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BitTorrent Sharing: The Case Against John Does

JEANNIE ROEBUCK*

INTRODUCTION

In recent years, there has been an increase in copyright infringement litigation against multiple John Does. Copyright holders allege that their copyrights have been infringed through the use of BitTorrent, a peer-to-peer (“P2P”) sharing protocol.¹ In 2003, the first large-scale lawsuit was initiated by the Recording Industry Association of America (“RIAA”), a trade group representing record labels.² A year later, the Motion Picture Association of America (“MPAA”) joined the mass enforcement campaign.³ The lawsuits were part of an industry-wide movement intended to increase awareness among Internet users that P2P sharing of copyrighted files is an illegal activity and a user’s participation in such sharing could result in heavy sanctions.⁴

Prior to filing lawsuits against individual infringers, copyright owners attempted to enforce their copyrights by suing software platform distributors, like Internet Service Providers (“ISPs”), for contributory, vicarious, or inducement of copyright infringement.⁵ However, courts’ application of secondary liability in such cases was unpredictable. Generally, courts have not imposed liability on intermediaries for the actions of end users. Further, the Digital Millennium Copyright Act (“DMCA”) provides a potential safe harbor from secondary liability for ISPs that meet certain preliminary requirements.⁶ Therefore, suing consumers directly for copyright infringement became an alternative for copyright owners to enforce their rights.

In 2008, after the RIAA ceased enforcing copyrights against individual infringers, it appeared that mass copyright lawsuits would

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1. See *Copyright Infringement Cases on the Rise in Federal Court*, PATE LAW FIRM (Feb. 14, 2012), <http://www.pagepate.com/copyright-infringement-cases-on-the-rise-in-federal-court/>.

2. John Borland, *RIAA Sues 261 File Swappers*, CNET (Sept. 8, 2003), http://news.cnet.com/2100-1023_3-5072564.html.

3. *How to Not Get Sued for File Sharing*, ELECTRONIC FRONTIER FOUNDATION (July 1, 2006), <https://www EFF.org/wp/how-not-get-sued-file-sharing>.

4. *Frequently Asked Questions for Students Doing Reports*, RIAA, www.riaa.com/faq.php (last visited Apr. 8, 2013) [hereinafter *FAQ—RIAA*].

5. See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

6. 17 U.S.C. § 512(c) (2006) (listing requirements to be eligible for the safe harbor).

decline.⁷ However, such suits have returned with a vengeance. Many suits involve the adult entertainment industry, while others concern infringement of independent films or books.⁸ Cary Sherman, Chairman and CEO of the RIAA, estimated the effect of online infringement on the entertainment industry as “billions of dollars in lost sales, thousands of lost jobs, countless lost career opportunities.”⁹ Online piracy is an unresolved issue that continues to cause great economic harm to an industry that relies heavily on copyright protection.¹⁰

Cases involving the P2P file-sharing platform BitTorrent have created confusion in the courts. This is because courts had to balance several competing interests: the copyright owner’s right to enforce his or her copyright against others, the innocent computer user’s First Amendment right to participate in online forums anonymously or pseudonymously, and the need to protect innocent Internet users from false claims.¹¹ Courts have also expressed concerns about the potential abuse of the litigation system, which occurs when copyright holders attempt to coerce settlements from ISP subscribers.¹²

Part I of this Article explains the history of secondary liability within the P2P sharing context. Part II analyzes the applicable DMCA provisions in the P2P sharing context and concludes that the recent flurry of BitTorrent cases is partially due to the DMCA’s inability to address large-scale infringement. Part III describes P2P sharing technology and argues for an expedited discovery process in BitTorrent cases. Part IV discusses the confusion amongst courts regarding cases where plaintiffs attempt to unmask the identities of Internet subscribers. Part V argues that mass copyright infringement lawsuits are problematic because of their procedural deficiencies and the negative public relations they cause. Finally, Part VI proposes two solutions to end mass copyright infringement actions. The first is through litigation, and the second is through a compulsory licensing scheme.

7. Nate Anderson, *No More Lawsuits: ISPs to Work with RIAA, Cut off P2P Users*, ARSTECHNICA (Dec. 19, 2008), <http://arstechnica.com/tech-policy/news/2008/12/no-more-lawsuits-isps-to-work-with-riaa-cut-off-p2p-users/>.

8. *A New Flava of BitTorrent Copyright Lawsuit*, SAPER LAW (Oct. 13, 2012), <http://saperlaw.com/blog/2012/10/13/a-new-flava-of-bittorrent-copyright-lawsuit/> (“[T]here has been an explosion of copyright infringement suits by adult entertainment studios against individuals.”); see also Julianne Pepitone, *50,000 BitTorrent Users Sued for Alleged Illegal Downloads*, CNN MONEY (June 10, 2011), http://money.cnn.com/2011/06/10/technology/bittorrent_lawsuits/index.htm (“Voltage Pictures, the studio behind 2009’s *The Hurt Locker*, is suing almost 25,000 BitTorrent users who allegedly illegally downloaded that movie. Just weeks before, 23,000 were sued for downloading *The Expendables*, produced by Nu Image.”).

9. *An Update: Piracy on University Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 9 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg33812/pdf/CHRG-110hhrg33812.pdf> (statement of Cary Sherman, President, RIAA).

10. *FAQ—RIAA*, *supra* note 4 (“[P]iracy is a very real threat to the livelihoods of not only artists and music label employees but also thousands of less celebrated people in the music industry—from sound engineers and technicians to warehouse workers and record store clerks.”).

11. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004).

12. See, e.g., *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

I. BRIEF HISTORY OF SECONDARY LIABILITY IN THE P2P SHARING CONTEXT

Efforts to combat online piracy did not begin with the lawsuits against individual users. The RIAA initially instituted lawsuits against ISPs and companies that owned the P2P platforms.¹³ When the RIAA first filed suit against individual file sharers, shockwaves flew through the legal community.¹⁴ Originally, one of the reasons copyright owners went after the facilitators, rather than the direct infringers, was because of the cost-effectiveness of receiving a large lump sum from a single lawsuit instead of small sums from multiple individual suits. Additionally, it was effective to sue the actors causing the problem—the entities making large-scale copyright infringement possible by distributing P2P sharing software.

The modern litigation over P2P sharing relies on the Supreme Court's analysis in *Sony Corp. of Am. v. Universal City Studios, Inc.*¹⁵ *Sony* involved the Betamax home recording video system, a device that allowed users to record television shows for viewing at a later time.¹⁶ Copyright owners sued Sony, the manufacturer of Betamax, for contributory copyright infringement.¹⁷ Favoring technological innovation, the Supreme Court did not find Sony liable, holding that "if a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's uses."¹⁸ The Court found that "time-shifting," or watching a recorded program at a later time, was a legitimate act of fair use, and was predominately used for individual personal enjoyment.¹⁹

While P2P technology is different from the Betamax, the *Sony* framework is nevertheless applicable. Whether P2P file sharing constitutes copyright infringement depends on whether the shared work is copyrighted and whether the sharing was authorized. Thus, similar to the Betamax, P2P sharing technology allows for both infringing and non-infringing uses.

The first major case regarding P2P sharing was *A&M Records, Inc. v. Napster*.²⁰ Defendant Napster, an online music service, allowed P2P sharing of copyrighted music files through a central server.²¹ Plaintiffs, the copyright holders of the shared files, brought various secondary liability claims against Napster.²² Napster relied on *Sony*'s holding for its defense

13. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1346 (2004) (stating that, initially, copyright owners mostly sued direct facilitators of the infringement).

14. See *id.*

15. 464 U.S. 417 (1984).

16. *Id.*

17. See *id.*

18. See *id.* at 491.

19. See *id.* at 417.

20. 239 F.3d 1004 (9th Cir. 2001).

