-2009.pdf>.

The fundamental idea behind the BitTorrent protocol is that by dividing a single data file into small blocks it can be efficiently downloaded by others connected to the sharing network.²⁰ BitTorrent breaks files up into “lots of smaller ‘pieces,’ each of which is usually around 256 kilobytes (one-fourth of one megabyte) in size.”²¹ Users that connect to a sharing network are known as “peers.”²² Peers that attempt to download a file do so by connecting to potentially thousands of other peers that are simultaneously engaged in downloading the same file.²³ Each peer downloads a different portion of the file from different users. These segmented portions of the larger file are known as “blocks.”²⁴ Unlike older downloading methods, where “the user would download the entire file in one large chunk from a single peer at a time, BitTorrent permits users to download lots of different pieces at the same time from different peers.”²⁵ Once all of the pieces of a file are downloaded, “the file is automatically reassembled into its original form.”²⁶

In order to organize and facilitate this process, BitTorrent uses what are known as “torrent files.”²⁷ When a user wants to download a specific “target” data file (for instance, a music or movie file), he or she must first download a torrent file that is associated with the

²⁰ See LaFond, *supra* note 9.

²¹ See *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1026 (9th Cir. 2013).

²² See *id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.*

²⁶ See *Columbia Pictures Indus., Inc. v. Fung*, *supra* note 19.

²⁷ See *id.* (“The torrent file is quite small, as it contains none of the actual content that may be copyrighted but, instead, a minimal amount of vital information: the size of the (separate) movie file being shared; the number of “pieces” the movie file is broken into; a cryptographic “hash” that peers will use to authenticate the downloaded file as a true and complete copy of the original; and the address of one or more “trackers.”).

desired data file.²⁸ This torrent file subsequently organizes how the content that makes up the target file is shared amongst peers. The torrent file contains a unique hash code, which is an identifier developed by an algorithm.²⁹ This hash code “serves as a roadmap to a BitTorrent program to download all the pieces of a file such as a motion picture or music.”³⁰

When the user activates the torrent file, it connects the user with a tracker.³¹ A tracker is essentially a server that connects peers with each other and provides information statistics about upload and download speeds.³² The tracker then examines the associated network speeds of all other peers affiliated with that torrent file that are currently uploading and downloading the target file.³³ This group of other peers is known as a “swarm,” a metaphoric device used to describe the potential cluster of thousands of individuals uploading and downloading around target file at the same time.³⁴ A swarm can consist of peers from all around the world, whose only shared characteristic is the fact that they are all downloading and uploading the target file.³⁵ The tracker then randomly selects several other peers from the swarm to establish a connection with.³⁶ The individual user then sends a request to these other users to download blocks of the target file that the individual does not already have.

²⁸ *See id.*

²⁹ *See id.* (“A hash is a unique digital identifier of certain data. It is usually written as a forty-digit long hexadecimal number, where each digit can be 0–9 or A–F.”).

³⁰ *Liberty Media Holdings, LLC v. Does 1-62*, No. 11-cv-575, 2011 U.S. Dist. WL 2491776, at 1-62 (S.D.Cal. March 22, 2011).

³¹ *See* Fowler, *CatchingPirates*, *supra* note 9.

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See* LaFond, *Billy Goats*, *supra* note 9.

Note, however, that the user cannot connect to all of the peers within the swarm at the same time. Each user is allowed to connect with only a subset of the swarm at any one time; usually, this number is four other peers.³⁷ Furthermore, in most instances the supply of blocks of the target file outstrips the feasible demand for them.³⁸ That is, the amount of blocks being shared usually far outmatches the available bandwidth an individual has to download content with.³⁹

These limits necessitate an ordering structure for efficient downloading, and such an ordering structure is included with the BitTorrent protocol.⁴⁰ The determination of which peers share with each other is made based on download speed calculations.⁴¹ Each peer thus shares with the four peers that will provide it with the highest download speed available.⁴² After a specified amount of time, usually around 30 seconds, each user randomly connects to a fifth peer and examines the download rate. The connection speeds of the now five peers are compared, and the lowest peer dropped.⁴³ This process results in a constant search for the highest download speed and discourages freeriding, as users that share at higher rates will be able to download the file more quickly.⁴⁴ Importantly, throughout this process users are constantly shifting connections; indeed, they potentially connect and transfer data with a new individual every 30 seconds.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See* LaFond, Billy Goats, *supra* note 9.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

This process continues until the user disconnects from the swarm.⁴⁵ This can occur by the user turning off his or her torrent software or stopping the torrent software from transferring the target file.⁴⁶ Users typically disconnect as soon as the target file is finished downloading, but they may potentially disconnect either substantially before or after the target file has finished downloading.⁴⁷

It is important to note that this nature of BitTorrent technology means that the file sharing process is different than past file sharing programs and services. Unlike other peer-to-peer file sharing services like Napster, Kazaa and Grokster, BitTorrent transfers do not involve a centralized server that hosts or transfers the data files in question. Instead, BitTorrent involves users interacting directly with other users to upload and download the content.

III. An Examination of the Mass Pornography Litigation Phenomena.

The BitTorrent protocol can be used to share a vast variety of data files. Unmistakably, some of the files shared via BitTorrent consist of copyright infringing content. Furthermore, some of this copyright infringing content consists of pornographic videos. Following the lead of other content industry groups, such as the RIAA, content rights holders within the pornography industry have begun to litigate copyright infringement lawsuits against individuals that they claim to have participated in illegal downloading and uploading activities.

There are three characteristics of these lawsuits, however, that make them unique compared to past attempts to litigate directly against individual downloaders. Fundamentally, the sheer number of individuals involved in these types of lawsuits sets them apart from past

⁴⁵ *Id.*

⁴⁶ *See* LaFond, Billy Goats, *supra* note 9.

⁴⁷ *See id.*

litigation attempts. Notably, while it took years for the RIAA to reach lawsuits against 35,000 individuals, cases involving pornographic content reached over 200,000 users in less than three years.⁴⁸ Another characteristic that sets these lawsuits apart is several circumstances that indicate lawsuits are being filed illegitimately. Several courts have called into question the litigation tactics involved in these lawsuits, including threatening the use of sanctions.⁴⁹ Courts and commentators have also noted that there are legitimate reasons to question whether the underlying John Does involved in these lawsuits had ever downloaded the work in question. Additionally, the fact that not a single case out of the thousands brought thus far has made it past the early stages of discovery suggests that the plaintiffs have motives that diverge from those traditionally associated with proper litigation. One final characteristic that sets these types of cases apart is their particular emphasis on coercing individuals into settlement. While putting forth settlement offers early in the litigation cycle is not unique to this type of litigation, the forcefulness and strength involved in reaching out for a settlement perhaps is. Furthermore, the nature of the underlying works – that is, pornography – is likely being used to shame individuals into settling these types of cases, regardless of whether they have actually committed copyright infringement.

This section provides a thorough examination of mass copyright infringement lawsuits involving pornography. It begins by examining how such cases have typically proceeded. It then examines the current major players in these types of lawsuits. It concludes by illustrating several causes for concern involving these lawsuits and their related settlement efforts.

⁴⁸ See Reyhan Harmanci, *The Pirates and Trolls of Porn Valley*, BUZZFEED (Aug. 30, 2012), <http://www.buzzfeed.com/reghan/the-pirates-and-trolls-of-porn-valley>.

⁴⁹ See Karunaratne, *The Case Against*, *supra* note 9 at 303. (citing *Mick Haig Prods., e.K. v. Does 1-670*, No. 3:10-CV-1900-N, 2011 WL 5104095, at *1, *5 n.9 (N.D. Tex. Sept. 9, 2011); *K-Beech, Inc. v. Does 1-85*, No. 3:11cv469-JAG (E.D. Va. Oct. 5, 2011), available at <https://www.eff.org/files/K-Beech.pdf>).

A. Life Cycle of a Mass Pornography Lawsuit

1. Gathering IP Addresses

The first step in a typical mass pornography lawsuit involves action by a copyright holder or an associate of a copyright holder to identify a list of IP addresses associated with the sharing of a copyrighted work. This process involves examining what peers make up a swarm associated with the work at a given point in time.⁵⁰ The exact method that copyright holders use to identify specific IP addresses is at this time unclear.⁵¹ However, current industry practices and techniques illustrate how the process might occur.

There are currently two popular methods for monitoring BitTorrent traffic for copyright infringing material. Indirect monitoring involves the process of communicating with the tracker and receiving a list of all IP addresses of peers involved in the swarm.⁵² This process has the benefit of being a fast method to harvest a large number of peer IP addresses. However, some industry experts have criticized it for being unreliable.⁵³ Indirect monitoring also leaves a trace of the individual conducting the monitoring, as their IP address also becomes part of the swarm associated with the torrent and therefore can be identified by others. Direct monitoring involves direct probing and contact by the monitoring party with other peers in the swarm.⁵⁴ This

⁵⁰ See Emil Protalinski, *New Research: Most top torrents are monitored, your IP address can be logged within three hours*, THE NEXT WEB (Sept. 4, 2012), <http://thenextweb.com/insider/2012/09/04/new-research-most-top-torrents-monitored-ip-address-logged-within-three-hours/>.

⁵¹ See Balganes, *Uneasy Case*, *supra* note 9.

⁵² See TOM CHOTHIA et al., *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, 8TH INT'L ICST CONFERENCE, SECURECOMM 2012, PADUA, ITALY, SEPTEMBER 3-5, 2012. REVISED SELECTED PAPERS, 185-202, available at <http://www.cs.bham.ac.uk/~tpc/Papers/P2PSecComm2012.pdf>.

⁵³ Michael Piatek, Tadayoshi Kohno, and Arvind Krishnamurthy, *Challenges and Directions for Monitoring P2P File Sharing Networks — or — Why My Printer Received a DMCA Takedown Notice.*, Proceedings of the USENIX Workshop on Hot Topics in Security (2008), available at http://dmca.cs.washington.edu/dmca_hotsec08.pdf.

⁵⁴ See TOM CHOTHIA et al., *supra* note 50.

mechanism has been put forth as a more reliable method of obtaining IP addresses through monitoring; however, it has not been shown to be employed by copyright enforcement entities. In both cases, the monitoring party receives three key pieces of information: the title of target file being shared, the date and time of the activity, and the IP address associated with a specific peer.

