BITTORRENT COPYRIGHT TROLLING: A PRAGMATIC PROPOSAL FOR A SYSTEMIC PROBLEM

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I. INTRODUCTION[1]

When Adrienne Neal received a letter in the mail from the U.S. Copyright Group, she chose not to respond because she thought it was a scam.[2] The letter contained a settlement offer, informing Ms. Neal that she was being sued in federal court for allegedly illegally downloading the copyrighted film *Far Cry*.[3] The letter notified her that the plaintiff was willing to settle the matter out of court for a few thousand dollars.[4] Having never heard of the film in question and confident in her innocence, Ms. Neal ignored the settlement offer and did not respond to the complaint—particularly because she did not fully understand the ins-and-outs of the proceedings and could not afford to hire an attorney to fight the charges.[5] In response to her silence, the U.S. Copyright Group sought a default judgment for full damages, costs, and attorney's fees.[6] Stories such as these are

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[1] It is worth noting at the outset that when I began writing this Comment in August 2010 the topic was, at best, under-analyzed. Since then, a good deal of scholarship on the issue has emerged, which I have tried to incorporate as fluidly as possible without altering the essence of my writing. I am grateful that so many talented thinkers have turned their attention to the topic; I hope this Comment helps push the discussion forward.

[2] Letter from Adrienne Neal at 3, Achte/Neunte Boll Kino Beteiligungs GMBH & Co KG v. Adrienne Neal and Does 1–139, No. 1:10-cv-00453-RMC (D.D.C. Mar. 1, 2011), ECF No. 162.

[3] *Id.* The plaintiff initially tried joining 4,577 anonymous "John Doe" defendants in the lawsuit. *See* Amended Complaint at 1, Achte/Neunte Boll Kino Beteiligungs GMBH & Co KG v. Adrienne Neal and Does 1–4,577, No. 1:10-cv-00453-RMC (D.D.C. May 12, 2010), ECF No. 12.

[4] Letter from Adrienne Neal, *supra* note 2, at 3. The exact amount of money requested from Ms. Neal was undisclosed but in another case the plaintiff sought $3,400 to settle. *See* Ex. A to Complaint at 2, Seth Abrams v. Hard Drive Productions, Inc., and Does 1–50, No. 3:12-cv-01006 JCS (N.D. Cal. Feb. 28, 2012), ECF No. 1 [hereinafter Offer Letter].

[5] Letter from Adrienne Neal, *supra* note 2, at 3.

[6] Affidavit in Support of Default at 1, Achte/Neunte Boll Kino Beteiligungs

becoming more common as BitTorrent[7] copyright litigation flourishes across the country.

Copyright law is derived from Article I, Section 8 of the Constitution, which gives Congress the power: "[t]o 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."[8] The law of copyright is designed as an incentive for the development of creative works.[9] The United States Copyright Act[10] outlines the types of works that are eligible for copyright protection[11] and enumerates the potential remedies[12] for copyright holders if their exclusive rights[13] are violated.[14] The Act explicitly states that copyright infringers can be held liable for either: (1) the copyright holder's actual damages and the infringer's profits, or (2) if actual damages are difficult to calculate, statutory damages ranging from $750 to $30,000 per infringement.[15] If a copyright holder requests statutory damages, the court can increase the maximum award to $150,000 if the court finds that "infringement was committed willfully."[16]

The advent of the Internet and peer-to-peer (P2P) file-sharing has drastically changed the scope and nature of copyright considerations.[17] Digital piracy of copyrighted works has had a

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GMBH & Co KG v. Adrienne Neal and Does 1–139, No. 1:10-cv-00453-RMC (D.D.C. Jan. 31, 2011), ECF No. 157; *see also* Second Amended Complaint for Copyright Infringement at 7, Achte/Neunte Boll Kino Beteiligungs GMBH & Co KG v. Adrienne Neal and Does 1–139, No. 1:10-cv-00453-RMC (D.D.C. Dec. 6, 2010), ECF No. 145.

[7] BitTorrent is a specific type of file-sharing technology which will be explained in depth *infra* Part III.A.2.

[8] U.S. CONST. art. I, § 8, cl. 8.

[9] Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009) ("Copyright law is thus thought to exist primarily to give authors (that is, creators) an incentive to create and thereafter disseminate their works publicly.").

[10] 17 U.S.C. §§ 101–1332 (2006).

[11] *Id.* § 102.

[12] *Id.* §§ 501–513.

[13] *Id.* § 106.

[14] The Supreme Court has clarified that in order to "establish [copyright] infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

[15] 17 U.S.C. § 504.

[16] *Id.* § 504(c)(2).

[17] *See, e.g.*, John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (2007) ("The widespread use of peer-to-peer (P2P) file-sharing technology . . . has enabled ordinary Americans to become mass

profound effect on the media industry worldwide.[18] Although new business models, like that of Hulu, are emerging to help monetize digital content, piracy is still attractive to some Internet users.[19] Industries such as film,[20] video games,[21] computer software,[22] and music[23] have all felt the effects of piracy. As these industries have

copyright infringers with spectacular ease."). To be clear, a P2P network is any network that "allow[s] users to share large files directly with one another without going through a central server." Comcast Corp. v. F.C.C., 600 F.3d 642, 644 (D.C. Cir. 2010). Both Napster and BitTorrent are examples of P2P.

[18] *Illegal Downloading and Media Investment: Spotting the Pirates*, ECONOMIST, Aug. 20, 2011, *available at* http://www.economist.com/node/21526299 (discussing how consumer attitudes towards piracy around the world have a direct effect on the amount of money invested by companies in creating media).

[19] *See, e.g.*, Devin Coldewey, *Delay On Hulu Availability More Than Doubles Piracy of Fox Shows*, TECHCRUNCH (Aug. 22, 2011), http://techcrunch.com/2011/08/22/delay-on-hulu-availability-more-than-doubles-piracy-of-fox-shows/ (eight-day delay in original air-date and Hulu availability can encourage some fans to obtain the shows illegally—especially with newfound sense of "getting something for nothing" entitlement that consumers have in the digital age); *see also* Chris Welch, *'Game of Thrones' Season Premiere Illegally Downloaded Over One Million Times*, THE VERGE (Apr. 1, 2013), http://www.theverge.com/2013/4/1/4171792/game-of-thrones-season-three-premiere-pirated-one-million-times (noting that one million illegal downloads occurred less than twenty-four hours after the premiere, even though HBO "allowed customers to stream Game of Thrones via HBO Go at the same time that cable subscribers watched it live").

[20] In 2011, the most-pirated film, *Fast Five*, was illegally downloaded via BitTorrent over 9,000,000 times, which astoundingly was a decrease from 2010's most-pirated film, *Avatar*— illegally downloaded 16,000,000 times. Drew Olanoff, *The Most Pirated Movie in 2011 was Downloaded 9,260,000 Times*, THE NEXT WEB (Dec. 24, 2011), http://thenextweb.com/media/2011/12/24/the-most-pirated-movie-in-2011-was-downloaded-9260000-times/.

[21] It is estimated that three-quarters of the video games released in late 2010 and early 2011 were shared illegally. Editorial, *Going After the Pirates*, N.Y. TIMES, Nov. 26, 2011, *available at* http://www.nytimes.com/2011/11/27/opinion/sunday/going-after-the-pirates.html.