21. *Id.*

22. See *id.*

and argued that, similar to the Betamax, Napster's software was capable of substantial non-infringing uses; therefore, Napster should not be liable for contributory infringement.²³ The court accepted Napster's argument regarding contributory liability, but found Napster liable based on a theory of vicarious liability: Napster had actual and specific knowledge of the infringing activities, failed to remove the infringing material, and financially benefited from the activity.²⁴

The next landmark P2P copyright infringement case was *MGM Studios v. Grokster*.²⁵ Many copyright holders in the entertainment industry brought suit against Grokster, a popular P2P sharing platform. In its decision, the Ninth Circuit determined that the decentralized architecture of Grokster's technology precluded a finding of vicarious liability.²⁶ The court held that Grokster did not have sufficient control of, or access to, its software platform.²⁷ The case ultimately reached the Supreme Court, where the Court found Grokster liable for inducement of infringement since Grokster self-promoted its service as an alternative to Napster and attempted to capture Napster's market share.²⁸

Distinctions can be drawn between Napster's and Grokster's P2P sharing architecture. While Napster used a central server to facilitate file-sharing, thereby retaining control over the user registry, Grokster's P2P network was decentralized—each individual user acted as both the client and server.²⁹

There are numerous secondary liability theories; however, it is difficult to aptly apply any to the BitTorrent protocol. It seems unlikely that a court would find the protocol contributorily liable for infringement occurring through its service since the BitTorrent platform is capable of substantial non-infringing uses.³⁰ Additionally, like Grokster, BitTorrent does not use a central server where shared content can be searched for or removed. BitTorrent users share content stored on their individual computers, which makes it difficult for BitTorrent to detect and remove infringing content—a requisite for vicarious liability.³¹ Even if BitTorrent deactivated all computers within its control, users could continue to share

23. See *id.* at 1018–22.

24. See *id.* at 1024.

25. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

26. *Id.* at 914.

27. *Id.*

28. *Id.* at 925.

29. Pamela B. Huff, Kristi F. Nickel & Matthew M. Jennings, *Trademarks and Copyright in Cyberspace: Protecting Your Business from Cybersquatters and Filesharers*, SL082 ALI-ABA COURSE OF STUDY 153, 164–66 (2006).

30. *Does BitTorrent = Piracy?*, BITTORRENT, www.doesbittorrentequalpiracy.com (last visited Apr. 20, 2013) (listing specific legal uses of BitTorrent, such as using it either as a marketing tool to introduce music or works by upcoming artists or as a platform that allows increased public access to classical works in the public domain).

31. *Metro-Goldwyn-Mayer Studios*, 380 F.3d at 1164 (stating that the right and ability to supervise infringers is a necessary element of vicarious liability).

files with little or no interruption.³² The inducement theory of liability also does not cleanly apply to BitTorrent's service. Generally, inducement bases liability on marketing efforts that actively promote copyright infringement.³³ BitTorrent's current marketing efforts merely describe the service as a platform for file-sharing, which arguably could shield the service from liability.

Even if a secondary liability claim against BitTorrent were to be successful, many other P2P sharing platforms exist that can be used as alternatives. Therefore, it is understandable that copyright owners have sought out other avenues to enforce their copyrights.³⁴

II. THE DMCA AND WHY IT DOESN'T REALLY HELP

Congress enacted the DMCA to modernize copyright law, seeking to balance the public's interest in having access to works disseminated over the Internet with the rights of copyright holders to control their works.³⁵ Title II of the DMCA "creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities."³⁶ It provides ISPs with a safe harbor from secondary liability so long as the provider is acting as a conduit and takes certain protective measures.³⁷

One protective measure requires the intermediary to reasonably implement a policy where it would terminate the accounts of users who engage in repeated copyright infringement.³⁸ The DMCA does not define "reasonable implementation," leaving the term open to interpretation.³⁹ Courts have generally construed this to mean that the implementation is reasonable if the ISP: "(1) has a system for responding to takedown notices, (2) does not interfere with the copyright owners' ability to issue notices, and (3) under 'appropriate circumstances' terminates users who repeatedly or blatantly infringe copyright."⁴⁰ An intermediary could avoid liability if a copyright owner notified the intermediary of infringement, and then the

32. *Id.* at 1163.

33. See Eric Klinker, *Does BitTorrent = Piracy?*, OFFICIAL BITTORRENT BLOG (Dec. 19, 2012), <http://blog.bittorrent.com/2012/12/19/does-bittorrent-piracy/>. Eric Klinker, CEO of BitTorrent, wrote: "We do not endorse piracy. We do not encourage it. We don't point to piracy sites. We don't host any infringing content. We have, and we will continue to, work tirelessly with industries, artists, and fans to create a sustainable digital future for content." *Id.*

34. See *Columbia Pictures Indus., Inc. v. Fung*, No. 10-55946, 2013 WL 1174151 (9th Cir. Mar. 21, 2013).

35. *RealNetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, 641 F. Supp. 2d 913, 944 (N.D. Cal. 2009).

36. 17 U.S.C. § 512 (2006).

37. *Id.* § 512(c); see also *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, Nos. 09-55902, 09-56777, 10-55732, 2013 WL 1092793, at *9 n.10 (9th Cir. Mar. 14, 2013) (stating § 512(a) of the DMCA applies to service providers who act only as "conduits" for the transmission of information).

38. See 17 U.S.C. § 512 (i)(1)(A)–(B) (2006).

39. AnneMarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 728-29 (2011) (discussing confusion in policy-making for ISPs due to the lack of definitions in the DMCA).

40. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109–10 (9th Cir. 2007).

intermediary expeditiously removed the infringing work.⁴¹ Intermediaries would not be required to search for and take down other infringing materials of which the intermediary was not notified.⁴²

The DMCA allows copyright owners to subpoena service providers to turn over the subscriber information of an alleged infringer.⁴³ However, this ability has been interpreted to only authorize subpoenas against ISPs that actually store infringing material.⁴⁴ Since P2P sharing providers act only as conduits, subpoenas against such entities are likely not authorized under the DMCA.⁴⁵

The DMCA focuses on limiting intermediary liability rather than compensating copyright owners for damage caused by infringement. Arguably, this benefits intermediaries while inconveniencing copyright owners. Congress appears to be hesitant to hold intermediaries liable for end user actions for fear of stifling technological innovation.⁴⁶ Such a consequence would be contrary to the purpose of copyright law itself: To promote the “Progress of Science and Useful Arts.”⁴⁷

Since the DMCA lacks a complete remedy for the economic harm caused by online piracy, copyright owners continue to enforce their copyrights against individual users. As explained below, however, mass lawsuits are not ideal for combating online piracy.

III. BITTORRENT SHARING AND EXPEDITED DISCOVERY

Understanding P2P technology and terminology helps explain the need for expedited discovery in online copyright infringement cases involving BitTorrent.

A. BITTORRENT SHARING

BitTorrent is software that allows “small computers with low bandwidths” to participate in “large data transfers across a P2P network.”⁴⁸ The process works as follows:

An initial file provider shares a file with [the] P2P network in a process . . . called “seeding.” Other users (“peers”) on the network

41. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010); *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 642 (S.D.N.Y. 2011).

42. See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2013).

43. See 17 U.S.C. § 512(h) (2006).

44. *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); see also *Well Go USA, Inc. v. Unknown Participants in Filesharing Swarm Identified by Hash: B7FEC872874DOCC9B1372ECE5ED07AD7420A3BBB*, No. 4:12-cv-00963, 2012 WL 4387420, at *1 (S.D. Tex. Sept. 25, 2012).

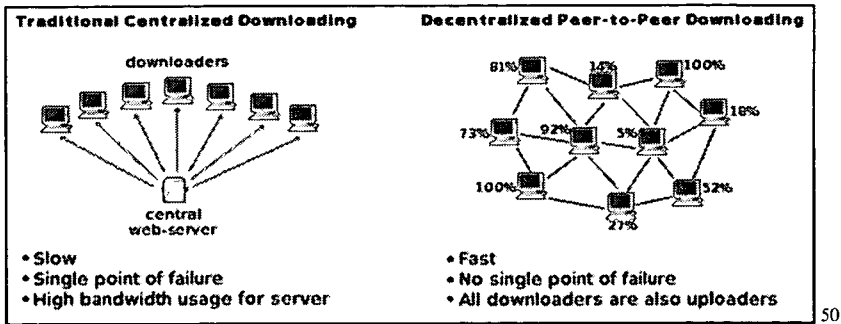
45. See *UMG Recordings, Inc.*, 667 F.3d 1022.

46. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 36–37 (D.C. Cir. 2003). Congress sought to promote the development of electronic commerce while also reducing online piracy. *Id.* Such intent is effectuated by the limitation of liability provision that offers intermediaries some certainty regarding their legal exposure for infringement that occurs through their activities. *Id.*

47. U.S. CONST. art. I, § 8, cl. 8.

48. *Braun v. Does 1 and 2-69*, No. 12-cv-3690 YGR (JSC), 2012 WL 3627640, at *1 (N.D. Cal. Aug. 21, 2012).

connect to the seed file to download [it]. Each new file downloader receives a different piece of data from each user who has already downloaded the file. This piecemeal system with multiple pieces of data coming from different peer members is called a “swarm.” As new peers request the same file, each new peer becomes a part of the network and the peers offer parts of the file stored on their computers to other peers. This means that every “node” or peer who has a copy of the infringing copyrighted material also becomes a source [to] download that infringing file.⁴⁹



The illustration above shows how P2P sharing is different and more effective than the traditional centralized downloading system. The piecemeal sharing used in P2P networks allows a user to download pieces of a file from many other users, rather than all at once from one central location. File sharing is faster because each downloader is also an uploader, meaning users can share pieces of downloaded files without waiting until they obtain the entire file.

B. EXPEDITED DISCOVERY

When a plaintiff knows the identity of a defendant, the plaintiff can properly name the defendant under Rule 4 of the Federal Rules of Civil Procedure (“FRCP”).⁵¹ Contrarily, when a copyright owner discovers a BitTorrent user infringed upon her work, the name and address of the infringer is not readily available.⁵² The copyright owner only has access to the user’s Internet Protocol (“IP”) address, the associated ISP, the date and time of the alleged infringement, and the software protocol used by the user.⁵³ IP addresses are anonymous, as they only identify the computer used to infringe, not the individual user.⁵⁴ Without the identity of the

49. *Id.*

50. Diagram of BitTorrent Protocol, TIXATI, <http://www.tixati.com/discover/> (last visited Dec. 15, 2013).

51. FED. R. CIV. P. 4.

52. *New Sensations, Inc. v. Does 1-426*, No. 12-3800 JSC, 2012 WL 4675281, at *3 (N.D. Cal. Oct. 1, 2012).

53. *See id.* at *3.

54. *See id.* at *5 (stating that IP addresses are anonymous in nature). An IP address is a unique identifier that computers are assigned when an Internet user connects to the Internet in order to send and receive data on a network. Stephanie Crawford, *What Is an IP Address?*, HOWSTUFFWORKS, computer.howstuffworks.com/internet/basics/question549.htm (last visited Apr. 4, 2013).

infringer, the plaintiff is unable to serve the unknown “John Doe” in a lawsuit.⁵⁵

One remedy for this situation is for the plaintiff to file a claim in court, and subsequently request expedited discovery to subpoena the ISP to obtain the identity of the Doe.⁵⁶ The ISP’s response would reveal the identity of the subscriber assigned the particular IP address at the time of the alleged infringement.⁵⁷ While this process sounds simple, copyright enforcement actions that seek to unmask anonymous users through this process have led to inconsistent results.

IV. CURRENT STATE OF COPYRIGHT ENFORCEMENT AGAINST INDIVIDUAL BITTORRENT USERS IN COURTS

Federal courts have original jurisdiction over copyright disputes.⁵⁸ FRCP 26(d)(1) requires a court order for discovery when requested prior to a Rule 26(f) conference between the parties.⁵⁹ Courts usually apply a “good cause” standard to determine whether to permit such early discovery,⁶⁰ allowing it when “the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.”⁶¹

While the language of the tests or the number of factors may differ between courts, every “good cause” analysis balances the First Amendment rights and privacy interests of the John Does against the concreteness of the plaintiff’s claim and need for redress.⁶² For example, courts in the Northern District of California consider whether:

(1) the plaintiff can identify the missing party with sufficient specificity such that the [c]ourt can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the plaintiff’s suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible.⁶³

55. See *New Sensations, Inc.*, 2012 WL 4675281, at *7 (stating the trend in the district of California is to find joinder improper where the only commonality between the Doe defendants is participation in the same swarm).

56. FED. R. CIV. P. 26(d), 45.

57. See *New Sensations, Inc.*, 2012 WL 4675281, at *1.

58. 28 U.S.C. § 1338 (2006).

59. FED. R. CIV. P. 26(d).

60. See, e.g., *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Malibu Media, LLC, v. Does 1-16*, No. 12-cv-0235 (RLW), 2012 WL 1681819, at *1 (D.D.C. Apr. 11, 2012); *Malibu Media, LLC v. Does 1-5*, No. 12 Civ. 2959 (JPO), 2012 WL 2001968, at *1 (S.D.N.Y. June 1, 2012).

61. *Semitool, Inc.*, 208 F.R.D. at 276.

62. See *id.* (stating that, while unmasking standards differ widely, all standards balance the plaintiffs right to redress and the defendants anonymity rights).

63. *OpenMind Solutions, Inc. v. Does 1-39*, No. C 11-3311, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999)).

These courts also take into account the necessity of providing those harmed with a forum where they can “seek redress for grievances against the legitimate and valuable right to participate in online forums anonymously . . . without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.”⁶⁴

The Second Circuit evaluates the following factors:

(1) The concreteness of the plaintiff’s showing of a *prima facie* actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) the need for the subpoenaed information to advance the claim; and (5) the objecting party’s expectation of privacy.⁶⁵

There are many concerns regarding unmasking anonymous Doe defendants in the BitTorrent context. Past court decisions indicate that, while there is no general consensus within specific jurisdictions, the key procedural inquiry that determines the outcome of BitTorrent cases is whether the Doe defendants are properly joined.⁶⁶ Courts typically disagree on whether there is proper joinder between the participants of the same BitTorrent “swarm.”⁶⁷ Some courts hold that mere participation in the same “swarm” is insufficient to find proper joinder.⁶⁸ This procedural issue is extremely important in the context of BitTorrent cases because a court will only issue a subpoena to identify the infringer if all procedural requirements, such as joinder, are met.⁶⁹

A. JURISDICTIONS THAT FIND JOINDER IS NOT SATISFIED SOLELY BY PARTICIPATION IN THE SAME BITTORRENT SWARM

In the Northern District of California, participation in the same BitTorrent swarm is usually insufficient to find joinder. The following section describes the four factor expedited discovery standard used in the Northern District of California.

The first factor requires courts to inquire “whether the Plaintiff has identified Defendants with sufficient specificity, demonstrating that each Defendant is a real person or entity who would be subjected to [the court’s] jurisdiction.”⁷⁰ Generally, the court finds this factor satisfied if the plaintiff uses forensic software to identify the defendant’s IP addresses and geo-location technology to trace the IP address to within the state of

64. See, e.g., *Hard Drive Prods., Inc. v. Does* 1-130, No. C-11-3826 DMR, 2011 WL 5573960, at *1 (N.D. Cal. Nov. 16, 2011) (citing *Columbia Ins. Co.*, 185 F.R.D. at 578–80).

65. *Arista Records, LLC v. Doe* 3, 604 F.3d 110, 119 (2d Cir. 2010) (citing *Sony Music Entm’t, Inc. v. Does* 1-40, 326 F. Supp. 2d 556, 564–65 (S.D.N.Y. 2004)).

66. See *infra* Part IV.B.

67. *Id.*

68. *Id.*

69. *New Sensations, Inc. v. Does* 1-426, No. 12-3800 JSC, 2012 WL 4675281, at *7 (N.D. Cal. Oct. 1, 2012).

70. *Pac. Century Int’l, Ltd. v. Does* 1-48, No. C 11-3823 MEJ, 2011 WL 4725243, at *2 (N.D. Cal. Oct. 7, 2011).

California.⁷¹

Under the second factor, courts ask “whether the Plaintiff has identified all previous steps taken to locate the elusive defendant.”⁷² This element ensures the plaintiff has made a good faith effort to comply with the requirements of service of process.⁷³ Generally, this requirement is satisfied if the plaintiff seeks help from a company specializing in the detection of copyright infringement on the Internet.⁷⁴ These types of companies investigate information such as the IP address used for the alleged infringing activity, the time stamp, the software protocol used, the percent of the file downloaded, and the hash of the torrent file.⁷⁵

The third factor requires courts to inquire whether: (1) the plaintiff has shown a *prima facie* case for copyright infringement; (2) the complaint could survive a motion to dismiss for lack of personal jurisdiction; and (3) whether the Doe defendants are properly joined.⁷⁶

The fourth factor simply asks whether the plaintiff has demonstrated a reasonable likelihood of identifying the defendant through discovery such that service of process would be possible.⁷⁷ Courts typically find that the subscriber information sought in the subpoena would likely identify the defendant because the ISP assigns a unique IP address to each subscriber and retains subscriber activity records.⁷⁸

Plaintiffs often face trouble meeting the third factor in establishing that the Doe defendants are properly joined.⁷⁹ To withstand a motion to dismiss,⁸⁰ plaintiffs must simply show (1) a valid copyright, and (2) that each defendant copied a work covered by the copyright.⁸¹ These factors are met if the plaintiff has a valid copyright registration and can show that each Doe defendant participated in the same BitTorrent sharing network to share

71. See, e.g., *Braun v. Does 2-69*, No. 12-cv-3690 YGR (JSC), 2012 WL 3627640, at *2 (N.D. Cal. Aug. 21, 2012); *Pink Lotus Entm't v. Does 1-46*, No. C-11-02263 HRL, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011); *Pac. Century Int'l, Ltd.*, 2011 WL 4725243, at *2.

72. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

73. *Id.*

74. See, e.g., *New Sensations, Inc. v. Does 1-426*, No. 12-3800 JSC, 2012 WL 4675281, at *4-5 (N.D. Cal. Oct. 1, 2012); *OpenMind Solutions, Inc. v. Does 1-39*, No. C 11-3311 MEJ, 2011 WL 4715200, at *3-4 (N.D. Cal. Oct. 7, 2011).

75. *New Sensations, Inc.*, 2012 WL 4675281, at *2-3 (listing the information the plaintiff provided and explaining that the hash is an alphanumeric representation of a torrent file that remains the same during any particular swarm).

76. See *id.* at *4-6.

77. *OpenMind Solutions, Inc.*, 2011 WL 4715200, at *2 (citing *Columbia Ins. Co.*, 185 F.R.D. at 578-80).

78. See *id.* at *5.

79. See, e.g., *New Sensations, Inc.*, 2012 WL 4675281, at *4-5 (finding the plaintiff made a sufficient showing of a *prima facie* copyright infringement claim and that it could withstand a motion to dismiss based on personal jurisdiction, but that the plaintiffs did not make a sufficient showing that the Doe defendants were properly joined); *MCGIP, LLC v. Does 1-149*, No. C 11-02331 LB, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011); *OpenMind Solutions, Inc.*, 2011 WL 3740714, at *1.

80. *Liberty Media Holdings, LLC v. Does 1-62*, No. 11cv 575 MMA (NLS), 2011 WL 1869923, at *4 (S.D. Cal. May 12, 2011).

81. *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1199 (N.D. Cal. 2004).

the plaintiff's work.⁸² Personal jurisdiction is established if the plaintiff uses location-tracking techniques to determine that the IP address of the Doe defendant is located within California.⁸³

Establishing joinder, however, presents difficulty. Under the FRCP, joinder of defendants in a single action is permitted if the claim "aris[es] out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all plaintiffs will arise in the action."⁸⁴ While the Supreme Court has stated, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties, joinder of claims, parties, and remedies," federal courts in California have nevertheless shown a tendency to find that participation in the same BitTorrent "swarm" is insufficient to find proper joinder.⁸⁵

To satisfy joinder in jurisdictions like California, plaintiffs must show a *concerted action* between the Doe defendants.⁸⁶ Courts find that "[t]he 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."⁸⁷ For example, in *New Sensation, Inc. v. Does 1-426*,⁸⁸ the court found that "the trend in [the Northern District of California] has been to find joinder improper in BitTorrent file sharing cases where the alleged commonality is only that the defendants participated in the same swarm."⁸⁹ The court found that the plaintiff could not withstand a motion to dismiss based on improper joinder of 426 Doe defendants that allegedly participated in a swarm lasting over two months.⁹⁰ Likewise, in *Diabolic Video Prods., Inc. v. Does 1-2099*,⁹¹ the court found that the mere use of same BitTorrent network was insufficient to find joinder, stating that "this court and others . . . have repeatedly held that the mere allegation that defendants have used the same peer-to-peer network to infringe a copyrighted work is insufficient to meet the standards for joinder set forth in Rule 20."⁹² The plaintiff in *Diabolic Video Prods.* attempted to join 2099 Doe defendants that allegedly reproduced a copyrighted film on at least

82. *New Sensations, Inc.*, 2011 WL 4407222, at *3.

83. *See, e.g., id.* at *4; *AF Holdings LLC v. Doe*, No. 12cv1519-BTM (BLM), 2012 WL 3238023, at *2 (N.D. Cal. Aug. 7, 2012); *Third Degree Films, Inc. v. Does 1-178*, No. C 12-3858 MEJ, 2012 WL 3763649, at *3 (N.D. Cal. Aug. 29, 2012).

84. FED. R. CIV. P. 20(a)(1).

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

86. *See, e.g., Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1157-65 (N.D. Cal. 2011); *Diabolic Video Prods., Inc. v. Does 1-2099*, No. 10-cv-5865-PSG, 2011 WL 3100404, at *3 (N.D. Cal. May 31, 2011); *Millennium TGA, Inc. v. Does 1-21*, No. 11-2258 SC, 2011 WL 1812786, at *3 (N.D. Cal. May 12, 2011); *Pac. Century Int'l Ltd. v. Does 1-101*, No. C-11-02533-(DMR), 2011 WL 2690142, at *4 (N.D. Cal. July 8, 2011).

87. *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011).

88. No. 12-3800 JSC, 2012 WL 4675281 (N.D. Cal. Oct. 1, 2012).

89. *Id.* at *7.

90. *See id.* at *3.

91. No. 10-cv-5865-PSG, 2011 WL 3100404 (N.D. Cal. May 31, 2011).

92. *Id.* at *3.

forty-nine different days.⁹³ Since the plaintiff could not satisfy joinder under the court's four-part test, the court only granted the plaintiff's request for expedited discovery to uncover the Does' identities for only one Doe defendant.⁹⁴ Similarly, the court in *Pac. Century Int'l Ltd. v. Does 1-101*,⁹⁵ found joinder improper for 101 Doe defendants, stating "the only commonality between copyright infringers of the same work is that each committed the same violation of the law in exactly the same way."⁹⁶

Thus, courts in the Northern District of California find joinder improper if it is based on the mere allegation that Doe defendants participated in the same BitTorrent swarm.⁹⁷ Many other jurisdictions agree with this theory.⁹⁸ While not unsympathetic to copyright owners,⁹⁹ one court has gone so far as to require certain plaintiffs to file suits against the Does individually, one at a time. This requirement prevents abusive litigation tactics and provides a remedy for online copyright infringement.¹⁰⁰

The joinder inquiry is the primary hurdle for copyright owners to enforce their copyright against multiple P2P sharing infringers. Joinder is also determinative of whether the court will issue a subpoena for the ISP.¹⁰¹ Therefore, plaintiffs attempting to enforce their copyright in jurisdictions that embrace a narrow view of joinder may find it difficult to obtain the identifying information.

B. JURISDICTIONS THAT FIND JOINDER IS SATISFIED SOLELY BY PARTICIPATION IN THE SAME BITTORRENT SWARM

Some jurisdictions interpret joinder broadly and allow joinder of Doe defendants that participated in the same BitTorrent sharing swarm. These courts find that joinder exists if there is a *logical relation* between the

93. *See id.*

94. *See id.* at *4.

95. No. C-11-02533-(DMR), 2011 WL 2690142 (N.D. Cal. July 8, 2011).

96. *Id.* at *4.

97. *See supra* text accompanying note 66.

98. *See, e.g.,* Third Degree Films v. Does 1-72, No. 12-10760-FDS, 2012 WL 5464177 (D. Mass. Nov. 5, 2012); Patrick Collins, Inc. v. Does 1-23, No. 11-cv-15231, 2012 WL 1019034 (E.D. Mich. Mar. 26, 2012); Patrick Collins, Inc. v. Does 1-44, No. JFM 8:12-cv-00020, 2012 WL 1144854 (D. Md. Apr. 4, 2012); Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669 (S.D. Fla. 2011); Hard Drive Prods., Inc. v. Does 1-30, No. 2:11cv345, 2011 WL 4915551 (E.D. Va. Oct. 17, 2011); Raw Films, Inc. v. Does 1-32, No. 1:11-cv-2939-TWT, 2011 WL 6840590 (N.D. Ga. Dec. 29, 2011).

99. On The Cheap, LLC v. Does 1-5011, 280 F.R.D. 500, 505 (N.D. Cal. 2011); *see also* Third Degree Films, Inc. v. Does 1-131, 280 F.R.D. 493, 498 n.7 (D. Ariz. 2012); K-Beech, Inc. v. John Does 1-41, No. V-11-46, 2012 WL 773683, at *6 (S.D. Tex. Mar. 8, 2012).