2. *The Complaint*

Once the copyright enforcement entity has gained a list of IP addresses associated with sharing a particular piece of content, the enforcement entity then typically files a complaint in federal court for copyright infringement. The complaint at this stage is styled in the fashion of “Copyright Entity v. John Does 1-XX.” The number of John Does involved in a given suit varies; there can be as many as 5000 John Does involved in a given lawsuit, or as few as one. The complaint typically makes clear to the court that at the time of filing, the “true names and capacities, whether individual, corporate, associate or otherwise, of defendants....are unknown” to the plaintiff, and that the “Plaintiff knows each Defendant only by the [IP] address assigned to the account used by the Defendant at the account holder's [ISP]on the date and at the time at which the infringing activity of each Defendant was observed.”⁵⁵ The complaint also makes clear that the plaintiff seeks to “subpoena theISP.... that issued the Defendants' IP addresses in order to learn the identity of the account holders for the below IP addresses.”⁵⁶

The complaint then alleges that the defendants are “a group of BitTorrent users or peers whose computers are collectively interconnected for the sharing of a particular unique file,

⁵⁵ *Liberty Media Holdings, LLC v. Does 1-62*, No. 11 cv 575, 2011 U.S. Dist. WL 2491776, (S.D.Cal. 2011).

⁵⁶ *Id.*

otherwise known as a “swarm.”⁵⁷ The plaintiffs then state that “information obtained in discovery will lead to the identification of each Defendant’s true name and permit the Plaintiff to amend this Complaint to state the same. Plaintiff further believes that the information obtained in discovery may lead to the identification of additional infringing parties to be added to this Complaint as defendants.”⁵⁸ The plaintiffs then allege that “[e]ach of the fictitiously named defendants engaged in their copyright infringement scheme together. They all used the same torrent-sharing website to coordinate their copyright theft, and they all shared and republished the same Motion Picture, and thus collectively participated in the same swarm sharing, the same hash file, on the same date.”⁵⁹ The complaint then moves on to list each John Doe’s identified IP address, along with alleging that the IP address was used “to illegally republish and illegally distribute the Plaintiffs copyrighted Motion Picture to an unknown number of other individuals over the Internet” at a specific date and time.⁶⁰

The complaint then proceeds to describe the technical mechanics of how BitTorrent works. This section explains that “[d]efendant peers each utilized a .torrent file to upload and download Plaintiffs copyrighted film,” that “...each Defendant peer downloaded a torrent containing Plaintiffs copyrighted Motion Picture...” and that “each Defendant uploaded their torrent onto a BitTorrent site for the purpose of sharing Plaintiffs copyrighted work with other members of the BitTorrent collective network.”⁶¹

⁵⁷ *Liberty Media Holdings, LLC*, 2011 WL 2491776 at 1-62.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

The complaint then describes what has become known as the “swarm theory,” the rationale commonly invoked by plaintiffs in mass copyright infringement lawsuits to justify joinder of potentially thousands of defendants in one lawsuit. The complaint alleges that:

“Plaintiffs copyrighted Motion Picture was then uploaded and downloaded through a single swarm collective among the various Defendants in concert - all members sharing the same exact video, using the same exact hash file....Once uploaded to the BitTorrent site, the Defendant peers shared the Plaintiffs copyrighted Motion Picture as participants in a unique single swarm. More precisely, the BitTorrent network divided the original copyrighted work into many small pieces and distributed these pieces throughout the swarm until each of the collectively participating Defendants in the swarm had a partial or complete infringing copy of the Motion Picture. Based on this information, Defendants all participated in the same collective swarm, infringing upon Plaintiffs exclusive rights in its work by uploading (distributing) and downloading (reproducing) Plaintiffs copyrighted film, and through their actions each Defendant assisted each and every other Defendant, each members of the P2P network swarm, to illegally download Plaintiff's copyrighted work.”⁶²

The complaint then concludes by listing the causes of action against the defendants. These include allegations of copyright infringement, including violations of the plaintiff's right of distribution and reproduction.⁶³ The allegations may also include contributory copyright infringement,⁶⁴ civil conspiracy,⁶⁵ and negligence.⁶⁶

⁶² *Id.*

⁶³ *See id.* (“Plaintiff is informed and believes, and on that basis alleges, that Defendants without the permission or consent of Plaintiff, have used, and continue to use, the BitTorrent online media distribution system to distribute the Motion Picture to the public, and/or make the Motion Picture available for distribution to others, including other BitTorrent users. In doing so, Defendants have violated Plaintiffs exclusive rights of reproduction and distribution. Defendants' actions constitute infringement of Plaintiffs copyrights and exclusive rights under the Copyright Act.”).

⁶⁴ The allegation proceeds based on the following premise: “BitTorrent users upload infringing works in concert in order to gain access and ability to download other infringing copyrighted works. As each of the thousands of people who illegally downloaded the movie accessed this illegal publication, they derived portions of their illegal replication of the file from multiple persons, including but not limited to the Defendants named in this action. The Defendants knew of the infringement, were conscious of their own infringement, and the Defendants were conscious of the fact that multiple other persons derivatively downloaded the file containing the Plaintiffs Motion Picture. The infringement by other BitTorrent users could not have occurred but for the Defendant's participation in uploading the Plaintiffs protected work. As such, the Defendants participation in the infringing activities of others is substantial. The Defendants each profited from this contributory infringement by way of being granted access to a greater library of other infringing works, some of which belonged to the Plaintiff and some of which belonged to

3. Motion for Expedited Discovery

Usually immediately following the filing of the complaint, plaintiffs involved in mass copyright infringement lawsuits file an *ex parte* Motion for Expedited Discovery. This allows the plaintiff to move forward with discovery at an expedited pace without knowing the identities of the defendants. Under the Federal Rules of Civil Procedure, both parties to a proceeding typically have to hold a discovery conference prior to the beginning of discovery.⁶⁷ However, the Federal Rules allow a court to grant limited discovery before such a conference is held, if circumstances indicate it is necessary to do so.⁶⁸ Here, plaintiffs state that expedited discovery is necessary because ISPs are under no obligation to maintain permanent records of IP address. Indeed, ISPs regularly delete their records of IP addresses, usually within six months.

other copyright owners.” See *Liberty Media Holdings, LLC, v. Does 1 through 62*, 2011 WL 2491776 (S.D. Cal. 2011).

⁶⁵ The allegation proceeds based on the premise that “Plaintiff is informed and believes, and based thereon alleges, that each Defendant distributed infringing movies in anticipation of receiving copies of infringing movies in return. Each Doe Defendant knew or should have known that the infringing content the Defendant downloaded to his computer came from the computers of other users, who made the content available to him and others on the BitTorrent network, in violation of copyright laws. The operators of the BitTorrent servers form the hub of a rimless wheel conspiracy to reproduce and distribute content without the copyright holders' authorization and without regard to copyright laws. Each Doe Defendant understood the nature of the conspiracy to violate copyrights and agreed to join the conspiracy by downloading the BitTorrent client with the intention of using that BitTorrent client to knowingly download, reproduce, and distribute infringing files with coconspirators. Each Defendant engaged in an unlawful act in furtherance of the conspiracy when he, without authorization, used the BitTorrent client to download, reproduce, and distribute copies of Plaintiff's copyright registered works. Defendants, all and each of them, conspired with the other Defendants by agreeing to provide infringing reproductions of various copyright protected works, including Plaintiff's works, in exchange for infringing reproductions of other copyright protected works, including Plaintiff's works. Each Defendant took affirmative steps to advance the conspiracy by unlawfully and without authorization reproducing Plaintiff's copyrighted works and distributing those works to coconspirators by and through the BitTorrent network in anticipation of receiving other infringing copies of copyright protected works in exchange.” See *Liberty Media Holdings*, *supra* note 53.

⁶⁶ The allegation proceeds based on the premise that “Defendants failed to adequately secure their internet access, whether accessible only through their computer when physically connected to an internet router, or accessible to many computers by use of a wireless router, and prevent its use for this unlawful purpose. Upon information and belief, Plaintiff alleges that Defendants' failure to secure their internet access allowed for the copying and sharing of Plaintiff's Motion Picture by use of the BitTorrent protocol on Defendants' respective internet connections, and interfering with Plaintiff's exclusive rights in the copyrighted work.” See *id.*

⁶⁷ See FED. R. CIV. P. 26(f).

⁶⁸ *Id.* at 26(d)(1).

Many courts have typically granted these motions as a matter of course, in part because at this point in the litigation there are no named defendants to confer with. Some courts, however, have questioned the need to grant such a motion against all joined defendants, and have used this as an opportunity to force plaintiffs to justify joinder of all defendants.⁶⁹ In those cases, however, the motion is still usually granted.⁷⁰ As explained in Part IV of this paper, courts should, however, use greater caution in granting such motions in the future.

4. ISP Subpoena

Once a plaintiff has been granted a motion for expedited discovery, the next step taken in the litigation process is to serve a subpoena upon the defendant's ISPs pursuant to Rule 45 of the Federal Rules of Civil Procedure.⁷¹ Such subpoenas typically ask the ISP to provide the plaintiffs with the subscriber information associated with the IP address they provide them with. Subscriber information typically includes an individual's name, address, home phone number and personal email address.

An ISP that receives a subpoena typically first notifies the account holder that they have received a subpoena request.⁷² The notification sent to account holders typically "explain that an

⁶⁹ *Hard Drive Productions, Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1152 (N.D. Cal. 2011).

⁷⁰ *Id.*

⁷¹ *See* FED. R. CIV. P. 45.

⁷² For example, the following is a sample letter that an ISP (Comcast) very likely sent to a subscriber: "Dear Comcast High-Speed Internet Subscriber: Comcast has received a notification by a copyright owner, or its authorized agent, reporting an alleged infringement of one or more copyrighted works made on or over Comcast's High-Speed Internet service (the 'Service'). The copyright owner has identified the Internet Protocol ('IP') address associated with your Service account at the time as the source of the infringing works. The works identified by the copyright owner in its notification are listed below. Comcast reminds you that use of the Service (or any part of the Service) in any manner that constitutes an infringement of any copyrighted work is a violation of Comcast's Acceptable Use Policy and may result in the suspension or termination of your Service account. If you have any questions regarding this notice, you may direct them to Comcast in writing by sending a letter or e-mail to: Comcast Customer Security Assurance Comcast Cable Communications, LLC 1800 Bishops Gate Blvd., 3rd Floor East Wing Mount Laurel, NJ 08054 U.S.A. Phone: (888) 565-4329 Fax: (856) 324-2940 For more information regarding Comcast's copyright infringement policy, procedures, and contact information, please read our Acceptable Use

[IP] address that was “assigned” to [the] account was “associated” with an illegal download on BitTorrent.”⁷³ The ISP also usually explains that unless the subscriber files an objection or a request for more time with the court, the ISP will comply with the request. Such notifications typically “come in nondescript envelopes, contain a copy of the subpoena issued by the court, and give subscribers thirty (30) days....to respond.”⁷⁴

A subscriber that chooses to challenge the subpoena in federal court usually files a Motion to Quash. Such motions typically challenge the subpoena on the grounds of improper joinder and lack of personal jurisdiction.