[22] One study claimed that in 2009 over forty percent of software programs installed on computers around the world were obtained illegally. BUSINESS SOFTWARE ALLIANCE, PIRACY IMPACT STUDY: THE ECONOMIC BENEFITS OF REDUCING SOFTWARE PIRACY (Sept. 15, 2010), *available at* http://portal.bsa.org/piracyimpact2010/index.html.

[23] Total revenue from U.S. music sales and licensing was $14.6 billion in 1999; the 2009 figure was only $6.3 billion. David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNNMONEY (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/. The International Federation of the Phonographic Industry (IFPI), a recording industry trade group, claims that in 2008 ninety-five percent of all music downloaded online was obtained illegally. *Legal Downloads Swamped by Piracy*, BBC NEWS (Jan. 16, 2009), http://news.bbc.co.uk/2/hi/technology/7832396.stm. The IFPI alleges that digital piracy accounted for thirty percent of the decline in global music sales from 2004 to 2009, Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES, Jan. 21, 2010, *available at* http://www.nytimes.com/2010/01/22/business/global/22music.html, but not

learned, effectively enforcing copyright in the digital age is difficult if not futile.[24]

The 1999 release of Napster, a file-sharing application geared towards digital music, was a watershed moment for copyright law; Napster helped bring digital piracy into the mainstream.[25] The Recording Industry Association of America (RIAA), a music industry trade group, responded to a perceived increase in copyright violations with a flood of lawsuits beginning in 2003.[26] These lawsuits were largely designed to dissuade potential illegal downloading by threatening litigation and raising awareness of the illegality of most file-sharing.[27] But after suing approximately 35,000 individuals during the ensuing five years, the RIAA officially announced the end of its copyright litigation campaign in December 2008.[28] Some commentators attributed the "sudden shift" in strategy to the high financial costs involved, negative associated public relations, and overall ineffectiveness at preventing illegal downloading.[29]

Despite the RIAA's absence, copyright litigation has soared in the past few years largely due to pockets of the film industry taking over where the RIAA left off.[30] Indeed, since the beginning of 2010, well over 200,000 individual defendants have been sued in the United

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everyone agrees with this "piracy hurts sales" conclusion. *See Music Sales are not Affected by Web Piracy, Study Finds*, BBC NEWS (Mar. 20, 2013), http://www.bbc.co.uk/news/technology-21856720 (reporting on a study of 16,000 Europeans—which the IFPI called "flawed and misleading"—concluding that music sales are not hampered by digital piracy).

[24] *See generally* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 66–67 (2002–2003) (noting the "limited capacity of existing legal protections to combat digital piracy") (internal citation omitted).

[25] *See* Corey Rayburn, *After Napster*, 6 VA. J.L. & TECH. 16, 17 (2001) (describing Napster—even in its "defunct state"—as a "cultural phenomenon").

[26] *RIAA v. The People*, ELECTRONIC FRONTIER FOUNDATION (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later.

[27] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, *available at* http://online.wsj.com/article/SB122966038836021137.html.

[28] *Id.*

[29] *Id.*

[30] One judge characterized the trend as a "nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals." *In re* BitTorrent Adult Film Copyright Infringement Cases, 2012 U.S. Dist. LEXIS 61447, at *1 (E.D.N.Y. May 1, 2012). Another judge described the plaintiffs in these cases as "copyright locusts [who] have descended on the federal courts" and further lamented that "[i]t is difficult to even imagine the extraordinary amount of time federal judges have spent on these cases." Opinion & Order at 3, 3, n.2, Patrick Collins, Inc. v. John Does 1–4, No. 1:12-cv-02962-HB (S.D.N.Y. Sept. 4, 2012), ECF No. 11.

States for allegedly sharing copyrighted material online and this number continues to grow.[31] Instead of the drawn out[32] and expensive[33] courtroom-oriented strategy employed by the RIAA, the recent crop of BitTorrent copyright litigation relies almost exclusively on pre-trial settlements and thereby completely avoids litigation.[34] The likely logic of this litigation strategy, which has been dubbed the "settlement letter factory" business model,[35] is that collecting small settlement payments from a large pool of alleged infringers is preferable to large payments from a small amount of proven infringers. The adult movie industry, for example, views this innovative litigation strategy as a potentially lucrative new revenue stream.[36] Those who file BitTorrent copyright lawsuits are often referred to as "copyright trolls."[37] Copyright trolls have caused a

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[31] Ernesto, *200,000 BitTorrent Users Sued in the United States*, TORRENTFREAK (Aug. 8, 2011), http://torrentfreak.com/200000-bittorrent-users-sued-in-the-united-states-110808/.

[32] *See, e.g.*, the docket report for Capitol Records et al. v. Thomas-Rasset, No. 0:06-cv-01497-MJD-LIB (D. Minn. Apr. 19, 2006), a notorious music file-sharing case that lasted nearly seven years.

[33] One analysis looked at the RIAA's IRS Form 990 filings between 2004 and 2008 and found that "the RIAA spent roughly $90 million on legal fees to recover $2.5 million." James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 85 n.42 (2012).

[34] *See* Nate Anderson, *The "Legal Blackmail" Business: Inside a P2P Settlement Factory*, ARS TECHNICA (Sept. 29, 2010), http://arstechnica.com/tech-policy/news/2010/09/amounts-to-blackmail-inside-a-p2p-settlement-letter-factory.ars.

[35] *Id.*

[36] Nicholas Deleon, *Adult Movie Industry Follows RIAA's Footsteps, Sees Lawsuits as New Revenue Source*, TECHCRUNCH (Jan. 31, 2011), http://techcrunch.com/2011/01/31/adult-movie-industry-follows-riaas-footsteps-sees-lawsuits-as-new-revenue-source/; Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, HOLLYWOOD REP. (Dec. 21, 2010), http://www.hollywoodreporter.com/blogs/thr-esq/litigation-campaign-quietly-targets-tens-63769 (quoting an attorney working in the field of BitTorrent copyright litigation as saying: "We're creating a revenue stream and monetizing the equivalent of an alternative distribution channel").