100. *In re* BitTorrent Adult Film Copyright Infringement Cases, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *14 (E.D.N.Y. May 1, 2012).

101. *See, e.g.,* *New Sensations, Inc.*, 2012 WL 4675281, at *4-5 (finding the plaintiff made a sufficient showing of a prima facie copyright infringement claim and that it could withstand a motion to dismiss based on personal jurisdiction, but that the plaintiffs did not make a sufficient showing that the Doe defendants were properly joined).

plaintiffs' claims.¹⁰² For example, courts in the District of Columbia define a logical relation as "a flexible test and courts seek the 'broadest possible scope of action.'"¹⁰³ These courts believe that the "BitTorrent file-sharing protocol makes every downloader an uploader of the illegally transferred files."¹⁰⁴ Courts in this particular district have permitted joinder of 1062 Doe defendants.¹⁰⁵

Similarly, the Federal Court for the Southern District of New York has stated:

[I]t is difficult to see how the sharing and downloading activity alleged in the Complaint—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 copyright file—could *not* constitute a "series of transactions or occurrences" for purposes of Rule 20(a).¹⁰⁶

The court found that the 176 named Doe defendants were properly joined at the early stages in the litigation because the plaintiff alleged the defendants were trading the same file as part of the same swarm.¹⁰⁷ The court, however, indicated it was open to reconsidering the joinder issue at a later date.¹⁰⁸

Courts taking a broad view of the joinder find that, due to the architecture of the BitTorrent protocol, an individual participating in the swarm is both a downloader and an uploader of the a file.¹⁰⁹ Therefore, each defendant may be responsible for distributing the work to others.¹¹⁰ Such courts reject the theory that a BitTorrent swarm is insufficient for joinder because the defendants committed the same type of violation in the same way.¹¹¹ One court has stated, "[a]s a technical matter, it is correct that simply because two defendants were members of the same swarm does not demonstrate that they were simultaneously sharing pieces of plaintiff's Work."¹¹² Other jurisdictions have adopted this same theory.¹¹³

102. See, e.g., *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 333 (D.D.C. 2011); *Liberty Media Holdings, LLC v. Does 1-62*, No. 11-cv-575-MMA (NLS), 2012 WL 628309, at *7 (S.D. Cal. Feb. 24, 2012).

103. *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 342 (quoting *Lane v. Tschetter*, No. 05-1414 (EGS), 2007 WL 2007493 (D.D.C. July 10, 2007)).

104. See *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 343–35 (internal quotations omitted).

105. *Id.*

106. *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 244 (S.D.N.Y. 2012).

107. See *id.* at 244–45.

108. *Id.*

109. *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 343.

110. *Id.* (stating that each peer is a possible source and distributor of the file).

111. *Digital Sin, Inc. v. Does 1-27*, No. 12 Civ. 3873(JMF), 2012 WL 2036035, at *2 (S.D.N.Y. June 6, 2012) (rejecting the theory that a swarm cannot constitute proper joinder because it is only the same violation in the same way).

112. *Patrick Collins, Inc. v. Does 1-28*, No. 12-13670, 2013 WL 359759, at *12 (E.D. Mich. Jan. 29, 2013) (internal quotations omitted).

113. See, e.g., *id.* at *8; *First Time Videos, LLC v. Does 1-76*, 276 F.R.D. 254, 257 (N.D. Ill. Aug. 16, 2011); *Combat Zone Corp. v. John/Jane Does 1-13*, No. 3:12-cv-3927-B, 2013 WL 230382, at *4 (N.D. Tex. Jan. 22, 2013); *Patrick Collins, Inc. v. Does 1-33*, No. 11-cv-02163-CMA-MJW, 2012 WL 415424, at *4 (D. Colo. Feb. 8, 2012).

C. CONFUSION ACROSS THE NATION IS EVIDENT

The requirements for joinder vary by jurisdiction. Courts within a single jurisdiction have also reached inconsistent conclusions, indicating nationwide disagreement regarding BitTorrent sharing cases. Even within the Northern District of California, which typically views joinder narrowly, some courts have found joinder to be proper in BitTorrent cases. In *Braun v. Does 1 and 2-69*,¹¹⁴ the court found, “while several courts have concluded that joinder is inappropriate under similar circumstances, the [c]ourt concludes that Plaintiff has at least made a prima facie showing that the Doe Defendants are properly joined.”¹¹⁵ The court allowed discovery for sixty-nine Doe defendants alleged to have participated in a thirty-six hour swarm.¹¹⁶ Similarly, in *Open Mind Solutions Inc. v. Does 1-39*,¹¹⁷ the court found that the plaintiff satisfied a preliminary showing of proper joinder because the claims were logically related.¹¹⁸ Allegedly, the thirty-nine Doe defendants were present in the same swarm for approximately a month and a half and shared pieces of the same seed file.¹¹⁹

Districts that adopt a broad view of joinder also produce inconsistent rulings. For example, a court in New York has stated that “a number of [c]ourts have adopted the ‘swarm joinder’ theory,” recognizing that “the validity of the ‘swarm joinder’ theory is the subject of a wide-ranging split in this Circuit and others,” and found that the joinder of nine Doe defendants was improper.¹²⁰ Similarly, a court in the District of Columbia, which has the broadest view of joinder, required the plaintiff to “allege facts that permit the court at least to infer some actual, concerted exchange of data between [the Doe defendants],” and found the joinder of eleven Doe defendants improper.¹²¹

Moreover, the time at which courts evaluate the expedited discovery standard may differ. Some courts apply the expedited discovery test when determining whether to issue a subpoena; others may issue the subpoena, and then subsequently apply the test when deciding whether a Doe may quash a subpoena.¹²²

V. PROBLEMS WITH THE MASS COPYRIGHT ENFORCEMENT MODEL

While the outcome of an expedited discovery request often hinges on

114. No. 12-cv-3690 YGR (JSC), 2012 WL 3627640 (N.D. Cal. Aug. 21, 2012).

115. *Id.* at *3.

116. *See id.* at *3–4.

117. No. C 11-3311 MEJ, 2011 WL 4715200 (N.D. Cal. Oct. 7, 2011)

118. *Id.* at *6.

119. *Id.*; *see also supra* Part III.A (defining seed file).

120. *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233, 240 (E.D.N.Y. Nov. 20, 2012).

121. *Malibu Media, LLC v. Does 1-11*, 286 F.R.D. 113, 116 (D.D.C. 2012).

122. *See Hard Drive Prods., Inc. v. Does 1-130*, No. C-11-3826 DMR, 2011 WL 5573960 (N.D. Cal. Nov. 16, 2011) (applying the unmasking standard upon plaintiff’s *ex parte* application for leave to take early discovery). *But see John Wiley & Sons, Inc. v. Doe Nos. 1-30*, 284 F.R.D. 185 (S.D.N.Y. 2012) (applying the unmasking standard upon a Doe defendant’s motion to quash an already issued subpoena).

whether the defendants are properly joined, there are several other concerns with this type of enforcement model. These concerns are: personal jurisdiction, misidentification, First Amendment privacy concerns, prejudice, and coercive litigation tactics.

A. PERSONAL JURISDICTION

Geo-location tracking of a specific IP address generally satisfies the personal jurisdiction inquiry. However, one California court expressed serious reservations regarding whether personal jurisdiction exists when an IP address is traced to a specific state.¹²³ The court recognized that geo-location technology is reliable only to predict the country in which an IP address is located, not the state.¹²⁴ Thus, tracing an IP address to a certain state does not necessarily prove that the Doe defendant resides there.¹²⁵ The court noted that if the Doe defendant does not reside in the state to which the IP address was traced, it is unclear whether there would be sufficient minimum contacts within that state to establish personal jurisdiction.¹²⁶

Conversely, studies indicate that modern geo-location tracing technology has drastically improved, allowing IP address to be accurately traced within approximately twenty-two miles, and newer techniques are emerging that narrow the area to approximately four-tenths of a mile.¹²⁷ Establishing personal jurisdiction, therefore, is one area where courts have expressed concern and are wary of the current geo-location tracking techniques.