If the subscriber chooses not to respond to the notification by protesting the subpoena in court, the ISP will either comply by sending the plaintiff the subscriber’s account information, or will challenge the subpoena itself. It appears that ISPs have developed a reputation for themselves depending on whether they typically object to such subpoena requests. Several ISPs have repeatedly challenged the validity of these subpoenas; however, a significant number continue to comply without a challenge.

Policy by clicking on the Terms of Service link at <http://www.comcast.net>. Sincerely, Comcast Customer Security Assurance Copyright work(s) identified in the notification of claimed infringement: Evidence: Infringement Title: Black Bi Cuckolding 7 Infringement File Name: Black Bi Cuckolding 7 Infringement Hash: c783f07e2014080429325a603614d4c5c6bd907b Infringement File Size: 1462178519 bytes Infringement Protocol: BitTorrent Infringement Timestamp: 2012-05-XX Time redacted Infringers IP Address: redacted The following files were included in the download: File 1: Black Bi Cuckolding 7/Black Bi Cuckolding 7.wmv.” See Comcast Customer Security Assurance, *Notice of Action Under the Digital Millennium Copyright Act*, COMCAST CABLE COMMUNICATIONS, LLC (May 2012), http://diertrolldie.files.wordpress.com/2012/05/td_notice1.pdf.

⁷³ *Slaying the Copyright Troll: Help, I Got a Letter from my ISP Seeking to Subpoena My Identity Because a Copyright Troll Wants to Sue me for Copyright Infringement — What do I do?*, THE PIETZ LAW FIRM, <http://pietzlawfirm.com/slaying-the-copyright-troll-help-i-got-a-letter-from-my-isp-seeking-to-subpoena-my-identity-because-a-copyright-troll-wants-to-sue-me-for-copyright-infringement-what-do-i-do> (last visited March, 27, 2014).

⁷⁴ See *id.*

5. *Contact Between the Plaintiff and Subscriber*

If the subscriber does not respond to the ISP notification and the ISP does not choose to challenge the validity of the subpoena in court, then the subscriber's account information will be given to the plaintiffs. Account information typically includes the subscriber's name, physical address, email address, and telephone number.

Following the receipt of the subscriber information, the plaintiff will reach out to the subscriber in various ways to attempt to reach a settlement. Typically, this will occur first via a physical letter mailed to the subscriber's address. Such letters are traditionally sent on the stationary of the plaintiff's representative law firm and inform the subscriber that the content holder has retained legal counsel to "pursue legal actions against people who illegally downloaded their copyright content (i.e. 'digital pirates')." ⁷⁵ Such letters typically continue by informing the subscriber that "[d]igital piracy is a very serious problem for adult content producers, such as our client, who depend on revenues to sustain their business and pay their employees." ⁷⁶

Next, typical letters begin to describe the allegations against the subscriber. They state that on a given date, "our agents observed the IP address with which you are associated illegally downloading and sharing with others via the BitTorrent protocol the following copyrighted file(s)." ⁷⁷ The letter then provides the subscriber with the title of the copyrighted work in question. Given that these complaints involve pornographic films, the titles of the work in question can sometimes be graphic, sexually revealing, and potentially embarrassing. Examples

⁷⁵ Settlement Letter from Prenda Law, <http://copyrightletter.com/wp-content/uploads/2012/09/PrendLawDemand-Letter1.pdf> (May 8, 2011).

⁷⁶ *Id.*

⁷⁷ *Id.*

of such titles include “Amateur Allure—Erin,”⁷⁸ “Illegal Ass 2,”⁷⁹ “Anal Wreckers,”⁸⁰ and “Big Butt Oil Orgy 2.”⁸¹ The letter next lists the subscriber’s ISP name, as well as the “IP address you were assigned during your illegal activity.”⁸² Such letters then note that plaintiffs “have received a subpoena return from your ISP confirming that you are indeed the person that was associated with the IP address that was performing the illegal download of our client’s content listed above on the exact date(s) listed above.”⁸³ This statement appears to be designed to overconfidently assert that the plaintiffs have completely confirmed that the named individual is responsible for the allegedly infringing download; however, there is good reason to believe that this may not be the case.

The letter then begins to describe the details of the legal action the plaintiffs are pursuing. The letter states the date and location where the plaintiffs have filed a complaint against the individuals in federal court, followed by the case number. The letter then notes that “[u]nder the Federal Rules of Civil Procedure, our lawsuit against you personally will not commence until we serve you with a Complaint, which we are prepared to do if our settlement effort fail.”⁸⁴ The letter states that “[w]hile it is too late to undo the illegal file sharing associated with your IP

⁷⁸ Hard Drive Prods, Inc. v. Does 1-188, 809 F. Supp. 2d 1150, 1151 (N.D. Cal. 2011)

⁷⁹ Third Degree Films, Inc. v. Does 1-108, No. 11 Civ. 3007, 2012 WL 669055 (D. Md. Feb. 28, 2012).

⁸⁰ Digiprotect USA Corporation v. John/Jane Does 1-266, No. 10 CV 8759, 2010 WL 4823574 (S.D.N.Y. Nov. 19, 2010).

⁸¹ Third Degree Films, Inc. v. Does 1-53, No. 8:12-CV-00349, 2012 WL 1150811 (D. Md. Apr. 4, 2012).

⁸² Settlement Letter from Prenda Law, <http://copyrightletter.com/wp-content/uploads/2012/09/PrendLawDemand-Letter1.pdf> (May 8, 2011).

⁸³ *Id.*

⁸⁴ Letter from John L. Steele, Attorney and Counselor at Law, Steele and Hansmeier, PLLC, <http://dietrolldie.files.wordpress.com/2011/09/57230736-settlement-letter.pdf> (May 16, 2011). *See also* Settlement Letter from Prenda Law, <http://copyrightletter.com/wp-content/uploads/2012/09/PrendLawDemand-Letter1.pdf> (May 8, 2011).

address,⁸⁵ we have prepared an offer to enable our client to recover damages for the harm caused by the illegal downloading and to allow both parties to avoid the expense of a lawsuit.”⁸⁶ The letter then provides the subscriber with a brief overview of copyright law damages, stating that “[u]nder the Copyright Law of the United States, copyright owners may recover up to \$150,000 in statutory damages (in cases where statutory damages are applicable, which may or may not be the case here) per infringing file plus attorney’s fees in cases, whereas here, infringement was willful.”⁸⁷ The letter then notes that:

in at least one case where the Copyright Law has been applied to digital piracy and statutory damages were applicable, juries have awarded over \$20,000 per pirated file. During the RIAA’s well-publicized campaign against digital music piracy, over 30,000 people nationwide settled their cases for amount ranging from an average of \$3,000 to \$12,000. More recently, on December 22, 2010, a case in which a defendant was accused of illegally downloading 6 works via BitTorrent, a settlement was reached for \$250,000.⁸⁸

The letter then begins to introduce the details of the proposed settlement. The letter states that “[i]n light of these factors, we believe that providing you with an opportunity to avoid litigation by working out a settlement with us, versus the costs of attorneys’ fees and the uncertainty associated with jury verdicts, is very reasonable and in good faith.”⁸⁹ The letter then lays out the settlement offer: “In exchange for a comprehensive release of all legal claims in this matter, which will enable you to avoid becoming a named Defendant in our lawsuit, our firm is

⁸⁵ Note the choice of wording employed here. The letter has switched back to “IP address” instead of its previous assurance that the plaintiff was confident that the person named in the letter was responsible for conducting the illegally downloading.

⁸⁶ Letter from John L. Steele, Attorney and Counselor at Law, Steele and Hansmeier, PLLC, <http://dietrolldie.files.wordpress.com/2011/09/57230736-settlement-letter.pdf> (May 16, 2011).

⁸⁷ Settlement Letter from Prenda Law, <http://copyrightletter.com/wp-content/uploads/2012/09/PrendLawDemand-Letter1.pdf> (May 8, 2011). See also Letter from John L. Steele, Attorney and Counselor at Law, Steele and Hansmeier, PLLC, <http://dietrolldie.files.wordpress.com/2011/09/57230736-settlement-letter.pdf> (May 16, 2011).

⁸⁸ *Id.*

⁸⁹ *Id.*

authorized to accept” a named sum, usually around \$2,500 “as full settlement for the claims.”⁹⁰ The letter then states that the offer will expire on a given date and time, usually within 14 days. The letter then states that “[i]f you reject our settlement offers, we expect to serve you with a Complaint and commence litigation.”⁹¹ The letter then reiterates that “if you act promptly you will avoid being named as a Defendant in the lawsuit.”⁹² The letter then discusses what kind of payment options are available to the subscriber to pay the settlement amount, as well as where to mail the payment.

Following this, the letter notes that the subscriber should:

consider this letter to constitute formal notice that until and unless we are able to settle our client’s claim against you we demand that you not delete any files from your computer or any other computers under your control or in your possession. If forced to proceed against you in a lawsuit, we will have a computer forensic expert inspect these computers in an effort to locate the subject content and to determine if you have deleted any content. If in the course of litigation the forensic computer evidence suggests that you deleted media files, our client will amend its complaint to add a ‘spoliation of evidence’ claim against you. Be advised that if we prevail on this additional claim, the court could award monetary sanctions, evidentiary sanctions and reasonable attorney fees.⁹³

The letter itself then concludes by offering the strong, underlined suggestion that the subscriber consult with an attorney.

The letter typically also includes a Frequently Asked Questions (FAQ) sheet. The questions and answers included in this sheet are typically written in simple English to help the subscriber fully understand the situation. The FAQ can include questions like “Will I remain anonymous if I settle?” (Given answer: “Yes, you will remain anonymous if you settle”) and

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Supra* note 84.

⁹³ *Supra* note 84.

“How do I make this go away?” (Given answer: “Paying the settlement fee will immediately release you from liability and close the case”).⁹⁴ The letter also typically includes a settlement payment form, designed to make it as easy as possible for the subscriber to quickly pay the settlement amount. The settlement form looks like a typical pay-by-mail order form, and includes options to pay by bank account or credit card.⁹⁵

Finally, the letter also typically includes a sample settlement release and agreement form.⁹⁶ The settlement form typically states that in consideration with full payment of the given settlement amount, the plaintiff agrees to “remise, release, acquit, satisfy, and forever discharge the said Releasee, of and from all manner of actions, causes of action, suits, debts, covenants contracts, controversies, agreements, promises, claims, and demands” regarding the named lawsuit or “any claim related to any act Releaser alleges that Releasee may or may not have done, which said Releaser ever had, now has, or which any personal representative, successor, heir or assign of said Releaser, hereafter can, shall or may have, against said Releasee, by reason of any matter, cause or thing whatsoever, from the beginning of time to the date of this instrument.”⁹⁷ The release agreement then states that the subscriber agrees to release the plaintiffs “from all manner of actions, causes of action, suits, debt, covenants, contracts, controversies, agreements, promises, claims and demands arising from or relating to the aforementioned lawsuit or any claim related any act” alleged.⁹⁸ The agreement concludes by stating that both parties “agree that the terms of this agreement shall forever remain confidential”

⁹⁴ *Supra* note 84.