[37] *See, e.g.*, James DeBriyn, *supra* note 33, at 86 ("A copyright troll is a plaintiff who seeks damages for infringement upon a copyright it owns, not to be made whole, but rather as a primary or supplemental revenue stream."); Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 55 (2012), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1019&context=endnotes ("A copyright troll, roughly defined, is a person or entity that acquires a (usually narrow) license from an original copyright holder for the sole purpose of suing and obtaining settlements from alleged infringers."); *Who are copyright trolls?*, FIGHT COPYRIGHT TROLLS, http://fightcopyrighttrolls.com/about/ (last visited Nov. 13, 2012) ("Copyright trolls are law firms or individual lawyers who adopted a lucrative scheme to profit from

"disruption of the under-enforcement equilibrium" that has historically existed in copyright law.[38] Moreover, because copyright trolls "have in theory violated none of the law's formal rules and principles, copyright law has thus far failed to articulate a coherent basis on which to curb their activities."[39]

This Comment takes the position that the unscrupulous activities of copyright trolls should be curbed. Part II of this Comment will look at the business model used by copyright trolls involved in BitTorrent copyright litigation. The most crucial aspects of "the settlement letter factory" model are highlighted, including: joining together alleged infringers of the copyrighted work into a single lawsuit for discovery purposes; expedited discovery requests to reveal the true identities of the anonymous defendants; and the sending of ominous settlement offers that are designed to induce settlement without the need for trial. Part III sets forth a multi-faceted and pragmatic approach to help eradicate the problem of copyright trolls. The solution is grounded in the acknowledgment of the vastly different stakeholders involved—indeed, for every copyright troll hoping to extort easy money out of unsuspecting citizens, there is likely a genuine content creator interested in protecting the market for his work. Similarly, for every factually innocent defendant who should not be made to choose between fighting the false charges in court or settling, there is likely a bona fide copyright infringer who knowingly and willingly broke the law and thus should be punished. The solution attempts to balance these competing interests by showing different ways in which the copyright troll can be hindered while still leaving the core of copyright enforcement intact. The solution encourages judges to inquire into the motives and practices of BitTorrent copyright plaintiffs, and emphasizes the discretion judges have over such cases. Part IV concludes that copyright protections should be encouraged in the digital age but that there is fine line between overzealous copyright defenders and copyright trolls.

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copyright infringement allegations through extortion. Copyright trolls represent holders of copyrights on movies (mostly pornography).").

[38] Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. (forthcoming 2013) (manuscript at 6–7), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150716. Balganesh observes that "the troll's actions convert copyright law's previously *actionable but tolerated claims* into *actionable and enforced* ones, disrupting the implicit equilibrium." *Id.* at 6 (emphasis in original).

[39] *Id.* at 7.

II. THE BITTORRENT COPYRIGHT TROLL BUSINESS MODEL

Law firms that specialize in BitTorrent copyright litigation[40] are often referred to as "settlement factories" or "copyright trolls," and use a "payup or we'll getcha" method designed to induce alleged infringers to settle outside of court.[41] Once a defendant is identified, the plaintiff will offer to settle the matter outside of court for a relatively small fee (usually a few thousand dollars),[42] with the threat of litigation and its associated stress and expenses hanging over the defendant's head.[43] Many alleged infringers—even the factually innocent—settle the claim since fighting the allegation in court could result in legal bills of tens of thousands of dollars—many times greater than the settlement demand.[44] Although settlement rates are usually a closely-guarded secret, one copyright troll "bragged" that forty-five percent of alleged infringers accepted offers of settlement,[45] while another estimated he has made "[m]ore than a few million [dollars]" settling these suits.[46]

Copyright trolls generally follow the same procedural pattern in their efforts to elicit settlements from alleged infringers. The first

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[40] For a list of major players in the area, *see generally*, *Discussions*, FIGHT COPYRIGHT TROLLS, http://fightcopyrighttrolls.com/discussions/ (last visited Mar. 17, 2013). Prenda Law is one of the most notorious copyright trolls. For example, in early 2012, Prenda Law listed 118 cases in response to a court's request for "[a] list of the BitTorrent copyright infringement cases involving multiple joined John Doe Defendants . . . ." *See* Ex. A to Declaration of Charles E. Piehl in Response to Minute Order at 4–6, AF Holdings LLC v. Does 1–135, No. 5:11-cv-03336 (N.D. Cal. Feb. 24, 2012), ECF No. 43. Prenda's operations, however, were dealt a significant blow in early May 2013 and their trolling days appear to be numbered. *See* Joe Mullin, *Prenda Hammered: Judge Sends Porn-Trolling Lawyers to Criminal Investigators*, ARSTECHNICA (May 6, 2013), http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal-investigators/. However, despite the likely absence of one of BitTorrent copyright trolling's most notorious law firms, the underlying law remains the same—and the problem of BitTorrent copyright trolling remains unsolved.

[41] *See, e.g.*, Anderson, *supra* note 34.

[42] In one example, the plaintiff sought $3,400 from the alleged illegal downloader. *See* Offer Letter, *supra* note 4, at 2.

[43] *Id.*

[44] *See, e.g.*, Anderson, *supra* note 34.

[45] Mick Haig Prods., e.K. v. John Does 1–670, No. 3:10-cv-1900-N, 2011 WL 5104095, at *5 n.7 (N.D. Tex. Sept. 9, 2011). This attorney, however, received $10,000 in sanctions for his "staggering chutzpah" relating to his issuing of 670 unauthorized subpoenas. *See* Mick Haig Prods. E.K. v. Does 1–670, 687 F.3d 649 (5th Cir. 2012).

[46] 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/2/.

step is to find a copyright holder willing to sue infringers for illegal use of a copyrighted work.[47] Proponents of the "settlement letter factory" business model often base lawsuits on embarassing films, such as pornographic movies, in order to maximize the lawsuits' shock value and effectiveness.[48] The logic is clear: the more embarrassing the film, the more willing the alleged infringer will be to accept the settlement offer, so as to avoid being associated with such questionable content.[49]

After identifying which copyrighted work or works will serve as the basis for the lawsuit, the second step is to find alleged infringers to name in the lawsuit.[50] To expedite the process, copyright holders utilize companies that specialize in monitoring and tracking P2P networks and illegal downloads.[51] These companies, like GuardaLey,[52] use proprietary software to identify defendants.[53] This software will allegedly identify and record the Internet Protocol (IP) addresses[54] of the suspected infringers and other pertinent data, such

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[47] Some copyright trolls will obtain part of the copyright via assignment and file as plaintiff. This act of "unbundling" is explicitly recognized by Congress and the Supreme Court. *See* New York Times Co., Inc. v. Tasini, 533 U.S. 483, 484 (2001) ("The 1976 [Copyright] Act recast the copyright as a bundle of discrete 'exclusive rights,' § 106, each of which 'may be transferred . . . and owned separately,' § 201(d)(2)."). This was the strategy employed by Righthaven, LLC, although it partially led to their demise because their assignments did not follow the precise letter of the law. *See* Balganesh, *supra* note 38, at 18–20. To avoid potential complications, then, an easy workaround is to avoid assignment of the copyright and have the copyright owner file as plaintiff, presumably splitting any profits after the fact. Balganesh thus appears mistaken when he writes that "copyright trolling depends entirely on the transferability of actionable copyright claims." Balganesh, *supra* note 38, at 29.

[48] *See, e.g.*, Complaint at 7, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 19, 2012), ECF No. 1 (listing the copyrighted motion picture *Tiffany Sex With a Supermodel* as the basis for the lawsuit).

[49] Electronic Frontier Foundation Intellectual Property Director Corynne McSherry has said that the "added pressure of embarrassment associated with pornography . . . can convince those ensnared in the suits to quickly pay what's demanded of them, whether or not they have legitimate defenses. That's why it's so important to make sure the process is fair." Nate Anderson, *Lawyer Can't Handle Opposition, Gives Up on P2P Porn Lawsuit*, ARS TECHNICA (Feb. 1, 2011), http://arstechnica.com/tech-policy/2011/02/lawyers-cant-handle-opposition-give-up-on-p2p-porn-lawsuit/.

[50] Anderson, *supra* note 34.