B. MISIDENTIFICATION

Misidentification occurs when the subpoenaed subscriber information does not match with the actual infringer. Some courts have recognized this problem. For example, in *In re BitTorrent*, the court found that an IP address alone was insufficient to establish “a reasonable likelihood [that] it [would] lead to the identity of defendants who could be sued.”¹²⁸ The court noted that “a single IP address usually supports multiple computer devices—which unlike traditional telephones can be operated simultaneously by different individuals.”¹²⁹ Further, many courts have expressed concerns that the actual infringer may be a family member or friend of the subscriber, or anyone who used the subscriber’s unsecured

123. See *Hard Drive Prods., Inc. v. Does 1-90*, No. C 11-03825 HRL, 2012 WL 1094653 (N.D. Cal. Mar. 30, 2012).

124. *Id.* at *4.

125. *Id.*

126. See *id.*

127. Yong Wang et al., *Towards Street-Level Client-Independent IP Geolocation*, NORTHWESTERN UNIVERSITY, http://www.usenix.org/event/nsdi11/tech/full_papers/Wang_Yong.pdf (last visited Apr. 21, 2013).

128. *In re BitTorrent Adult Film Copyright Infringement Cases*, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *7 (E.D.N.Y. May 1, 2012).

129. See *id.* at *3.

Internet connection.¹³⁰ In such cases, the subpoena would reveal only the identity of an innocent subscriber.¹³¹ Misidentification can occur, for example, when an individual has an Internet subscription but is not tech-savvy enough to secure the Wi-Fi connection. Even if a Wi-Fi account is secured, a skilled user could hack into the account, or an unskilled user could guess the Wi-Fi password and gain access to the signal.

Misidentification means that innocent subscribers could be unfairly dragged into litigation.¹³² Roughly 30% of the ISP subscribers involved in infringement suits are innocent.¹³³ Unfortunately, many of these innocent subscribers settle with the plaintiffs due to the high costs associated with retaining a defense attorney.¹³⁴

Courts aware of misidentification issues may still issue subpoenas because the information sought falls within the broad standard of discoverable information.¹³⁵ Since only the ISP subscriber knows whether he or she downloaded the copyrighted work, a court could find that a subscriber's information is relevant to proving the plaintiff's claim.¹³⁶ Misidentification, therefore, is another area where there is often confusion amongst the courts. Some courts recognize misidentification as a problem, while others have yet to realize the issue.

C. FIRST AMENDMENT AND PRIVACY

Privacy issues also arise in mass copyright infringement suits. Internet users are generally under the assumption that their identities are private unless there is a good reason for them to be revealed.¹³⁷ If a plaintiff can subpoena a user's identity for what turns out to be a baseless copyright infringement claim, lifting the veil of anonymity may be seen as an invasion of privacy. Hence, the privacy issue hinges on whether the Doe defendants have an expectation of privacy in their identity such that it would outweigh the plaintiff's need for redress.¹³⁸

Some courts find that the plaintiff's right to redress does not outweigh

130. *See id.* at *3–4.

131. *See, e.g.,* *New Sensations, Inc. v. Does* 1-306, No. 2:12-cv-1885-GEB-EFB, 2012 WL 5031651, at *5 (N.D. Cal. Oct. 17, 2012); *Third Degree Films v. Does* 1-3577, No. C 11-02768 LB, 2011 WL 5374569, at *4 (N.D. Cal. Nov. 4, 2011); *SBO Pictures, Inc. v. Does* 1-3036, No. 11-4220 SC, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011).

132. *Hard Drive Prods., Inc. v. Does* 1-130, No. C-11-3826 DMR, 2011 WL 5573960, at *2 (N.D. Cal. Nov. 16, 2011).

133. *In re BitTorrent Adult Film Copyright Infringement Cases*, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *3 (E.D.N.Y. May 1, 2012) (stating plaintiff estimated that 30% of the names turned over are innocent).

134. *Copyright Infringement Defense*, WESSELS & ARSENAULT LLC, <http://www.frontrangelegalservices.com/services/ip-patent-trademark-copyright/copyrightdefense/> (last visited Sept. 30, 2013).

135. FED. R. CIV. P. 26.

136. *See John Wiley & Sons, Inc. v. Does* Nos. 1-30, 284 F.R.D. 185, 190 n.5 (S.D.N.Y. 2012).

137. *Alice Kao, RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405, 419–20 (2004).

138. *See, e.g.,* *Arista Records, LLC v. Doe* 3, 604 F.3d 110, 119 (2d Cir. 2010) (laying out a standard to unmask Doe defendants and weighing privacy expectations in such determination).

the privacy rights of a potentially innocent subscriber.¹³⁹ However, it has been established that the First Amendment right to anonymity cannot be used to mask copyright infringement.¹⁴⁰ Additionally, courts have concluded that ISP subscribers have a decreased expectation of privacy because the terms of service set by most ISPs prohibit unlawful transmission of information and permit the ISP to disclose information necessary to satisfy any law, regulation, or governmental request.¹⁴¹

D. PREJUDICE

Courts also disagree when it comes to identifying the prejudiced party in mass copyright infringement suits. Some courts have stated that joinder at the early stage of the litigation might, in fact, be beneficial to the Doe defendants. For example, a court in the District of Columbia found that the joinder would be beneficial to the putative defendants because it would allow administrative efficiency for the court, the plaintiffs, and the ISPs.¹⁴² Defendants would benefit by being able to see what defenses the other Doe defendants raised.¹⁴³ Certain Colorado courts have acknowledged this benefit as well.¹⁴⁴

Moreover, Doe defendants could be seen as the prejudiced party because there is a risk that evidence would be lost in a suit with numerous defendants asserting separate defenses. Prejudice might also exist because defendants that appear *pro se* would have to serve hundreds of other Does with pleadings.¹⁴⁵

Conversely, the plaintiff may be deemed the prejudiced party if expedited discovery is not granted. Forcing plaintiffs to file individual lawsuits is a significant obstacle in the enforcement of copyrights due to high costs and lengthy delays.¹⁴⁶ Some courts conclude that the Doe defendants are not prejudiced by joinder at early stages in litigation because they are identified only by their IP address and thus are not required to

139. See *In re BitTorrent Adult Film Copyright Infringement Cases*, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *9 (E.D.N.Y. May 1, 2012) (finding innocent subscribers' expectation of privacy outweighed plaintiff's claim); *New Sensations, Inc. v. Does 1-306*, No. 2:12-cv-1885-GEB-EFB, 2012 WL 5031651, at *5 (E.D. Cal. Oct. 17, 2012); *Patrick Collins, Inc. v. John Does 1 through 37*, No. 2:12-cv-1259-JAM-EFB, 2012 WL 2872832, at *4 (E.D. Cal. July 11, 2012).

140. See *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (stating that the First Amendment does not provide a license for copyright infringement).

141. See, e.g., *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 566-67 (S.D.N.Y. 2004); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003).

142. *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 344 (D.D.C. 2011).

143. *Id.*

144. See, e.g., *Patrick Collins, Inc. v. John Does 1-33*, No. 11-cv-02163-CMA-MJW, 2012 WL 415424, at *3 (D. Colo. Feb. 8, 2012); *Patrick Collins, Inc. v. John Does 1-15*, No. 11-cv-02164-CMA-MJW, 2012 WL 415436, at *3 (D. Colo. Feb. 8, 2012).

145. See, e.g., *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011); *CineTel Films, Inc. v. Does 1-1,052*, 853 F. Supp. 2d 545, 554 (D. Md. 2012).

146. See, e.g., *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 344 (D.D.C. 2011); *Third Degree Films, Inc. v. Does 1-178*, No. C 12-3858 MEJ, 2012 WL 3763649, at *5-6 (N.D. Cal. Aug. 29, 2012).

respond to the allegations or assert a defense.¹⁴⁷ One court stated, “without granting Plaintiff’s request, the defendants cannot be identified or served and the litigation cannot proceed. Additionally, expedited discovery is necessary to prevent the requested data from being lost forever as part of routine deletions by the ISPs.”¹⁴⁸ Such disagreement as to which party is burdened with greater prejudice also contributes to the current dissonance in BitTorrent cases.

E. COERCIVE LITIGATION TACTICS

Many courts recognize that plaintiffs in mass copyright infringement suits do not actually intend to proceed with the litigation, but rather use the discovery process as a tool to obtain subscriber information and coerce settlements.¹⁴⁹ This tactic is particularly effective in cases involving adult entertainment because of the embarrassment associated with a public lawsuit.