⁹⁵ *See supra* note 84.

⁹⁶ *See supra* note 84.

⁹⁷ *Supra* note 84.

⁹⁸ *Id.*

and that both parties “shall not discuss this agreement.”⁹⁹ The plaintiff agrees to “not disclose information it may have regarding” the subscriber “the litigation described herein, or any settlement discussion entered into between the parties unless ordered to do so by a valid court order or by permission” of the subscriber.¹⁰⁰

If the subscriber chooses to pay the settlement amount, then the plaintiff likely mails the subscriber a substantially similar agreement as the one outlined above, which both parties sign. After such actions, the subscriber is dropped from the lawsuit, as indicated by the numerous John Doe dismissals that populate the Docket Sheets of such mass litigation cases.

If the subscriber does not pay the settlement amount by the given deadline, the plaintiffs typically do not immediately serve the subscriber with a complaint as stated. Instead, they typically continue to seek out a settlement agreement with the subscriber. Additional letters and emails¹⁰¹ may be sent to the subscriber seeking a settlement. In addition, the plaintiffs typically begin to call the subscriber’s phone number. Such calls typically begin as “Robocalls,” or automated messages recorded by the plaintiffs that appear to send substantially the same message to numerous subscribers affiliated with such lawsuits. The plaintiffs’ lawyers also phone the subscriber personally on occasion. The following is a transcript of a typical call:

“This is [Law Firm] calling about a couple of letters our office has mailed to you having to do with a copyright infringement lawsuit. Our client was generous enough to extend their settlement offer and that has now been expired for more than 30 days so it’s pretty clear to them that you do not plan to enter into a settlement agreement, which is fine. This call is just to inform you that we do have a number of new attorneys on staff. We have started to file lawsuits with individuals, and we will start that process with you shortly. Initially you will receive time sensitive documents. We’ve

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See* Copyright Law Group Settlement Email, http://dietrolldie.files.wordpress.com/2011/09/clg_settlementemail_00350md.pdf (April 2012).

found that most people do choose to have an attorney review them. If you want to get an idea of what the complaint will look like, just go to our website, weifghtpriracy.com and see some our recent filings. Of course, if you have any questions, we can be reached at [800 number].”¹⁰²

A more recent form of communication between the plaintiffs and the subscriber involves a request for additional information related to the case. Termed “Exculpatory Evidence Requests,” these letters have typically been sent out in lieu of the initial settlement letter to the subscriber.¹⁰³ Exculpatory letters first state that the individual’s ISP has identified him or her as “the subscriber in control” of a stated IP address. The letter states that the IP address was “detected infringing one or more” of the plaintiff’s copyrighted works, and that the law firm is “currently reviewing [the] matter for purposes of determining whether to pursue....a copyright infringement claim.”¹⁰⁴ The letter includes a form that the subscriber is asked to complete in order to convey to the plaintiff “any evidence which...makes it less likely that [the subscriber is] the infringer.”¹⁰⁵ The questions on such forms typically ask the subscriber to “[l]ist all authorized users of the network,” whether “there a WiFi access point associated with the public IP address,” if “BitTorrent been installed on any systems,” “[h]ow far is the closet neighbor” to the subscriber, whether the subscriber has “visited any Web sites containing Torrent Magnet Links,” whether the subscriber has “used search engines to search for information on torrent files or Web sites,” whether the subscriber has “ever visited streaming media site containing “unauthorized”

¹⁰² See DieTrollDie, Prenda Robo Call, https://www.dropbox.com/s/r4f6zvhjqc4ckq/Prenda_Lutz1.wav.

¹⁰³ See *Lipscomb Fishing Co., or “Exculpatory Evidence Request”* DieTrollDie, January 28, 2013, <http://diertrolldie.com/2013/01/28/lipscomb-fishing-co-or-exculpatory-evidence-request/>.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

copies of Plaintiff's movies," and whether the subscriber has "ever receive[d] notices of copyright infringement from your ISP or other content owner."¹⁰⁶

Communication between the plaintiff and the subscriber continues in this manner until either the subscriber pays the settlement amount to the plaintiff, or the subscriber becomes a named defendant in the lawsuit, at which time the case proceeds through the judicial process.

B. Who Are the "Copyright Trolls"

An examination of the mass copyright litigation phenomena necessitates an examination into the key players behind the dispute, chiefly because a limited number of entities are involved in these types of cases thus far. Although hundreds of copyright infringement cases have been brought against tens of thousands of individuals, there are only approximately forty-five different plaintiffs involved in such cases. There is even a fewer amount of law firms and attorneys typically associated with such cases; three main law firms represent the bulk of mass litigation copyright cases.

An examination of the plaintiffs involved in mass litigation copyrighting infringement suits reveals that approximately forty-five different copyright holders are involved in bringing forth the vast majority of such lawsuits. Figure 1, below, provides a list of the copyright holders names as they appear in the captions of such cases. The copyright holder names are listed in order according to the number of lawsuits they were identified to be a part of.

¹⁰⁶ *See id.*

FIGURE 1
LIST OF PLAINTIFFS IN MASS COPYRIGHT LITIGATION

Malibu Media
Patrick Collins
Third Degree Films
A.F. Holdings
Hard Drive
New Sensations
Nu Image
Raw Films
First Time Videos
K-Beach
Liberty Media
MCGIP
Pacific Century Interactive
SBO Pictures
Boy Racer
Digital Sin
IO Group
Bait Productions
Berlin Media
Discount Video
Media Productions
Openmind Solutions
West Coast Productions
Aerosoft
Bubble Gum Productions
Call of the Wild
Camelot Dist.
Celestial
CineTel Films
Combat Zone
Diabolic Video Productions
DigiProtect
Donkeyball Movie LLC
Lightspeed Media
Mavrick Entertainment
Millennium TGA
Next Phase Distribution

On the Cheap
Paradox Productions
PHE Inc.
PW Productions
Quad Intern
ReFX Audio
Sunlust Pictures
Voltage Pictures
Zero Tolerance

An examination of the law firms representing the entities involved in mass litigation copyright infringement suits reveals that just four law firms were associated with most plaintiffs involved in such cases. These law firms—Prenda, Lipscomb, CEG TEK, and DGW – are responsible for filing virtually all of the litigation surrounding these types of cases.

The sheer number of copyright litigation cases originating from such a small sample set of plaintiffs raises the question of the ultimate rationale behind bringing such litigation in the first place. Given that BitTorrent has been said to promulgate mass copyright infringement activities involving a comprehensive range of media types, it stands to reason that if lawsuits such as these were a way to truly recoup media creation costs, a greater amount of plaintiffs might be involved in such cases. A small range of plaintiffs, however, would appear to be in line with the thesis that such plaintiffs are potentially engaging in an abuse of the judicial system in order to embark in a profit-creating endeavor.

C. Potential Problems With Mass Copyright Litigation

While legitimate enforcement of copyright infringement represents a valid and important use of the judicial system, there are several characteristics of mass copyright infringement lawsuits that make such lawsuits and their accompanying settlement discussions highly suspect. Following from the close examination of mass copyright infringement cases above, several

questions can be raised as to their legitimacy, fairness to the individuals involved, as well as a proper use of judicial resources.

1. IP Address Sufficiency

As a threshold issue, it is important to note that a myriad of problems are associated with attempts to litigate against an individual based upon an IP address. Numerous technical reports and legal scholars have noted that attempts to associate an IP address with a specific individual are inherently flawed and can easily result in misidentification. While an IP address may be used as a tool to locate subscriber information, that information is not conclusive as to who committed the alleged act of infringement. Such subscription information only reveals “the person paying for the internet service;” it does not necessarily reveal anything about the actual infringer.¹⁰⁷ The actual alleged infringer could in fact be “a family member, roommate, employee, customer, guest, or even a complete stranger.”¹⁰⁸ Famously, a similar mass copyright infringement lawsuit in the United Kingdom involved naming a 60-year old woman who stated she had never heard of peer-to-peer technology.¹⁰⁹ She was named in a lawsuit for illegally downloading pornography on the basis of faulty IP address information.¹¹⁰

Despite this questionable link between an IP address and a specific individual, and despite the fact that courts have held that IP addresses are not sufficient to identify individuals,¹¹¹

¹⁰⁷ A.F. Holdings v. John Doe, 2:12-cv-5709-ODW(JCx) (C.D. Cal 2012).

¹⁰⁸ *Id.*

¹⁰⁹ See The Pirates And Trolls Of Porn Valley, <http://www.buzzfeed.com/reghan/the-pirates-and-trolls-of-porn-valley>.

¹¹⁰ See *id.*

¹¹¹ See A.F. Holdings v. Rogers, 12cv1519 BTM(BLM) (S.D. Cal 2013). While courts have held that IP address information is not sufficient, alone, to identify an individual, courts have typically allowed IP address information to serve as a basis for moving forward with expedited discovery.

plaintiffs in mass copyright infringement suits nevertheless use IP addresses as the basis for petitioning for expedited discovery. With nothing more than a list of IP addresses, plaintiffs successfully ask the court for subpoena requests in order to obtain subscriber contact information. Plaintiffs appear to take no steps to mitigate problems associated with IP identification; one court, for example, has chastised plaintiffs for not conducting any investigation as to whether the address was spoofed, or even determining whether the download was actually completed.¹¹² Plaintiffs then use such information to engage in possibly coercive and deceptive settlement negotiations. If the underlying IP address information utilized by the plaintiffs is faulty, then there is sufficient reason to question whether plaintiffs have sufficiently established even the basic threshold question of whether they are targeting the correct individuals. The inadequacy of using an IP address to establish the identity of a single individual thus reveals a significant problem with mass copyright infringement lawsuits; that is, there is a significant chance that such proceedings are being initiated against completely innocent individuals based on faulty information.¹¹³

2. *Personal Jurisdiction*

Questions regarding personal jurisdiction strike at the center of a court's power to render decisions against an individual. The Supreme Court has stated that the Due Process Clause requires an individual to be subject to the personal jurisdiction of the court.¹¹⁴ Unless an

¹¹² See *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333-ODW(JCx) (C.D. Cal 2013).