[51] *Id.*

[52] *See* GUARDALEY, http://www.guardaley.com (last visited Jan. 17, 2012) ("GuardaLey uses the most innovative techniques in order to protect your investments and products including: pictures, video games, software, music and movies.").

[53] *Id.*

[54] An IP address is a unique identifying number which every network-connected

as the date and time that the alleged infringement took place.[55]

The third step is to seek joinder of the anonymous defendants via Federal Rule of Civil Procedure 20(a)(2).[56] Joining the defendants together into a single action allows the plaintiff to seek damages from all alleged infringers simultaneously, which in turn allows the copyright troll to maximize return on investment. The filing fee in federal court for a copyright claim is $350 per action.[57] Thus, plaintiffs can realize astronomical cost savings when courts allow joinder. For example, one consolidated order granting joinder of 5,583 unnamed defendants in three separate cases saved the plaintiff nearly $2 *million* in filing fees.[58]

The fourth step is to learn the true identities of the anonymous "John Doe" defendants.[59] This is perhaps the most crucial step—without this identifying information, the settlement letters cannot be sent and the copyright troll business model would simply fall apart.[60]

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device must have in order to communicate with other devices on that network. *What is an IP Address?*, HOW STUFF WORKS, http://computer.howstuffworks.com/internet/basics/question549.htm (last visited Mar. 6, 2012). One commentator has likened it to a social security number. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, UCLA L. REV. 1701, 1739 (2010). For Internet users using a computer to connect to the Internet, their Internet Service Provider (ISP) will provide them with an IP address. *Id.* It is possible to use "geolocation" services to find a largely accurate answer to where an IP address is based, such as a particular city, but an IP address alone is not enough to show that the account holder acted illegally. *See* Order & Report & Recommendation at 6–8, *In re* BitTorrent Adult Film Copyright Infringement Cases, No. 2:11-cv-03995-DRH-GRB (E.D.N.Y. May 1, 2012), ECF No. 39 (outlining reasons why an IP address alone is insufficient to identify the infringer).

[55] *See, e.g.*, Ex. A to Complaint at 17, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 19, 2012), ECF No. 1 (listing IP address, date and time of alleged infringement, city, state, ISP, and network type).

[56] Examples of seeking joinder in these types of cases are too numerous to list here, but see, e.g., Complaint at 7, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 19, 2012), ECF No. 1 (justifying the joinder of the twenty-two defendants pursuant to FED. R. CIV. P. 20(a)(2)).

[57] *See, e.g.*, *Fee Schedule – Effective April, 17, 2012*, U.S. DISTRICT CT. FOR THE DISTRICT OF COLO., http://www.cod.uscourts.gov/Fees.aspx (last visited Nov. 8, 2012); *see also* the docket text associated with Complaint, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 19, 2012), ECF No. 1 (noting the "Filing fee $ 350 receipt number PPE061599").

[58] *Cf.* Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332 (D.D.C. Mar. 22, 2011).

[59] This Comment uses both "John Doe" and "Doe" interchangeably in reference to the anonymous defendants sued in these lawsuits.

[60] *See, e.g.*, Memorandum of Law in Support of Plaintiff's Motion for Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference at 3, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 24, 2012), ECF No. 4 ("Without this [identifying] information, Plaintiff cannot serve the Defendants nor

As the provider of the IP address, Internet Service Providers[61] (ISPs) are the only source of this identifying information.[62] An ISP can match a particular IP address with the name, address, telephone number, email address, and Media Access Control (MAC) address[63] of the subscriber assigned to it when the alleged illegal downloading took place. ISPs, however, often hesitate to comply with copyright trolls because of the "undue burden" of compliance, generally because of time and financial costs, as well as privacy concerns.[64] Thus, in response to such hesitation, copyright trolls generally file an *ex parte* motion for expedited discovery in conjunction with a request to subpoena the ISPs to compel them to turn over the identifying information.[65] Courts generally grant these expedited discovery

pursue this lawsuit to protect its valuable copyrights [*Tiffany Sex With a Supermodel*]."). Because this stage is so crucial for the copyright troll, some have argued that at this stage the court should *sua sponte* determine whether joinder and personal jurisdiction are appropriate. LaFond, *supra* note 37, at 54.

[61] An ISP is "any organization through which you can arrange Internet access." *What is an Internet service provider?*, IND. U.: U. INFO. TECH. SERVS. (May 17, 2011), http://kb.iu.edu/data/ahoz.html. They are typically commercial in nature and some examples include Time Warner, Comcast, and Verizon. *Id.*

[62] *See, e.g.*, Raw Films, Ltd. v. Does 1–11, No. 12-cv-368–WQH (NLS), 2012 WL 684763, at *2 (S.D. Cal. Mar. 2, 2012) ("Because the transactions in question occurred entirely online, the defendants have been elusive and the IP addresses and ISP are the only available identifying information. Without the requested discovery [compelling the ISP to identify the users behind the IP addresses], there are *no other measures Plaintiff can take to identify the personal information* for the Doe defendants.") (emphasis added).

[63] MAC addresses "allow computers to uniquely identify themselves on a network . . . . The MAC address generally remains fixed and follows the network device, but the IP address changes as the network device moves from one network to another." Bradley Mitchell, *The MAC Address — An Introduction to MAC Addressing*, ABOUT.COM, http://compnetworking.about.com/od/networkprotocolsip/l/aa062202a.htm (last visited Oct. 11, 2011). Thus, the MAC address identifies the specific computer that was allegedly used in the infringing activity.

[64] *See, e.g.*, Reply in Support of Motion to Quash Subpoenas Issued to Non-Party Internet Service Providers Bright House Networks, LLC et al. at 2, AF Holdings LLC v. Does 1–1,058, No. 1:12-cv-00048-BAH (D.D.C. Mar. 16, 2012), ECF No. 26; Memorandum of Points and Authorities in Support of Third Party Time Warner Cable Inc.'s Motion to Quash or Modify Subpoena at 9–10, Achte/Neunte Boll Kino Beteiligungs GBMH & Co. KG v. Does 1–2,094, No. 10-453, 2010 WL 2553275 (D.D.C. May 13, 2010).

[65] *See, e.g.*, Memorandum of Law in Support of Plaintiff's Motion for Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference at 3, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Apr. 24, 2012), ECF No. 4 ("Plaintiff seeks leave of Court to serve a Rule 45 subpoena on the ISPs and any related intermediary ISPs. Any such subpoena will demand the true name, address, telephone number, e-mail address and [MAC] address of the Defendant to whom the ISP issued an IP address.").

motions,[66] especially because ISPs retain logs of the activity of IP addresses for only a limited time.[67]

Once the true identities of the Doe defendants are known, the fifth and final step is to elicit settlements from the alleged infringers.[68] As described above, these settlement offers will give the defendants the opportunity to settle the case for a relatively inexpensive fee.[69] At the same time, the offer will remind the defendant of the risks associated with appearing in court, including time, money, and reputation costs.[70] If the alleged infringer agrees to the settlement payment, the plaintiff will voluntarily dismiss that particular Doe from the lawsuit with prejudice.[71]

Very few of these actions, if any, reach the trial stage.[72] This is

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[66] *See, e.g.*, AF Holdings LLC v. Does 1–96, No. C-11-03335, 2011 WL 4502413, at *1 (N.D. Cal. Sept. 27, 2011) ("When a defendant's identify is not known at the time a complaint is filed, courts often grant plaintiffs early discovery to determine the doe defendants' identities.").