These lawsuits run a common theme: plaintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: [a] single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars.¹⁵⁰

Settlement letters can threaten the subscriber with up to \$150,000 in damages if the case is litigated.¹⁵¹ However, settlements typically range from \$3000 to \$12,000, depending on the number of infringed files.¹⁵² Settlement demands usually range anywhere from \$1500 to \$4000—less than the cost of retaining a defense attorney.¹⁵³ Demand letters usually imply that the plaintiff will surely win in a lawsuit, despite the fact that the plaintiff has many procedural hurdles to overcome.¹⁵⁴

To combat these unfair tactics, organizations have emerged to assist individuals who feel frightened and helpless upon receiving a demand

147. See *supra* note 131.

148. *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

149. See, e.g., *Hard Drive Prods., Inc. v. Does 1-90*, No. C 11-03825 HRL, 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (stating “the court will not assist a plaintiff who seems to have no desire to actually litigate but instead seems to be using the courts to pursue an extrajudicial business plan against possible infringers and innocent others caught up in the ISP net.”); *New Sensations, Inc. v. Does 1-306*, No. 2:12-cv-1885-GEB-EFB, 2012 WL 5031651, at *5 (E.D. Cal. Oct. 17, 2012); *SBO Pictures, Inc. v. Does 1-3036*, No. 11-4220 SC, 2011 WL 6002620, at *4 (N.D. Cal. Nov. 30, 2011).

150. *Malibu Media, LLC v. Does 1-10*, No. 2:12-cv-3623-ODW(PJWx), 2012 WL 5382304, at *3 (C.D. Cal. June 27, 2012).

151. *Sample Settlement Letter*, DIETROLLDIE, <http://dietrolldie.files.wordpress.com/2011/09/57230736-settlement-letter.pdf> (last visited Apr. 21, 2013).

152. *Id.*

153. Kurt Opsahl & Mitch Stolz, *Copyright Troll Faces Hard Questions in Federal Court*, ELECTRONIC FRONTIER FOUNDATION (Mar. 12, 2013), <https://www.eff.org/deeplinks/2013/03/copyright-troll-questioned-harshly-federal-judge>.

154. See *Sample Settlement Letter*, *supra* note 151.

letter. One such organization is Chilling Effects Clearinghouse, a collaboration of law school clinics and the Electronic Frontier Foundation (“EFF”), which offers help to individuals sued for Internet activity.¹⁵⁵

Whether aggressive mass copyright infringement suits are ethical depends on a person’s stake in the outcome. Copyright owners argue that “the lawyers are just doing their jobs . . . somebody stole our property and we are trying to get it back,” while the EFF opines that “[the owners are] copyright trolls” and “they take a dragnet approach to litigation.”¹⁵⁶

While, on its face, mass litigation appears unjust, courts should recognize the amount of economic harm the P2P sharing of copyrighted files has caused copyright owners. Courts have noted that BitTorrent cases should not be dismissed based solely on a “guilty-by-association” rationale—meaning that a plaintiff might have filed suit in good faith, intending to litigate and not to coerce settlements.¹⁵⁷ The dismissal of such a case would not be fair to those who are not using the court system as simply a money making scheme.

F. SOLUTIONS

Under the FRCP, misjoinder may be grounds for severance of a party or claims.¹⁵⁸ Therefore, many courts have allowed improper joinder to sever the Doe defendants.¹⁵⁹ Often times, the claims against the severed Does are also dismissed without prejudice even though misjoinder is not grounds for dismissing actions.¹⁶⁰

While severance and dismissal might prevent the subpoenaing of hundreds or thousands of Doe defendants, the severance and dismissal technique is arbitrary. Courts should not base the decision to sever claims on beliefs about which Doe defendants are more likely to be infringers or might be properly joined since such facts would not yet be available to the court. An arbitrary severance could leave one Doe defendant remaining in an action while the others are dismissed. The remaining Doe is not any more or any less likely to have infringed the plaintiff’s copyright, but must defend against the action because his was the first named IP address. At this point, however, it is possible the plaintiff would voluntarily dismiss the case because the plaintiff’s primary goal was just to obtain ISP subscriber

155. *About Us*, CHILLING EFFECTS CLEARING HOUSE, <https://www.chillingeffects.org/about> (last visited Apr. 20, 2013).

156. Julianne Pepitone, *50,000 BitTorrent Users Sued for Alleged Illegal Downloads*, CNN MONEY (June 10, 2011), http://money.cnn.com/2011/06/10/technology/bittorrent_lawsuits/index.htm (stating the opposing views of the respective parties).

157. *Malibu Media, LLC v. Does 1-5*, 285 F.R.D. 273, 278 (S.D.N.Y. 2012).

158. FED. R. CIV. P. 21.

159. *See, e.g., Diabolic Video Prods., Inc. v. Does 1-2099*, No. 10-cv-5865-PSG, 2011 WL 3100404, at *4 (N.D. Cal. May 31, 2011) (severing Does 2–2099 and recommending dismissal of the claims against those Does without prejudice based on misjoinder).

160. *See, e.g., Patrick Collins, Inc. v. John Does 1 through 9*, No. 3:12-cv-01436-H(MDD), 2012 WL 7062535, at *4 (S.D. Cal. Nov. 8, 2012) (severing and dismissing claims against Does 2–9 based on misjoinder); *Pac. Century Int’l Ltd. v. Does 1-101*, No. C-11-02533-(DMR), 2011 WL 2690142, at *4 (N.D. Cal. July 8, 2011).

information.

Other courts may allow the subpoena for ISP identification, but attempt to mitigate the defendant's harm through a protective order. Some protective orders require that the information provided to the plaintiff remain. Specifically, the protective order would prohibit the information from public disclosure until the Doe defendant filed a motion to proceed anonymously and the court had ruled on that motion.¹⁶¹ Other courts might order the ISP not to disclose the Doe defendants' identifying information until the Does' window to file a motion to quash or proceed anonymously had expired, or any such motions had been ruled on.¹⁶² A court could also employ both methods of protection, severing the defendants and then issuing a protective order for the remaining subpoenaed Doe.¹⁶³

These solutions are not a cure for the potential harms. Discretionary severance by courts could ultimately result in a subpoena against one Doe defendant, but not the others. While this method would protect many Doe defendants from potential harassment, it would not fix the problem for the one remaining unlucky Doe defendant. Further, a protective order would not remedy the issue of misidentification, although it would mitigate the prospective embarrassment.

BitTorrent sharing is widespread,¹⁶⁴ and there is no indication it will stop.¹⁶⁵ Additionally, the Internet has become the preferred method for business and social communications, data transmission, and storage, displacing other types of media such as newspapers and magazines. BitTorrent technology leaves a copyright holder's works "vulnerable to massive, repeated, and worldwide infringement."¹⁶⁶ Online piracy is a very real and serious issue that has yet to be solved. However, mass copyright actions burden the courts and ISPs and create a negative public perception of the entertainment industry.¹⁶⁷

VI. PROPOSED SOLUTIONS

This Article proposes two solutions to the problem of mass copyright infringement actions. The first solution is to allow individual enforcement

161. See, e.g., *Digital Sin, Inc. v. Does 1-5698*, No. C 11-04397 LB, 2011 WL 5362068, at *5 (N.D. Cal. Nov. 4, 2011).

162. See, e.g., *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 245 (S.D.N.Y. 2012) (providing a sixty-day window).

163. See, e.g., *Digital Sin, Inc. v. Does 1-5698*, No. C 11-04397 LB, 2011 WL 5362068, at *5 (N.D. Cal. Nov. 4, 2011) (severing Does 2-5698 and issuing a protective order for the subpoenaed information).

164. *Sandvine Global Internet Phenomena Report 2H 2012*, SANDVINE, http://www.sandvine.com/downloads/documents/Phenomena_2H_2012/Sandvine_Global_Internet_Phenomena_Report_2H_2012.pdf (last visited Apr. 21, 2013) (reporting the traffic share of file-sharing in the second half of 2012: 12% in North America, 29.3% in Asia-Pacific, and 20.3% in Europe).

165. *Id.* (reporting an overall 40% increase in BitTorrent traffic in North America for the second half of 2012).

166. *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1073 (D. Ariz. 2006).

167. Negative public perception is illustrated by the emergence of organizations, such as Chilling Effects Clearance House, that seek to protect John Does.

actions, but only in limited circumstances and with reduced damages. The second is to implement a compulsory licensing scheme.