¹¹³ See *The Pirates And Trolls Of Porn Valley*, <http://www.buzzfeed.com/reghan/the-pirates-and-trolls-of-porn-valley> ("Mitch Stoltz, a lawyer at the Electronic Frontier Foundation who has been working on this issue on behalf of file sharers... ticked off a list of problems with associating pirate identities with IP addresses. "Their methods are opaque — the software that monitor BitTorrents have never been tested in court. They could be transposing digits, they could be getting the name wrong, the [Internet service providers] could have the wrong name associated with [an IP address]," he said.").

¹¹⁴ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

individual has consented to a court's personal jurisdiction, a court generally has no power over an individual unless he or she is present or domiciles within the jurisdiction,¹¹⁵ has made "purposeful contacts" with the jurisdiction,¹¹⁶ or has a "reasonable expectation" of facing a lawsuit in the jurisdiction.¹¹⁷ The Supreme Court has articulated that the guiding light for personal jurisdiction matters is whether the defendant's contacts with the state in question are "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹¹⁸ Moreover, in situations involving unnamed defendants, courts have recognized a judicial responsibility to investigate personal and subject matter jurisdiction when a non-party to the suit may be subject to costly discovery.¹¹⁹ In situations such as mass copyright infringement lawsuits, courts may have a particularly strong responsibility to investigate personal jurisdiction questions, as such cases are likely to involve individuals who are unfamiliar with the law, lack the means to obtain a lawyer, and are therefore more likely to settle case, waiving a right they did not know existed in the first place.

Plaintiffs involved in mass copyright infringement cases have brought numerous lawsuits against hundreds of individuals from all across the country joined together as part of a single suit. In cases involving such large numbers of individuals coming from so many different corners of the country, it is reasonable to investigate whether the court in question has the power to exercise personal jurisdiction against all defendants. Lacking such authority, a court would not

¹¹⁵ See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹¹⁶ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296-97 (1980).

¹¹⁷ See *Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958).

¹¹⁸ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 290 (Internal quotations removed).

¹¹⁹ See *Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.*, 619 F.3d 207, 213-14 (2d Cir. 2010) (holding that a court's inquiry into its personal jurisdiction is a proper exercise of the court's responsibility to determine that it had the power to enter a default judgment).

constitutionally be empowered to grant a subpoena request from the plaintiff regarding accessing defendant John Doe's ISP subscription information.

The plaintiffs of mass copyright infringement lawsuits typically justify the court's proper exercise of personal jurisdiction by stating that the nature of BitTorrent justifies jurisdiction over all defendants in the case.¹²⁰ Plaintiffs typically assert that because the nature of BitTorrent requires individuals to receive and transmit data from one another concurrently, all users of the protocol are acting in concert with one another. Plaintiffs claim that this act of simultaneous occurrence and mutual beneficial activity can sufficiently establish the required amount of minimum contacts between out of state defendants and in-state defendants for the court to exercise proper personal jurisdiction.¹²¹ For example, one plaintiff has claimed that "[u]nder the BitTorrent protocol every user simultaneously receives information from and transfers information to one another, and the aggregate group of downloaders/distributors of a particular file share such information in a so-called "swarm" of transfers in which the information is shared among the peers....more or less simultaneously and in concert with one another, thus connecting *peers physically present in this jurisdiction* to peers *elsewhere* in a shared and mutually supportive network of unlawful copying, all of which causes harm to Plaintiff in this jurisdiction" (emphasis added).¹²²

¹²⁰ See, e.g., *DigiProtect USA Corp. v. Does*, No. 10 Civ. 8760 (PAC), 2011 WL 4444666, at *2 (S.D.N.Y. Sept. 26, 2011).

¹²¹ Note, however, that the Federal Rules of Civil Procedure do not require plaintiffs to justify a court's exercise of personal jurisdiction. See 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1067.6 (3d ed. 2007) (collecting cases and noting that "strictly speaking, under Federal Rule 8(a) plaintiffs are not required to plead the basis for personal jurisdiction over defendants"). Nonetheless, a court must still justify its exercise of personal jurisdiction. The mere fact that plaintiffs feel compelled to explain the basis of a court's exercise of personal jurisdiction in and of itself raises the question that a court, acting on its own accord, might properly question its exercise of personal jurisdiction in such cases.

¹²² *DigiProtect USA Corp. v. Does*, 2011 WL 4444666 at *4.

There are significant reasons to question the premise of such justification, however. Notably, the BitTorrent protocol is more dynamic than such claims appear to allege. As noted in Part II, when an individual uses the BitTorrent protocol to download a target file, he or she connects only to a small subset of the entire swarm at any given time to download and upload the file. At no point is a single individual connected to all users within the swarm. Instead, users are connected to each other randomly, and such connections are in a near constant state of flux, as the protocol seeks to connect individuals with the fastest and most reliable connection speeds possible.

It is questionable whether such apparently random and disjointed connections between in-state and out-of-state defendants would be enough to meet the constitutional requirements for proper personal jurisdiction. Establishing random connections between peers, as the BitTorrent protocol does, would seem to fall short of the Supreme Court's requirements of "purposeful contacts"¹²³ and "reasonable expectation" of facing a lawsuit in the jurisdiction¹²⁴ standards.

Indeed, several courts have recognized that mass copyright infringement lawsuits present problems relating to personal jurisdiction.¹²⁵ Courts have noted that in past instances where early discovery was granted and plaintiffs obtained ISP subscriber information, plaintiffs "often learned that some of the ISP subscribers did not live in the state where the lawsuit was brought."¹²⁶ Courts have held that complaints that "summarily assert[] that...defendants 'downloaded copyrighted content from, or uploaded it to'" residents residing within the court's

¹²³ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296-97 (1980).

¹²⁴ See *Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958).

¹²⁵ See, e.g. *Liberty Media Holdings, LLC v. Does 1-62*, 11-CV-575-MMA NLS, 2012 WL 628309 (S.D. Cal. Feb. 24, 2012).

¹²⁶ *Hard Drive Productions, Inc. v. Does 1-90*, No. C11-03825, (N.D. Cal 2012) available at <http://www.scribd.com/doc/88220169/Gov-uscourts-cand-243765-18-0>.

jurisdiction are “insufficient to support the exercise of general or limited personal jurisdiction.”¹²⁷ Such courts note that even if the plaintiff “could show that each of the Doe defendants transferred a piece of the file to a...resident, this single, miniscule action would not constitute ‘minimum contacts’ with the state.”¹²⁸

There are technically feasible steps that plaintiffs can take to ensure that the defendants included in the suit are likely to reside within the court’s jurisdiction. Indeed, courts have found that “[i]nformation about the geographic location of internet accounts connected to specific IP addresses “is easily accessible and publicly available.”¹²⁹ While some courts do appear to be moving towards adopting a general standard that such technology be used in mass copyright infringement cases,¹³⁰ several jurisdictions have allowed mass copyright infringement lawsuits to move forward without employing the technology.¹³¹ In instances where such technology is not used to identify the defendants within a lawsuit, significant questions thus remains as to whether the court is properly exercising personal jurisdiction.¹³²

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *DigiProtect USA Corp. v. Does*, No. 10 Civ. 8760 (PAC), 2011 WL 4444666 at *4.

¹³⁰ *See id.*

¹³¹ *See, e.g. Liberty Media Holdings, LLC v. Does 1-62*, 11-CV-575-MMA NLS, 2012 WL 628309 (S.D. Cal. Feb. 24, 2012) (“Movants have not yet been identified and their connections, or lack there of, to California are unknown. In the absence of this information, it is premature to decide whether the Court has personal jurisdiction over unnamed Doe Defendants. Neither the Court nor Plaintiff can adequately determine if personal jurisdiction exists until Doe Defendants identify themselves or are identified by their ISPs.”); *IO Group, Inc., v. Does 1-19*, 2010 U.S. Dist. LEXIS 133717, 2010 WL 5071605 (N.D. Cal. Dec. 7, 2010); *Call of the Wild Movie, LLC v. Does 1-1, 062*, 770 F.Supp.2d 332, 347 (D.D.C.2011) (“[A]t this juncture when no putative defendant has been named, the Court has limited information to assess whether any putative defendant has a viable defense of lack of personal jurisdiction or to evaluate possible alternate bases to establish jurisdiction.”).

¹³² This is not to say that use of such techniques alleviates all concerns regarding personal jurisdiction. Even in instances in which such techniques are used, valid reasons exist to continue to question whether a court has valid personal jurisdiction against all defendants. *See Hard Drive Productions, Inc. v. Does 1-90*, C11-03825 HRL, 2012 WL 1094653 (N.D. Cal. Mar. 30, 2012) (“Plaintiff alleges in the complaint that it “used geolocation technology to trace the IP addresses of each Defendant to a point of origin within the State of California.... Although not a litmus test for personal jurisdiction, the use of geolocation gives Plaintiff good cause for asserting that personal jurisdiction is proper over the Defendants.” Complaint ¶ 3. But, in its supplemental briefing and at hearing, plaintiff admitted

3. Proper Joinder

A third concern with mass copyright infringement litigation is whether such cases are proper under the Federal Rules of Civil Procedure for joinder. Typical mass copyright infringement lawsuits involve bringing a complaint against as many as a thousand John Doe defendants. There are several reasons to question whether such cases, which bring in such a large number of defendants, each of whom is likely to assert unique defenses under unique sets of facts, are proper under the Federal Rules. While joining thousands of defendants together makes it easier for the plaintiffs involved in such cases to gather subscriber information and engage in settlement discussions, such joinders may present issues of fairness to the defendants. Moreover, massive joinder cases may be costly for the judicial system, as they allow plaintiffs to avoid paying filing fees for each defendant in the case.

The Federal Rules of Civil Procedure authorize joinder of defendants in cases in which a “right to relief is asserted against them jointly, severally, or in the alternative” that arises “out of the same transaction, occurrence, or series of transactions or occurrences” and if “any question of law or fact common to all defendants will arise in the action.”¹³³ Even if these requirements are met, however, joinder remains a matter of the court’s discretion. Courts may, “at any time, on any just terms” sever a party or claim.¹³⁴ While joinder of claims and parties is typically encouraged,¹³⁵ the Supreme Court has consistently instructed that courts only apply joinder in

that while geolocation “is the leading method for associating an IP address with an approximate geographic location,” it is only truly reliable when predicting the *country* in which an IP address is located. Dkt. No. 16, p. 3.”).

¹³³ FED. R. CIV. PRO. 21.

¹³⁴ FED. R. CIV. PRO. 21.