[67] *See, e.g.*, *Data Retention*, ELECTRONIC PRIVACY INFO. CENTER, http://epic.org/privacy/intl/data_retention.html (last visited Feb. 11, 2012).

[68] *See* Offer Letter, *supra* note 4; Nate Anderson, *Settle Up: Voicemails Show P2P Porn Law Firms in Action*, ARS TECHNICA (Apr. 20, 2011), http://arstechnica.com/tech-policy/2011/04/settle-up-voicemails-show-p2p-porn-law-firms-in-action/.

[69] *See* sources cited *supra* note 68.

[70] *See* sources cited *supra* note 68.

[71] *See, e.g.*, Memorandum RE: Outstanding Motions, Expedited Discovery, and Bellwether Trial at 6–7, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Oct. 3, 2012), ECF No. 29 [hereinafter Bellwether Trial Memo] ("Plaintiff's counsel candidly advised the Court that . . . [i]f the John Doe defendant who receives the letter agrees to pay, Plaintiff dismisses the complaint against that defendant with prejudice and without any further court proceedings, thus avoiding the public disclosure of the defendant's identity."). *Cf.* Plaintiff's Notice of Settlement and Voluntary Dismissal With Prejudice of John Doe 6 Only at 1, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. July 18, 2012), ECF No. 16 ("Plaintiff has settled this matter with John Doe 6 ('Defendant'). Pursuant to the settlement agreement's terms, Plaintiff hereby voluntary [sic] dismisses Defendant from this action *with prejudice*.") (emphasis in original).

[72] Despite filing claims against over 15,000 alleged illegal downloaders, Prenda Law admitted that "no defendants have been served" in their BitTorrent actions. Ex. A to Declaration of Charles E. Piehl in Response to Minute Order at 4–6, AF Holdings LLC v. Does 1–135, No. 5:11-cv-03336 (N.D. Cal. Feb. 24, 2012), ECF No. 43. Additionally, Patrick Collins, Inc. "has sued at least 11,570 John Doe Defendants in litigation around the country without ever serving a single defendant." Order on Pending Motions for Ex Parte Discovery and Order to Show Cause at 5, Patrick Collins, Inc. v. Does 1–79, No. 1:12-cv-10532-GAO (D. Mass. Nov. 7, 2012), ECF No. 51. *See generally* Brief of Amici Curiae Electronic Frontier Foundation, American Civil Liberties Union Foundation, and American Civil Liberties Union of the Nation's Capital in Support of Motion to Quash Subpoenas Issued to Non-Party Internet Service Providers at 2, AF Holdings LLC v. Does 1–1058, No. 1:12-cv-00048 (BAH) (D.D.C. Mar. 16, 2012), ECF No. 24 [hereinafter Brief of Amici]; Amicus Curiae

not surprising since trial is not the true goal of this litigation.[73] Instead, the goal is to obtain the true identities of the anonymous IP addresses in the least expensive way possible in order to maximize the copyright troll's return on investment in the settlement letters.[74]

III. A PROPOSED SOLUTION

The difficult starting point for analyzing BitTorrent copyright litigation is acknowledging the difference between copyright trolls and more "legitimate" copyright holders.[75] Additionally, the levels of culpability among a given pool of alleged illegal downloaders most likely varies widely: for every "Adrienne Neal" who is factually innocent and has never even heard of the copyrighted material in question, let alone intentionally downloaded it, there is presumably a sophisticated pirate who is factually guilty and deserves punishment.[76]

Electronic Frontier Foundation's Brief Requesting Reconsideration and Stay of Dec. 21 Order at 1, Hard Drive Productions, Inc. v. Does 1–1495, No. 1:11-cv-01741 (D.D.C. Jan. 29, 2012).

[73] Bellwether Trial Memo, *supra* note 71, at 6–7 ("Plaintiff's counsel candidly advised the Court that the Plaintiff's strategy is, after initiating the lawsuits, to seek leave to serve third-party subpoenas on the ISPs to obtain identification information for the IP addresses specified in Exhibit A to the Complaints. When Plaintiff receives this information from the ISPs, it contacts the subscribers associated with the IP addresses, usually by letter, advising them of the lawsuits and offering them the opportunity to settle by payment of a monetary sum.").

[74] *See id.*; Brief of Amici, *supra* note 72, at 2.

[75] Although the line is admittedly blurry, copyright trolls might be characterized as plaintiffs who leverage the significant damages available to copyright holders to extract quick settlements, whereas a legitimate copyright plaintiff could be a content creator who is genuinely interested in protecting the inherent or market value of his or her work. Balganesh gets to the heart of the matter by analyzing incentive structures:

> The traditional copyright owner's decision whether to enforce an actionable claim or not is thought to derive primarily (though not exclusively) from copyright's fundamental purposes as an inducement for creativity. Commencing an action for infringement is presumed to be a viable option principally when the harm from such infringement interferes in some way with (or is likely to interfere with) the market for creative works. A copyright owner's decision to sue a copier thus represents the belief that the copying in question is harming the owner's ability to exploit the market for the copyrighted work. . . . What makes the troll's disruption of the under-enforcement equilibrium problematic then is the fact that its reasons for doing so bear no relationship whatsoever to the market for creative works . . . . Its incentives to sue for copyright infringement emanate from motivations that diverge rather fundamentally from the social reasons for the very existence of the copyright system.

Balganesh, *supra* note 38, at 6–7 (internal citations omitted).

[76] To further complicate the matter, it is likely that any sophisticated pirate who

Courts are thus divided on how to best preside over these types of cases.[77] The disparate parties and stakeholders involved make it difficult to precisely formulate a "silver bullet" solution.[78] Instead, the best way to eliminate copyright trolls is through a combination of safeguards that judges can use at their discretion after applying a "smell test."[79] Because the copyright trolls in these lawsuits "have in theory violated none of the law's formal rules and principles,"[80] a "smell test" is necessary to determine the true motives of the plaintiff. Although courts cannot ignore an allegation of copyright infringement, a judge can use his discretion over matters such as joinder, right to anonymity, and statutory damages to rein in copyright trolls if the judge has reason to believe that the plaintiff is abusing the rules of procedure in order to obtain names and addresses to send threatening settlement offers.

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is most deserving of punishment uses a Virtual Private Network (VPN) that prevents them from being caught. A VPN "is a private network that uses a public network (usually the Internet) to connect remote sites or users together. . . . [A]nyone intercepting the encrypted data can't read it." Jeff Tyson & Stephanie Crawford, *How VPNs Work*, HOW STUFF WORKS (Apr. 14, 2011), http://www.howstuffworks.com /vpn.htm; *see also* Alan Henry, *Why You Should Start Using a VPN (and How to Choose the Best One for Your Needs)*, LIFEHACKER (Sept. 5, 2012, 8:00 AM), http://lifehacker.com/5940565/why-you-should-start-using-a-vpn-and-how-to-choose-the-best-one-for-your-needs ("VPNs are the only way to stay safe when using something like BitTorrent—everything else is just a false sense of security. Better safe than trying to defend yourself in court or paying a massive fine for something you may or may not have even done, right?").