A. INDIVIDUAL ENFORCEMENT ACTIONS

The first proposed solution is to allow individual enforcement actions as they are currently permitted today, but with some modifications. To sustain a claim, the plaintiff would first have to show it attempted *voluntary enforcement* of its copyrights. Further, the complaint would need to be directed at the *initial seeder*, or the individual who initially made the file available for others to share. Finally, either the Copyright Act would need to be amended to reduce statutory damages or, alternatively, copyright owners would only be permitted actual damages.

1. Voluntary Enforcement Actions

A possible modification to the current enforcement model is to require plaintiffs to have attempted self-enforcement prior to filing suit. One of the reasons owners who enforce their copyrights have gained a bad reputation is because they have not attempted to prevent or reduce infringement through other avenues. An innocent ISP subscriber may suddenly receive a settlement letter or discover she is involved in BitTorrent litigation and wonder why the ISP never notified her. If the subscriber is the actual infringer, notice would have provided the opportunity to cease any infringement.

Thus, a plaintiff should be required to demonstrate that it sent DMCA notices to the websites hosting infringing content prior to filing a lawsuit against individuals. This requirement would address the concern over protecting innocent subscribers. A DMCA notice would provide an innocent subscriber with sufficient notice that infringing activity occurred on his or her account, and the subscriber would have the opportunity to remedy the behavior before being named as a defendant. A notice could inform a subscriber that his or her Internet connection is unsecure or that strangers are using the connection for copyright infringement. The subscriber could then secure the connection, preventing further illicit activity. Requiring notice would reduce the chances of innocent ISP subscribers getting erroneously dragged into infringement actions.

With the enactment of the DMCA, Congress clearly intended to limit the liability of mere conduits. However, Congress also meant to put the burden on the copyright holders to police their own intellectual property through the notice and take down system. The DMCA puts the initial burden of policing the web for piracy on the copyright holders. It would make sense to require copyright holders to first fulfill the duty required of them by Congress before seeking redress in the courts.

2. Focus on the Sender

In the current enforcement model, copyright owners do not discriminate between the initial seeder and subsequent downloaders. Failure to differentiate casts a wide net because it does not focus on the

root cause. The focus in BitTorrent copyright infringement cases should be on the initial seeder, or the individual who first made the file available on the web. Finding and curing the root of the problem is essential to remedying the entire system.

Conversely, the argument for liability against subsequent downloaders is that they are also engaging infringing activity since P2P users are both downloader and uploaders. While this is true, it would still be most effective to focus enforcement efforts on such initial seeders.

3. Amendment or Actual Damages

There is a strong argument that current statutory damages are disproportionate to a copyright owner's actual harm. The Copyright Act permits a \$150,000 award for the willful infringement of a single copyrighted work, regardless of the actual value of the work or the actual damages suffered by the plaintiff.¹⁶⁸ To avoid such disproportionate awards, the Copyright Act should be amended either to reduce the \$150,000 statutory damage to an amount reflective of actual damages, or to limit the awards received by plaintiffs of BitTorrent lawsuits to actual damages.

Currently, the illegal download of one episode of *Top Gear*¹⁶⁹ would subject a user to \$150,000 in damages. The same episode would cost, at most, \$2.99 to download from iTunes. Admittedly, most infringers likely do not limit themselves to downloading one episode. Nevertheless, it seems quite challenging to download \$150,000 worth of copyrighted material. Online piracy causes economic harm to the entertainment industry, however, is the reported amount of harm accurate?¹⁷⁰ The reduction of statutory damages is also necessary, as it would combat the problem of coercive settlements. No longer would a copyright owner be able to threaten an ISP subscriber with high potential damages.

4. Uniform and Automatic Procedural Protections

If copyright owners file suits against individuals, courts should keep the defendants anonymous and require that all information provided to the plaintiff remain confidential. This would address the concerns of public embarrassment and the privacy of individuals. Further, if copyright infringement suits are only directed at the initial seeder, the result would be fewer cases where hundreds or thousands of Doe defendants are joined together. For additional caution, courts could limit the maximum number of Doe defendants joined in a BitTorrent infringement suit.¹⁷¹ Individual enforcement actions embodying the proposed modifications are one way to address the problems with current mass copyright infringement litigation.

168. 17 U.S.C. § 504(c) (2006).

169. *Top Gear*, BBC, <http://www.topgear.com/uk/> (last visited Nov. 27, 2013).

170. Rob Reid, *The Numbers Behind Copyright Math*, TED (Mar. 20, 2012), <http://blog.ted.com/2012/03/20/the-numbers-behind-the-copyright-math/>; see also Rob Reid: *The \$8 Billion iPod*, TED (Mar. 2012), https://www.ted.com/talks/rob_reid_the_8_billion_ipod.html.

171. For example, courts can adopt the local rule 19-1 of the Central District of California, which limits joinder of Doe defendants to ten per suit. See C.D. CAL. R. 19-1.

B. COMPULSORY LICENSING

Another proposed solution to the problem of mass copyright infringement actions would be to implement a compulsory licensing scheme. The scheme would be similar to that currently in place between radio stations and artists, whereby the radio station pays a small fee each time it plays a song.¹⁷² The existing radio model can serve as a foundation for a compulsory licensing program for BitTorrent use.

Recently, certain major ISPs implemented a “six-strike” rule, also known as the Copyright Alert System (“CAS”), in partnership with the entertainment industry.¹⁷³ The rule, enforced by the ISPs themselves, results in the termination or speed reduction of a user’s connection, as well as a notice about the harms caused by infringement, if the user engages in six instances of infringement.¹⁷⁴ Currently, the CAS is more of an educational tool. However, CAS could be turned into a compulsory licensing scheme if the ISP subscriber is forced to pay more than the retail value of the infringed work as a penalty for obtaining it through piracy. How much a subscriber should pay for each violation is debatable. For example, the subscriber could pay double or triple the price of the retail value of the work. In the context of a monthly or yearly subscription service, the user could be forced to pay a multiple of the normal subscription fee. Such a compulsory licensing scheme would permit copyright owners to recoup the financial harm caused by piracy.

CONCLUSION

No single solution will bring an end to the online piracy that is indisputably damaging copyright owners. However, it is imperative to consider whether the current method of individual enforcement advances the purpose copyright was intended to serve. Mass copyright infringement suits harass defendants while copyright owners often do little or nothing to reduce piracy or mitigate damages. This type of enforcement model does not reduce piracy. The existence of mass infringement suits indicates a need for reformation. Such reformation should address the divide between content producers and consumers, keeping in mind the precedent the aforementioned cases created in the legal system as well as the applicability of the framework to other areas of law.¹⁷⁵ Courts must avoid creating a

172. 17 U.S.C. §§ 114, 115 (2006).

173. Gerry Smith, ‘Six Strike’ System, Slowing or Suspending Internet for Illegal Downloads Takes Effect Monday, HUFFINGTON POST (Feb. 25, 2013), http://www.huffingtonpost.com/2013/02/25/six-strike-system_n_2759408.html.

174. See *id.*

175. For example, an entity called Newsright that launched in January of 2012 claims to be an online news registry and licensing service that tracks contents from 841 newspaper sites. Newsright uses its tracking technology to find unauthorized websites or blogs etc., which may be infringing on the news content by aggregating or gathering such news. See Adam Kuhn, Charles Bahlert & Andrea Brizuela, *NewsRight: The Digital Revolution the Newspaper Industry Has Been Waiting for*, USF SCHOOL OF LAW INTERNET AND INTELLECTUAL PROPERTY CLINIC (May 14, 2012), <http://lawblog.usfca.edu/internetjustice/2012/newsright-the-digital-revolution-the-newspaper-industry->

framework that could stifle innovation and deepen the divide between content producers and consumers—a divide that should not exist if the aim is to progress society with science and the useful arts.

This Article's proposed solutions attempt to address the problem of mass copyright infringement suits. The first solution is to modify the current individual enforcement system by requiring self-enforcement through the DMCA, focusing on the initial seeders, reducing damages, and implementing uniform protections throughout the legal system. The second solution is to implement a compulsory licensing scheme. Given the widespread existence of copyright infringement, it may be time to create a mandatory, automated, yet fair, system to prevent online infringement and provide copyright owners with compensation.

has-been-waiting-for/; Mathew Ingram, *NewsRight: A Carrot, or a Stick to Beat Aggregators with?*, GIGAOM (Jan. 6, 2012), <http://gigaom.com/2012/01/06/newsright-a-carrot-or-a-stick-to-beat-aggregators-with/> (stating there is suspicion that NewsRight is intended to be a "lawsuit machine").