¹³⁵ See 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1652 (3d ed. 2011) (Noting that the “purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.”).

circumstances that are “consistent with fairness to the parties.”¹³⁶ Joinder is not justified when a plaintiff merely alleges that each of the defendants has violated the same statutory duty; that is, joinder is not justified simply because the claims all involve copyright infringement.¹³⁷ Furthermore, joinder is not proper simply because defendants have all used the same method to violate the law.¹³⁸

Plaintiffs in mass copyright infringement cases typically assert that joinder against all defendants is proper by arguing that the unique nature of the BitTorrent protocol requires all defendants to act simultaneously with each other and therefore engage in the same transaction. In what has been termed the “swarm theory,” plaintiffs typically claim that “[o]nce a peer receives a piece of the computer file....it starts transmitting that piece to the other peers.... In this way, all of the peers and seeders are working together in what is called a “swarm.” each [Doe defendant] peer member participated in the same swarm and directly interacted and communicated with other members of that swarm through digital handshakes, the passing along of computer instructions, uploading and downloading, and by other types of transmissions.”¹³⁹

Such claims bring forth concerns similar to those surrounding the issue of personal jurisdiction. Namely, there is significant reason to question the way in which such plaintiffs characterize interactions over the BitTorrent protocol. Given the dynamic nature of BitTorrent, in which peers are constantly, randomly connecting and disconnecting from each other, it is difficult to see how all of the defendants named in such lawsuits could have possibly been connected to each other simultaneously. Given the design of the BitTorrent protocol, it is simply

¹³⁶ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

¹³⁷ *See Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997).

¹³⁸ *See Nassau Cnty. Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 (2d. Cir. 1974).

¹³⁹ *See Malibu Media, LLC v. Does 1-11*, 286 F.R.D. 113, 115 (D.D.C. 2012).

not the case, as plaintiffs typically assert, that each defendant named in the lawsuit necessarily participated in or contributed to the downloading activities of all other defendants included in the lawsuit.¹⁴⁰

Furthermore, claims of simultaneous acts of infringement seem to completely fall apart when one considers the fact that many defendants entered and exited the swarm at different times.¹⁴¹ It is highly unlikely that an individual that began a download at the beginning of the week would still be present in the swarm at the end of the week, given that the file would likely have completed downloading many days before.¹⁴² Nonetheless, many mass copyright infringement cases have attempted to join defendants whose allegedly infringed activity took place weeks, sometimes even months, apart.¹⁴³

¹⁴⁰ *See id.* at 116-17 (“Under the BitTorrent Protocol, it is not necessary that each of the Does 1–[11] participated in or contributed to the downloading of each other’s [pieces] of the work at issue—or even participated in or contributed to the downloading by any of the Does 1–[11]. Any []pieces[] of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm*. The bare fact that a Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they were part of the downloading by unknown hundreds or thousands of individuals across the country or across the world.”).

¹⁴¹ One scholar has explained such situations as follows: “imagine a swarm developed around a file seeded by A. On Day 1, B, C, and D enter that swarm with A and help each other acquire the file by exchanging pieces of the file with one another. Their exchange can fairly be called the same “series of transactions” for purposes of Rule 20. Now, after the exchange, assume all four stay plugged into the swarm through Day 2, uploading pieces of the file to any other users who enter into the swarm. On Day 3, B, C, and D disconnect. The next day E, F, and G enter the swarm with A. Since the swarm develops around the file, E, F, and G are part of the same swarm that A, B, and C were in. However, now the file exchange is occurring between A, E, F, and G. By contrast, B, C, and D have no involvement with the second exchange because they left the swarm. Given that B, C, and D were not and could not be sources for E, F, and G, the former group’s acquisition of the file was a wholly separate series of transactions from the latter’s. Instead, the only link between the parties is that they “used the same peer-to-peer network to copy and reproduce [[a plaintiff’s] video[],” which has time and again been ruled insufficient to meet the requirements for joinder. So long as the plaintiffs cannot allege more, they fail to prove that the defendants engaged in closely related transactions.” Karunaratne, *supra* note 9 at 295 (internal citations omitted).

¹⁴² *Boy Racer v. Does*, No. C 11-02834LHK (PSG), 2011 U.S. Dist. LEXIS 86746, at *2 (N.D. Cal. Aug. 5, 2011).

¹⁴³ *Digital Sins, Inc. v. John Does 1-245*, No. 11 Civ. 8170 (CM), 2012 WL 1744838 (S.D.N.Y. May 15, 2012) (“Nothing in the complaint negates the inference that the downloads by the various defendants were discrete and separate acts that took place at different times; indeed, the complaint alleges that separate defendants shared access to a file containing a pornographic film in separate and isolated incidents over the course of 59 days. In other words, what we have here is 245 separate and discrete transactions in which 245 individuals used the same method to access a file via the Internet—no concerted action whatever, and no series of related occurrences—at least, not related in any way except the method that was allegedly used to violate the law.”).

Joinder of hundreds of defendants in mass copyright litigation cases is further questionable due to the fact that plaintiffs avoid having to pay court filing fees for claims against all of the individual defendants. Typically, filing fees are paid per case and are approximately \$350.¹⁴⁴ Filing fees “not only provide crucial funding for the operation of the Court, but also serve as a deterrent to the filing of frivolous suits.”¹⁴⁵ Indeed, in addressing mass copyright infringement lawsuits, courts have begun to note that “[t]he only economy that litigating these cases as a single action would achieve is an economy to plaintiff – the economy of not having to pay a separate filing fee for each action brought.”¹⁴⁶ Once aggregated over the long term, the avoidance of paying filing fees becomes a significant issue for courts; one court noted that a leading plaintiff in such cases had avoided nearly \$300,000 by filing joined lawsuits.¹⁴⁷ This use of joinder allows plaintiffs to pursue their settlement-based business model without incurring the substantial litigation costs that would result from having to file individual lawsuits.¹⁴⁸ The fact that this kind of litigation appears to be motivated by a business model that relies on joinder in order to avoid paying filing fees raises significant questions as to whether joinder is in fact proper. The judicial economy the Federal Rules have in mind when speaking about joinder involve adequate and efficient use of court resources for the betterment of all litigations; the Rules were not created in order to facilitate the kind of business models plaintiffs in mass copyright infringement cases typically are engaged in.¹⁴⁹

¹⁴⁴ See 28 U.S.C. § 1914 (“The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of \$350...”).

¹⁴⁵ *Malibu Media v. John Does 1-24*, No. 2:12-cv-425-UA-DNF, 2013 WL 105094, at *4 (M.D. Fla. Jan. 9, 2013) (citing *In re McDonald*, 489 U.S. 180, 184 (1989)).

¹⁴⁶ *Malibu Media v. John Does 1-24*, No. 2:12-cv-425-UA-DNF, 2013 WL 105094, at *4 (M.D. Fla. Jan. 9, 2013).

¹⁴⁷ *Id.* at *6.

¹⁴⁸ See Karunaratne, *The Case Against*, *supra* note 9, at 303.

¹⁴⁹ *Malibu Media v. John Does 1-24*, No. 2:12-cv-425-UA-DNF, 2013 WL 105094, at *4 (M.D. Fla. Jan. 9, 2013).

4. Questionable Litigation Incentives, Bad Behavior and Unequal Bargaining Power

Finally, proper consideration of the nature of mass copyright infringement lawsuits necessitates recognizing the context in which such cases arise. While it is true that the plaintiffs in mass copyright infringement cases likely have legitimate substantive grounds for pursuing their cases,¹⁵⁰ it is also apparent that plaintiffs have recognized that they can create a lucrative business model out of utilizing federal courts to coerce individuals into paying settlement amounts.¹⁵¹ It is important to note that by bringing forth lawsuits that join together thousands of individuals, plaintiffs minimize their litigation costs and create a profitable litigation model “that can result in monetary gains in the six and even seven figure range.”¹⁵²

The profitability of this model, however, hinges on questionable litigation incentives. In order to be a profitable endeavor, plaintiffs bringing forth such suits must engage in “low cost, high volume” litigation. Such plaintiffs are thus seeking to create litigation against as many individuals as possible, as cheaply as possible. This model appears to inherently depend on minimizing litigation costs to the extreme; plaintiffs involved in mass copyright infringement cases appear to be litigating cases on a model that depends on such cases never reaching a jury. Plaintiffs in these cases never intend or desire for the case to fully go to trial.¹⁵³ A case litigated to its conclusion would simply be too costly for plaintiffs’ business model to remain profitable.

¹⁵⁰ See Karunaratne, *The Case Against*, *supra* note 9 (citing M. Alex Johnson, *Porn Piracy Wars Get Personal*, MSNBC.COM (July 20, 2011, 8:06 AM), <http://www.technolog.msnbc.msn.com/technology/technolog/porn-piracy-wars-get-personal-121928>).

¹⁵¹ See Karunaratne, *The Case Against*, *supra* note 9, at 303 (citing Art Neill, *Does a New Wave of Filesharing Lawsuits Represent a New Business Model for Copyright Owners?*, J. INTERNET L., June 2011, at 1, 8-9).

¹⁵² See Karunaratne, *The Case Against*, *supra* note 9, at 303 (citing David Kravets, *How Mass BitTorrent Lawsuits Turn Low-Budget Movies Into Big Bucks*, WIRED (Mar. 31, 2011, 2:36 PM), <http://www.wired.com/threatlevel/2011/03/bittorrent/>).

¹⁵³ See Keegan Hamilton, *Porn, Piracy, & BitTorrent*, SEATTLE WKLY. (Aug. 10, 2011), <http://www.seattleweekly.com/2011-08-10/news/porn-piracy-bittorrent/>.

Such litigation incentives are important to consider when examining activities surrounding mass copyright infringement cases as a whole. Such incentives indicate that plaintiffs are not bringing such lawsuits because they believe the case will likely succeed on the merits, but instead to use the federal court system in order to facilitate a coercive settlement regime.

Such questionable litigation incentives are also a cause for concern because they are likely to lead to unscrupulous litigation behavior. Given that “an innocent John Doe is just as likely to pay up as a guilty one,” plaintiffs involved in such cases do not have an incentive to ensure that individuals they accuse actually committed the infringing activity. Indeed, it would seem that such plaintiffs have an incentive to name as many defendants as possible, regardless of their possibility of guilt. This kind of litigation strategy has been characterized by one commentator as “shoot first, and identify....targets later.”¹⁵⁴ Indeed, plaintiffs themselves acknowledge the possibility of misidentification in the initial letters they send out to defendants in such cases, indicating that plaintiffs are fully aware of the problem but choose to proceed in cases nonetheless.¹⁵⁵

Knowingly initiating suits against innocent defendants, however, is far from the only example of observed bad behavior by plaintiffs in mass copyright infringement lawsuits. From the very beginning of such cases, several plaintiffs have been involved in conduct deemed to be unethical and subject to sanctions by various courts.¹⁵⁶ In one notable example, a judge admonished lawyers associated with the leading mass copyright infringement law firm, Prenda

¹⁵⁴ See Karunaratne, *The Case Against*, *supra* note 9, at 303.