[77] *See* cases discussed *infra*. As of this writing, no case involving John Doe defendants accused of violating copyright by using BitTorrent has been decided on the merits at an appellate level—which is not surprising since no case has been fully litigated. One case of particular interest, however, is Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. filed Apr. 19, 2012). In that case, Judge Baylson has taken the unusual step of ordering a bellwether trial, currently scheduled to begin after this Comment has gone to print. *See* Bellwether Trial Memo, *supra* note 71; Revised Scheduling Order, Malibu Media, LLC v. John Does 1–22, No. 5:12-cv-02088-MMB (E.D. Pa. Mar. 13, 2013), ECF No. 86. "In a bellwether trial procedure, a random sample of cases large enough to yield reliable results is tried to a jury. A judge, jury, or participating lawyers use the resulting verdicts as a basis for resolving the remaining cases." Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008).

[78] A "silver bullet" is "a quick solution to a difficult problem." *Silver Bullet*, DICTIONARY.COM, http://dictionary.reference.com/browse/silver+bullet (last visited Feb. 11, 2013).

[79] As used in this context, the "smell test" involves an ad hoc evaluation of the plaintiff that takes into consideration factors such as the underlying copyrighted work and the plaintiff's willingness to litigate the matter through trial.

[80] Balganesh, *supra* note 38, at 7.

A. *Joinder Must at Least be Limited to Only Those Who Reside in the District in Which the Lawsuit is Pending*

As described above, copyright trolls will usually seek to join numerous anonymous Doe defendants together into a single lawsuit under Rule 20.[81] This part will (1) give a refresher on the legal concepts implicated, (2) briefly trace the evolution of file-sharing and give an overview of BitTorrent technology, and (3) then argue that wholesale joinder of anonymous IP addresses is inappropriate.

1. Joinder and Personal Jurisdiction

A 2001 amendment to the Federal Rules of Civil Procedure made those rules unequivocally applicable to copyright litigation.[82] Rule 20(a)(2) allows a plaintiff to join multiple defendants in one action if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."[83] Under Rule 20(b), however, joinder is not mandatory.[84] Even if the Rule 20(a)(2) conditions are met, the court may order separate trials to protect any party against "embarrassment, delay, expense, or other prejudice."[85] Moreover, permissive joinder under Rule 20 must "comport with the principles of fundamental fairness."[86] The court is permitted to sever improperly joined parties at any time, as long as the severance is on just terms and the entire action is not dismissed outright.[87] A decision to sever is made on the court's own motion or on a party's motion.[88]

When considering joinder in the context of BitTorrent

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[81] *See supra* Part II.

[82] *See* FED. R. CIV. P. 81 advisory committee's note ("Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.").

[83] FED. R. CIV. P. 20(a)(2).

[84] FED. R. CIV. P. 20(b).

[85] *Id.*

[86] Coleman v. Quaker Oats, 232 F.3d 1271, 1296 (9th Cir. 2000) (internal citation omitted). Although the Supreme Court has held that "joinder of claims, parties and remedies is strongly encouraged," joinder must remain "consistent with fairness to the parties." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

[87] FED. R. CIV. P. 21.

[88] *Id.*

copyright litigation, it is important to keep the concept of personal jurisdiction in mind. Without personal jurisdiction, a court lacks the power to impose its decisions on a particular party.[89] Although modern personal jusrisdiction jurisprudence is not straightforward,[90] generally, in order for a court to have personal jurisdiction over a defendant, the defendant must: consent to or waive personal jurisdiction;[91] be present or domiciled in the jurisdiction;[92] have certain minimum contacts with the jurisdiction;[93] or have a reasonable expectation of facing suit in the jurisdiction.[94] Personal jurisdiction jurisprudence is grounded largely in the U.S. Constitution via the Due Process Clause and much of the analysis focuses on whether subjecting the defendant to suit in a particular jurisdiction would offend "traditional notions of fair play and substantial justice."[95] Although courts generally do not have the authority to dismiss a case for lack of personal jurisdiction *sua sponte*,[96] such an analysis is indeed proper when a defendant does not appear and the court is determining whether to award a default judgment.[97]

2. The Evolution of File-Sharing and an Explanation of the BitTorrent Protocol[98]

The underlying file-sharing technology that many use to illegally download copyrighted works[99] has become more advanced over the years—it is now easier for users to download copyrighted works, while

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[89] LARRY R. TEPLY, RALPH U. WHITTEN & DENIS F. MCLAUGHLIN, CIVIL PROCEDURE: CASES, TEXT, NOTES, AND PROBLEMS 28 (2d ed. 2008).

[90] Bryce A. Lenox, *Personal Jurisdiction in Cyberspace: Teaching the Stream of Commerce Dog New Tricks:* CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)*, 22 U. DAYTON L. REV. 331, 333 (1997) ("The path of personal jurisdiction over the last century has been a rocky one . . . .").

[91] FED. R. CIV. P. 12(h)(1).

[92] Milliken v. Meyer, 311 U.S. 457, 463–64 (1940).

[93] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[94] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[95] *Milliken*, 311 U.S. at 463.

[96] Pilgrim Badge & Label Corp. v. Barrios, 857 F.2d 1, 3 (1st Cir. 1988) ("[T]he caselaw appears uniform in concluding that a district court has no authority, *sua sponte*, to dismiss for lack of personal jurisdiction.").

[97] *See, e.g.*, Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp., 619 F.3d 207, 214 (2d Cir. 2010); Williams v. Life Sav. & Loan, 802 F.2d 1200, 1203 (10th Cir. 1986).

[98] For a video explanation of BitTorrent, see David King, *BitTorrent, Explained*, YOUTUBE, http://www.youtube.com/watch?v=NYTvTPrgSiM (uploaded Oct. 12, 2010).

[99] File-sharing is not the only way to illegally obtain copyrighted works on the Internet, but the legal issue discussed in this Comment is exclusive to it.

it is harder to simply shut down an illegal service in the hopes of stemming the tide of digital piracy.[100]

Since the early 1980s, the "traditional" client-server model has disseminated data across networks.[101] In a traditional file-transfer process, a file is stored on a server and the server is stored on a network, such as the Internet.[102] Other computers connected to that network can send messages to the host server, letting it know that it would like to copy the stored file.[103] When a connection is established between the host server and the requesting computer, the requesting computer becomes a "client" and copies the file from the host server.[104] The traditional model is completely one-sided in the sense that the client never shares any of its resources, such as processing power or hard-drive space.[105] Even though an individual client may only consume a small amount of bandwidth[106] in this traditional scenario, the host server can consume extraordinary amounts of bandwidth if many clients attempt to obtain the file from the host.[107] Therefore, in order to reduce the cost of bandwidth consumption, host servers will often put a cap on the number of clients that can simultaneously obtain the file, in addition to putting a cap on how fast each client can download the file.[108] A common example of the traditional model is a website such as http://www.espn.com, which resides on the Internet and stores all of the associated files (photos, audio, video, etc.) on its server.[109] When the client requests a certain page of the website by clicking on a link, for example, the server responds by sending the page and all associated content, such as

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[100] *See, e.g.*, Ernesto, *Anonymous, Decentralized and Uncensored File-Sharing is Booming*, TORRENTFREAK (Mar. 3, 2012), http://torrentfreak.com/anonymous-decentralized-and-uncensored-file-sharing-is-booming-120302/.