¹⁵⁵ Plaintiffs communicate in letters sent to John Doe defendants that unsecured WiFi access may contribute to misidentification. Plaintiffs assert, despite lacking legal support, that unsecured WiFi access may be negligent behavior.

¹⁵⁶ See *id.* (citing *Mick Haig Prods., e.K. v. Does 1-670*, No. 3:10-CV-1900-N, 2011 WL 5104095, at *1, *5 n.9 (N.D. Tex. Sept. 9, 2011); *K-Beech, Inc. v. Does 1-85*, No. 3:11cv469-JAG (E.D. Va. Oct. 5, 2011), available at <https://www.eff.org/files/K-Beech.pdf> (plaintiff ordered to show cause for why its conduct did not violate Rule 11)).

Law, for misleading the court by concealing information.¹⁵⁷ Judge Otis Wright III, of the Central District of California, issued an order calling for Rule 11 sanctions¹⁵⁸ and other disciplinary action against the chief individuals associated with mass copyright infringement pornography lawsuits: Brett Gibbs, John Steele, Paul Hansmeier, and Paul Duffy.¹⁵⁹ The court stated that plaintiffs engage in “lawsuits. . . filed using boilerplate complaints based on a modicum of evidence, calculated to maximize settlement profits by minimizing costs and effort.” The order eviscerates the plaintiff lawyers for deliberately withholding information from the court and making material misrepresentations involving their activities surrounding their mass copyright infringement scheme. The court stated that “Plaintiffs’ representations about their operations, relationships, and financial interests have varied from feigned ignorance to misstatements to outright lies” that were “calculated so that the Court would grant Plaintiffs’ early-discovery requests, thereby allowing Plaintiffs to identify defendants and exact settlement proceeds from them.” Additionally, in numerous instances, the plaintiffs involved in such cases have served subpoenas upon ISPs without having first been granted expedited discovery.¹⁶⁰ Plaintiffs then immediately engage in settlement negotiations with the identified subscribers, in violation of the court.

Additionally, the nature of the copyrighted work in question may contribute to unequal bargaining power between the plaintiffs and defendants, giving raise to concerns about possible

¹⁵⁷ See Ken White, *Deep Dive Analysis: Brett Gibbs Gets His Day in Court—But Prenda Law Is The Star*, TECHDIRT (Mar. 11, 2013), <http://www.techdirt.com/articles/20130311/19422822287/deep-dive-analysis-brett-gibbs-gets-his-day-court-prenda-law-is-star.shtml> (Noting that Judge White, the presiding judge, commented during the hearing that a deposition from an individual associated with Prenda Law contained “so much obstruction...that it's obvious that someone has an awful lot to hide.”).

¹⁵⁸ In a feat of poetic justice, Judge Wright calculated sanctions in the case to be “just below the cost of an effective appeal.” See *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333-ODW(JCx) (C.D. Cal 2013) at 10 n. 5.

¹⁵⁹ See *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333-ODW(JCx) (C.D. Cal 2013).

¹⁶⁰ *Mick Haig Prods., e.K. v. John Does 1-670*, No. 3:10-CV1900-N, 2011 U.S. Dist. LEXIS 128366, 2011 WL 5104095, at 1 (N.D. Tex. Sept. 9, 2011).

extortion-like behavior. Almost all of the works at issue in mass copyright infringement cases involve pornographic works.¹⁶¹ Additionally, almost all of works in question contain graphically-explicit, sexually-revealing and potentially embarrassing titles. Thus, in some instances a defendant may be forced to settle despite being confident in his or her case, as litigation would expose the defendant to his family, friends, co-workers, and the general community as a viewer of pornography.¹⁶² Such a risk is likely enough to make a defendant “inclined to agree to pay a few thousand dollars to make the whole embarrassing, inconvenient mess go away.”¹⁶³

The plaintiffs bringing forth these cases, in fact, have clearly indicated that this shaming effect is a part of the reason behind plaintiffs’ motivation for litigation. One leading plaintiff’s lawyer has stated publicly that “he expects to get settlements precisely because many people who download pornography are unwilling to risk being publicly identified as having done so.”¹⁶⁴ The lawyer stated that, “You have people that might be OK purchasing music off iTunes, but they’re not OK letting their wife know that they are purchasing pornography.”¹⁶⁵ Consequently, he bragged, once they are identified, “Most people just call in to settle. We have a 45 percent settlement rate.”¹⁶⁶ John Steele, perhaps the most prominent lawyer associated with mass copyright infringement lawsuits, has stated that individuals he has sued are “more than willing to

¹⁶¹ See *id.* at 305. Notably, however, not all of the works at the center of mass copyright infringement cases involve pornography. *The Hurt Locker*, an Academy-Award winning film, has been the center of a significant mass copyright infringement case. See *Voltage Pictures, LLC v. Does 1-5000*, 818 F. Supp. 2d 28 (D.D.C. 2011).

¹⁶² See *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333-ODW(JCx) (C.D. Cal 2013).

¹⁶³ Alison Frankel, *How Porno Piracy Cases Are Breaking Copyright Ground*, THOMSON REUTERS (Sept. 8, 2011), <http://blogs.reuters.com/alison-frankel/2011/09/09/how-porno-piracy-cases-are-breaking-copyright-ground/>.

¹⁶⁴ *Mick Haig Productions, e.K. v. Does*, 3:10-CV-1900-N, 2011 WL 5104095 (N.D. Tex. Sept. 9, 2011) aff’d sub nom. *Mick Haig Productions E.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012).

¹⁶⁵ John Council, *Adult Film Company’s Suit Shows Texas Is Good for Copyright Cases*, TEXAS LAWYER (Oct. 4, 2010), available at <http://viewer.zmags.com/publication/c4ff88fd#/#c4ff88fd/19>.

¹⁶⁶ *Id.*

say, 'I don't want my name in a federal lawsuit for, in this case, downloading transsexual porn.’¹⁶⁷ Steele notes that he uses this aversion to work out settlement agreements.¹⁶⁸

V. Dealing With Mass Copyright Infringement Litigation.

Mass copyright litigation cases have become near commonplace throughout the country. Over 100,000 defendants have been named in such cases. As such, district courts across the country are being forced to deal with the complicated issues involving IP address accuracy, personal jurisdiction, and proper joinder that arise in such cases. Not surprisingly, given the rapid evolution and vast complexity of such cases, courts have come to different conclusions as to how to best approach such cases. The following section provides a comprehensive examination of courts from around the country that have addressed the particularly vexing problem of joinder.

A. What Courts are Currently Doing

1. Current General Confused State.

Courts across the country are beginning to realize the pervasive nature of mass copyright infringement lawsuits.¹⁶⁹ Numerous courts in recent decisions have described the phenomenon as widespread. Cases involving mass copyright infringement typically now open with the court making a general observation that the case is one of the thousand currently pending cases involving similar allegations.

¹⁶⁷ Steve Schmadeke, *Chicago lawyer leads fight against porn piracy*, CHICAGO TRIBUNE (Nov. 15, 2010), available at http://articles.chicagotribune.com/2010-11-15/news/ct-met-porn-attorney-20101115_1_face-lawsuit-anti-piracy-campaign-copyright-violators.

¹⁶⁸ *See id.* (“We worked out a very reasonable, minor fine.”).

¹⁶⁹ *See Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 168 (S.D.N.Y. 2012) (“Over the past year, a large number of civil actions about the illegal trading of pornographic films on BitTorrent have been filed in federal courts across the country.”).

Several courts have begun to recognize the potential problems with mass copyright infringement cases described in Part III.C of this paper. Courts have noted that such cases may present problems relating to whether the court has proper personal jurisdiction and whether joinder is proper. Courts are also beginning to recognize that mass copyright infringement lawsuits are being litigated out of an interest to drive settlements and may involve instances of unscrupulous or coercive conduct by the plaintiffs.¹⁷⁰

While courts have been relatively quick to recognize problems associated with mass copyright infringement lawsuits, courts have come to widely divergent views as to how to best address such problems. Not only have several splits emerged amongst different circuits, but splits have emerged within circuits and even within districts themselves. In addressing the current diverging views, one court has noted “inconsistent holdings regarding whether defendants who participated in the same swarm on BitTorrent and downloaded the same file....can be properly joined.”¹⁷¹ The same court noted that within the same district “judges have come to different conclusions.”¹⁷² Given the fact that mass copyright infringement cases have evolved rapidly and have never yet reached a full judgment on the merits, let alone a decision from a Circuit Court, this divergence of opinion is perhaps understandable. An in-depth exploration of how courts have addressed the confusion, however, may help guide consideration of the issue moving forward.

¹⁷⁰ See e.g. *Third World Media, LLC v. Does 1-21*, CIV.A. 12-10947-FDS, 2012 WL 5464266 (D. Mass. Nov. 5, 2012) (“The plaintiffs’ claims and filings are virtually identical in all of these cases, and they have been brought by the same attorney. The strategy implemented by these plaintiffs has been to file mass copyright infringement lawsuits against ‘Doe’ defendants known only by their IP addresses, alleging that a person associated with each IP address illegally reproduced a pornographic film using BitTorrent file sharing technology as part of single ‘swarm.’ Plaintiffs then move for expedited discovery of the information identifying the defendants by means of Rule 45 subpoenas served on the relevant Internet Service Providers (“ISPs”)”).

¹⁷¹ *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 168 (S.D.N.Y. 2012).

¹⁷² See *id.*

2. *Judicial Consideration of Joinder*

While courts have come to different conclusions regarding personal jurisdiction and IP address sufficiency, the problem that appears most vexing to courts involves whether joinder is proper. There appears to be two diverging views on whether joinder of defendants in mass copyright infringement cases is proper.

Several courts have held that joinder of defendants is proper “as long as the complaint is based on “specific factual allegations” connecting the defendants to the “same specific swarming transaction, or series of transactions.”¹⁷³ Such courts have stated that when individuals participate in the “same swarm and download[] the same copyrighted pornographic film using BitTorrent” joinder is proper because “it is difficult to see how the sharing and downloading activity....—a series of individuals connecting either directly with each other or as part of a chain or ‘swarm’ of connectivity designed to illegally copy and share the exact same copyrighted file—could not constitute a ‘series of transactions or occurrences’ for purposes of Rule 20(a).”¹⁷⁴ Courts have also allowed joinder in mass copyright infringement cases on the theory that “the claims are ‘logically related.’”¹⁷⁵ Notably, many courts allow joinder in the early stages of case; courts typically state that because the defendants have yet to be identified, consideration of whether joinder is proper is premature.¹⁷⁶

¹⁷³ *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 168 (S.D.N.Y. 2012) (citing *DigiProtect USA Corp. v. Does 1–240*, 10 Civ. 8760, 2011 WL 4444666, at *3 n. 3 (S.D.N.Y. Sept. 26, 2011)).