[101] Ankur R. Patel, *BitTorrent Beware: Legitimizing BitTorrent Against Secondary Copyright Liability*, 10 APPALACHIAN J.L. 117, 118 (2010–2011) (citing WEIJIA JIA & WANLEI ZHOU, DISTRIBUTED NETWORK SYSTEMS: FROM CONCEPTS TO IMPLEMENTATIONS 6 (2004)).

[102] Michael Brown, *White Paper: How BitTorrent Works*, MAXIMUMPC (July 10, 2009, 7:00 AM), http://www.maximumpc.com/article/features/white_paper_bittorrent.

[103] *Id.*

[104] *Id.*

[105] Patel, *supra* note 101, at 119.

[106] "Bandwidth is a term used to describe how much information can be transmitted over a connection." *What is Bandwidth?*, WISEGEEK, http://www.wisegeek.com/what-is-bandwidth.htm (last visited Mar. 6, 2012). It is usually expressed as "bits per second" and so the greater the bandwidth, the greater the data transfer. *Id.*

[107] Brown, *supra* note 102.

[108] *Id.*

[109] Patel, *supra* note 101, at 119.

photos or videos.[110]

P2P sharing eliminates the need for a central server to host files.[111] Instead, the files are stored on the individual users' computers; when one downloads a file on a P2P network, he or she downloads the file from another user of the P2P network instead of downloading the file from a central location.[112] Every member, or "peer," acts as both a client (by requesting data from other peers) and as a server (by contributing a portion of their computing resources to the network as a whole).[113] Napster is one of the earliest and most influential examples of P2P technology.[114] In a typical Napster transaction, Peer A would request a file from Peer B, who stored the file on his own computer.[115] Peer B would respond by sending the file; Peer A would assist by contributing a portion of its resources to the transaction.[116] Napster, however, suffered from a limitation because it used a central server to keep track of connected computers and the files available on them.[117] Napster's central server was its downfall—a court construed the central server as evidence that Napster knowingly facilitated copyright infringement.[118]

BitTorrent is a protocol[119] that does not rely on a central server to establish download connections for users—a distinct advantage over earlier P2P software such as Napster.[120] Instead, it decentralizes data among the users.[121] This decentralized approach makes it virtually impossible to shut down BitTorrent, since no central server maintains a comprehensive index of active users.[122] Furthermore,

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[110] *Id.*

[111] Jeff Tyson, *How the Old Napster Worked*, HOW STUFF WORKS, http://www.howstuffworks.com/napster.htm (last visited Mar. 6, 2012).

[112] *Id.*

[113] Patel, *supra* note 101, at 119.

[114] *See generally* HILLARY J. MORGAN, NAPSTER'S INFLUENCE ON INTERNET COPYRIGHT LAW (2002); Symposium, *Beyond Napster: Debating the Future of Copyright on the Internet*, 50 AM. U. L. REV. 355 (2001)..

[115] Tyson, *supra* note 111.

[116] *Id.*

[117] Brown, *supra* note 102.

[118] A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part sub nom.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[119] BitTorrent is a "set of rules" that allows for this certain type of file-sharing. Carmen Carmack, *How BitTorrent Works*, HOW STUFF WORKS, http://computer.howstuffworks.com/bittorrent.htm (last visited Mar. 11, 2013).

[120] Brown, *supra* note 102.

[121] *Id.*

[122] *Id.*

BitTorrent overcomes the speed limitations associated with the traditional client-server method; it breaks down a larger file into smaller component pieces, which each user, or peer, can then share.[123] Once a user has downloaded all of the components to his computer, they are reassembled back into the original file.[124] Practically speaking, the more popular a file, the faster it will download because additional "peers" increase the ability to download all the component pieces.[125] This ease of use and potentially increased download speed has made BitTorrent an attractive option for those seeking to download copyrighted works. Even though there are legal uses for BitTorrent software,[126] a Princeton student's 2010 study found that eighty-five to ninety-nine percent of files distributed by BitTorrent infringed copyright.[127] As a result, some in the content industry believe that BitTorrent is to stealing movies what "bolt-cutters are to stealing bicycles."[128]

BitTorrent requires that one person act as an initial "seed" and make the entire file available to the network.[129] In order to share a file via BitTorrent, the person offering the initial file—the "seeder"—must first create a ".torrent" file,[130] which contains information on the

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[123] *Id.*

[124] *Id.* ("Each peer distributing a file breaks it into chunks ranging from 64KB to 4MB in size and creates a checksum for each chunk using a hashing algorithm. When another peer receives these chunks, it matches its checksum to the checksum recorded in the torrent file to verify its integrity.").

[125] Brown, *supra* note 102. Furthermore, generally a peer "who contributes quickly tends to receive quickly," thus incentivizing users to devote more bandwidth to the exchange. Michael Piatek et al., *Building BitTyrant, a (More) Strategic BitTorrent Client*, 32 LOGIN 8, 10 (2007), *available at* http://www.cs.washington.edu/homes/arvind/papers/login-bt.pdf.

[126] *See, e.g.*, Janko Roettgers, *10 More Sites for Free and Legal Torrents*, GIGAOM (Feb. 5, 2010, 9:00 AM), http://gigaom.com/video/ten-more-sites-for-free-and-legal-torrents/.

[127] ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 55 (2011).

[128] *Targeting Websites Dedicated To Stealing American Intellectual Property: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Scott Turow, President, Authors Guild), *available at* http://judiciary.senate.gov/pdf/11-2-16%20Turow%20Testimony.pdf.

[129] Brown, *supra* note 102.

[130] The .torrent file may become a thing of the past with the dissemination of "magnet links" on index sites such as The Pirate Bay. This is designed to make such index sites less vulnerable to lawsuits. *See, e.g.*, Ernesto, *The Pirate Bay Says Goodbye to (Most) Torrents on February 29*, TORRENTFREAK (Feb. 13, 2012), http://torrentfreak.com/the-pirate-bay-says-goodbye-to-most-torrents-on-february-29-120213/. The analysis, however, does not change for the end-user named in BitTorrent lawsuits, so the switch from .torrent files to magnet links is not of huge concern for this Comment.

"tracker"[131] and metadata[132] about the underlying file, such as the size of the component pieces.[133] Someone wishing to download the underlying file (known as a "leecher") will browse an index site, such as The Pirate Bay,[134] and locate the desired file.[135] Once the .torrent file is downloaded, the leecher opens the .torrent file with a BitTorrent client,[136] which establishes a connection between the leecher and the tracker.[137] Once the connection to the tracker is established, the tracker facilitates and enables the downloading of the underlying file, directing the leecher to the location of the component pieces.[138] As other users (peers) begin downloading the file from the initial seed, they simultaneously begin uploading the pieces they have already obtained or are in the process of obtaining from other peers.[139] Accordingly, once a peer has fully downloaded the entire file, he also becomes a seed.[140] All of the peers, including the initial seed, actively engaged in sharing a particular file are collectively known as a "swarm."[141] It is not guaranteed, however, that every member of a BitTorrent swarm will interact with every other

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[131] "A Bit Torrent tracker centrally coordinates the P2P transfer of files among users . . . . Specifically, the tracker identifies the network location of each client . . . [and] also tracks which fragment(s) of that file each client possesses, to assist in efficient data sharing between clients." Bradley Mitchell, *What Is a BitTorrent Tracker?*, ABOUT.COM, http://compnetworking.about.com/od/bittorrent/f/bttracker.htm (last visited Nov. 13, 2012).