¹⁷⁴ *See id.*

¹⁷⁵ *See Next Phase Distribution Inc. v. John Does 1-27*, 284 F.R.D. at 169 (citing *Patrick Collins, Inc. v. Does 1–21*, 282 F.R.D. 161, 166 (E.D.Mich.2012); *Maverick Entm't Grp., Inc. v. Does 1–2115*, 810 F.Supp.2d 1, 12 (D.D.C.2011); *K–Beech, Inc. v. Does 1–31*, No. 12 Civ. 88, 2012 WL 1431652, at *2 (D.Md. Apr. 24, 2012)).

¹⁷⁶ *See e.g. Patrick Collins, Inc. v. John Does 1-33*, No. 11-CV-02163-CMA-MJW, 2012 WL 415424 (D. Colo. Feb. 8, 2012); *see MCGIP, LLC v. Does 1-18*, C-11-1495 EMC, 2011 WL 2181620 (N.D. Cal. June 2, 2011).

However, numerous other courts have denied joinder in mass copyright infringement cases.¹⁷⁷ Joinder is typically denied because plaintiffs do “no more than assert that ‘the defendants merely committed the same type of violation in the same way.’”¹⁷⁸ Courts have held that joining John Does in mass copyright infringement lawsuits to be improper because each individual participated in “separate and discrete transactions” and there was no “concerted action” among them.¹⁷⁹ Courts have also noted that in most cases there is no way to show that “defendants shared the file with one another, as opposed to with other members of the same very large swarm.”¹⁸⁰ Finally, courts have noted that because defendants “would likely assert individual and different defenses,” there is little “litigation econom[y] to be gained from trying...different cases together.”¹⁸¹

Given this apparent split amongst courts, an examination as to how specific jurisdictions have addressed the issue of joinder is illuminating.¹⁸² Figure 2 represents a comprehensive examination of how courts from around the country have addressed the issue of joinder.

FIGURE 2

District	Joinder Granted	Joinder Not Granted
C.D. California	0	1
C.D. Illinois	1	1
D. Arizona	0	2
D. Colorado	2	10
D. Maryland	7	10
D. Massachusetts	4	6
D. District Columbia	6	2

¹⁷⁷ See, e.g. *Zero Tolerance Entm't Inc. v. Does 1–45*, No. 12 Civ. 1083, 2012 WL 2044593 (S.D.N.Y. June 6, 2012); see *SBO Pictures, Inc. v. Does 1–20*, No. 12 Civ. 3925, 2012 WL 2034631 (S.D.N.Y. June 5, 2012).

¹⁷⁸ *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 169 (S.D.N.Y. 2012).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (citing *SBO Pictures*, 2012 WL 2304253, at *2).

¹⁸¹ *Id.*

¹⁸² Data for Figure 3 was pulled from cases in which courts issued a written order or opinion on the issue of joinder. The data includes all court opinions on file as of Feb. 15, 2013.

E.D. California	1	11
E.D. Michigan	2	1
E.D. Pennsylvania	4	0
E.D. Virginia	0	3
E.D. New York	0	1
M.D. Florida	12	3
N.D. California	11	25
N.D. Georgia	0	1
N.D. Illinois	6	2
N.D. Indiana	2	0
N.D. Texas	1	0
S.D. Florida	2	1
S.D. California	4	3
S.D. Ohio	1	0
S.D. Texas	2	1
S.D. New York	7	6
W.D. Louisiana	0	1

Figure 2 reveals the division between how courts have addressed the issue of joinder. Notably, it illustrates that in many jurisdictions across the nation, courts within the same district have come to different conclusions on the issue of joinder. Overall, the data in Figure 2 reveals that more courts across the nation have come to the conclusion that joinder is not proper in mass copyright litigation lawsuits. Figure 2 reveals several jurisdictions that typically find joinder in such cases to be proper: the Northern District of Illinois, the Middle District of Florida, the District Court for the District of Columbia, the Eastern District of Pennsylvania, and the Northern District of Indiana. On the opposite end of the spectrum, the data reveals that the District of Arizona, the District of Colorado, the Eastern District of California, and the Eastern District of Virginia typically do not grant joinder. Finally, the District of Maryland, the District of Massachusetts, the Northern District of California, and the Southern District of New York are districts that have especially come to diverging internal views on the issue.

Given the significant internal divisions with jurisdictions, an examination of how particular judges have ruled on the issue of joinder is further illuminating. Figure 3 presents data as to how judges have ruled on the issue of joinder in the context of mass copyright infringement cases.

FIGURE 3

Judge	Joinder Granted	Joinder Not Granted
Alsup	1	0
Anello	1	0
Arguello	2	0
Atlas	1	0
Baer	0	1
Bartick	0	2
Baylson	1	0
Beeler	9	1
Brennan	0	5
Brown	0	1
Buchwald	1	0
Bucklew	0	1
Bucklo	1	0
Castillo	1	0
Chappell	8	0
Chasanow	0	1
Chen	1	0
Conti	1	1
Corley	1	2
Cosbey	2	0
Covington	0	1
Crotty	0	1
Cudmore	1	0
Dalton	0	1
Darrah	1	0
Delaney	0	2
Dembin	1	0
Engelmayer	2	0
Facciola	1	0
Forrest	2	0
Frazier	3	0

Furman	1	0
Gibney	0	1
Goodman	1	0
Gorman	0	1
Grewal	0	1
Hill	0	1
Hilton	0	1
Howell	5	0
Huff	0	1
Huvelle	0	1
Illston	0	3
Kelly	1	0
Kendall	1	0
Kushner	0	1
Leinenweber	1	0
Litkovitz	1	0
Lloyd	0	1
Manning	0	1
Maria-Elena James	5	0
Marrero	0	1
Martinez	0	5
McLaughlin	1	0
McMahon	0	1
Messitte	0	3
Michelson	1	0
Miller	0	1
Moore	0	1
Morales	0	1
Motz	0	6
Newman	1	3
Pauley	1	0
Porcelli	1	0
Rainey	0	1
Randon	1	0
Ryu	0	5
Saylor	0	7
Scheindlin	0	2
Scola	1	0
Seitz	0	2

Snow	0	1
Sorokin	3	0
Stacy	1	0
Steeh	0	1
Stengel	1	0
Stormes	2	0
Teilborg	0	1
Tharp	1	0
Thrash	0	1
Wilkins	0	1
Williams	7	1
Wright II	0	1
Young	1	0
Zimmerman	0	1

Figure 3 reveals that judges are remarkably consistent in their decision whether to grant joinder; only four of the examined judges issued contradicting opinions. Interestingly, the data in Figure 3 reveals that judges are not more or less likely to find joinder permissible based on the number of times they ruled on the issue. Thus, judges do not appear to be adopting a flexible approach to the issue of joinder and are not finding joinder less appropriate the more they are presented with mass copyright infringement cases.

B. Recommendations

In light of the findings of this examination, it is clear that district courts are struggling to determine how best to deal with mass copyright infringement litigation. However, when such litigation is viewed in the complete context of the technological nature of the BitTorrent protocol, as well as the nature of the business model plaintiffs attempt to pursue, the proper role of the court in such cases becomes clearer.

Fundamentally, courts should first realize the vast importance of carefully considering ex parte applications for expedited discovery. Upon granting such an application, courts give the

plaintiffs essentially carte blanche to gather the subscriber information from ISPs and begin a systemized settlement harassment campaign. Instead of regularly granting such applications, courts can utilize the opportunity to take a hard look at the plaintiff's request, and ensure that they are taking steps to properly target individuals that are likely to have committed the infringement within the court's jurisdictional powers.

Courts should also draw upon the correct technical definition of the BitTorrent protocol when considering issues of joinder. Given the requirements under the Federal Rules of Civil Procedure for joinder, it appears difficult to justify the joinder of dozens of individuals in one case. Given that past experience dictates that such defendants are each likely to raise a unique defense, courts should heed the opportunity to sever parties in such cases.

This is not to say that copyright holders are to be left without a solution to the very real problem of copyright infringement. It is to say, however, that intellectual property rights, like all other claims, must be properly filed before the court. Problems related to copyright infringement are no excuse for engaging in improper litigation tactics against thousands of individuals across the country and making a mockery of courts in the process. Copyright holders can and should use the courts to assert their rights, assuming they follow—like everyone else—the longstanding judicial guidelines that have been adopted in order to protect against the exact kinds of abuse displayed in these lawsuits. In the words of one court, “copyright laws originally designed to compensate starving artists” should not “allow starving attorneys in this electronic-media era to plunder the citizenry.”¹⁸³

¹⁸³ *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333-ODW(JCx) (C.D. Cal 2013).

VI. Conclusion

Copyright holders have a valid right to protect works through legitimate litigation. However, as this examination has shown, there are several reasons for courts to be skeptical of mass copyright infringement lawsuits. There is ample reason to suspect that such lawsuits are using the courts as part of a money-making business model. In the process of doing so, plaintiffs are engaging in questionable legal tactics and coercing individuals to pay settlement fines they might not even be responsible for. This examination has shown, however, that courts are far from powerless to stop this occurrence. Courts can exercise caution in granting expedited discovery requests, and can pay close attention to issues surrounding personal jurisdictions and IP address sufficiency. Courts can also sever mass copyright infringement lawsuits, therefore alleviating some procedural obstacles for defendants and ensuring that plaintiffs are not unfairly taking advantage of the judicial process for their own financial gain.

Moreover, this examination shows that while courts around the country are still grappling with these issues, the majority of jurisdictions and judges have decided that the fair and just option is to sever such lawsuits early on in the process. Such courts have consistently recognized that mass copyright litigation cases present problems under the traditional requirements for joinder and personal jurisdiction. Furthermore, such courts have also recognized the likelihood that both the court and defendants are being unfairly taken advantage of.

Going forward, courts presented with the problem of mass copyright litigation should confront the issues identified in this paper early on. They should confidently sever such lawsuits and carefully probe for personal jurisdiction issues, knowing that they are acting in accordance with the majority of courts throughout the country.

There are important lessons to be learned from this examination of mass copyright infringement lawsuits. Namely, they provide a telling example of the importance behind close judicial observation of subpoena requests for subscriber information. In the future, courts should heed the warning from these kinds of lawsuits and ensure that the judicial system is not being subject to abuse by conducting a thorough investigation before allowing the identity of individuals to be revealed.