[132] "Simply put, metadata is data about data. It is descriptive information about a particular data set, object, or resource, including how it is formatted, and when and by whom it was collected." *What is Metadata?*, IND. UNIV.: UNIV. INFO. TECH. SERVICES (Oct. 22, 2010), http://kb.iu.edu/data/aopm.html.

[133] Brown, *supra* note 102.

[134] The Pirate Bay is "the worlds [sic] largest bittorrent tracker." *About*, THE PIRATE BAY, http://thepiratebay.se/about (last visited Mar. 17, 2013). According to some industry observers, The Pirate Bay had twenty-five million users and represented a tenth of all Internet traffic in the fall of 2008. LEVINE, *supra* note 127, at 203.

[135] Searching an index site for .torrent files instead of directly searching other users' computers for files to download (as was the case with Napster) provides an extra layer of anonymity for BitTorrent users. WALLACE WANG, STEAL THIS COMPUTER BOOK 4.0: WHAT THEY WON'T TELL YOU ABOUT THE INTERNET 79 (4th ed., 2006).

[136] A BitTorrent client is software that a user will use to facilitate the downloading of files from BitTorrent. For an overview of different clients see Ernesto, *BitTorrent Client Comparison*, TORRENTFREAK (Apr. 22, 2006), http://torrentfreak.com/bittorrent-client-comparison/.

[137] Brown, *supra* note 102.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

member within that swarm.[142] The intersection of this complicated technology and antiquted law is where the analysis gets murky.

3. Traditional Notions of Fair Play and Substantial Justice Require that Joinder be Limited

Judicial opinion is mixed on whether joinder of anonymous defendants in a BitTorrent copyright action is appropriate at the discovery stage,[143] and judges are increasingly recognizing that this is a question with no clear answer.[144] At the very least, it appears that judges are growing more skeptical of joining thousands of anonymous defendants together for discovery purposes,[145] which is in line with the most just reading of the underlying law.

a. Rule 20(a)(2) may be Satisfied, But Prejudice Exists Under 20(b)

One downside of allowing wholesale joinder based merely on a plaintiff's allegations that all defendants engaged in the same BitTorrent swarm is that it permits the most troubling aspect of the "settlement letter factory" business model. This "worst-case scenario" occurs when a factually innocent defendant, from the opposite side of the country and without the means or knowledge to defend herself, receives a settlement offer in the mail. This factually innocent defendant is forced to choose whether to incur significant

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[142] LaFond, *supra* note 37, at 55 ("An individual device cannot, however, connect to all peers in each swarm subset at the same time. Each peer is allowed to share with only a fixed number (usually four) of other peers at a given time.").

[143] This is something of an understatement, as some judges reach contrary conclusions even to their own prior decisions. *Compare* Order, K-Beech, Inc. v. John Does 1–36, No. 11-cv-5058 (E.D. Pa. Oct. 21, 2011), ECF No. 30 (Kelly, J.) (finding joinder improper), *and* Order, K-Beech, Inc. v. John Does 1–78, No. 11-cv-5060 (E.D. Pa. Oct. 3, 2011), ECF No. 13 (Schiller, J.) (same), *with* Malibu Media, LLC v. John Does 1–15, No. 12-cv-2077, 2012 WL 3089383 (E.D. Pa. July 30, 2012) (Kelly, J.) (finding joinder proper), *and* Order, Malibu Media, LLC v. John Does 1–15, No. 12-cv-2090 (E.D. Pa. June 18, 2012), ECF No. 13 (Schiller, J.) (same).

[144] Opinion & Order at 3, Patrick Collins, Inc. v. John Does 1–4, No. 1:12-cv-02962-HB (S.D.N.Y. Sept. 4, 2012), ECF No. 11 ("The split in the district courts regarding this [joinder] question is not likely to be resolved anytime soon."); Decision and Order at 11, Next Phase Distribution, Inc. v. Does 1–27, No. 1:12-cv-03755-VM (S.D.N.Y. July 31, 2012), ECF No. 10 ("The fact that multiple courts, in well-reasoned opinions, have arrived at opposing conclusions suggests that there is no clearly correct answer to this [joinder] question.").

[145] *Compare* Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332 (D.D.C. Mar. 22, 2011) (finding joinder of 5,583 anonymous defendants proper), *with* Opinion & Order, Patrick Collins, Inc. v. John Does 1–4, No. 1:12-cv-02962-HB (S.D.N.Y. Sept. 4, 2012), ECF No. 11 (finding joinder of four anonymous defendants improper).

expense to travel to and defend herself in the district in which the lawsuit is pending, or simply comply with the settlement demand to make the matter go away.[146]

On the other hand, there is merit to the claim that use of BitTorrent satisfies the requirements of Rule 20(a)(2) for permissive joinder. Rule 20(a)(2) allows a plaintiff to join multiple defendants in one action if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and (B) *any* question of law or fact common to all defendants will arise in the action."[147] Members of a particular BitTorrent swarm can be said to have participated in the "same transaction" or "occurrence" which will result in at least one "question of law or fact common to all defendants." If one views a BitTorrent swarm as a "transaction" or "occurrence," then the IP addresses comprising that swarm will be part of the "same transaction" or "occurrence." It can and should be presumed from a plaintiff's initial complaint that a BitTorrent user affirmatively chooses to enter a particular swarm in order to make use of other swarm members' computer resources to download a particular file, while at the same time offering up their own computer's resources to facilitate the downloads of other members of the swarm. Even though being part of the same swarm does not guarantee interaction between every swarm member,[148] plaintiffs should not be required—for purposes of Rule 20(a)(2) at the initial, nascent stage of litigation—to prove that each member of the swarm actually connected and swapped bits of data with each other. Defendants use BitTorrent not to swap a file with certain, specific others, but to get

[146] In one example of this "worst-case scenario," the plaintiff filed suit in the Northern District of California and tried joining over 5,000 anonymous defendants, even though he conceded that "only [one] out of [seven] defendants were likely using a California IP address when the alleged infringing behavior occurred, and only [one] out of [five] of these California IP addresses were likely from the Northern District of California." On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 504 (N.D. Cal. 2011). In another case, plaintiff conceded that approximately thirty percent of Doe defendants were likely misidentified (i.e., that the person associated with the IP address is not the one who committed the copyright infringement). Digital Sin, Inc. v. John Does 1–176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

[147] FED. R. CIV. P. 20(a)(2) (emphasis added).

[148] LaFond, *supra* note 37, at 55 ("An individual device cannot, however, connect to all peers in each swarm subset at the same time. Each peer is allowed to share with only a fixed number (usually four) of other peers at a given time."). Thus, even if a BitTorrent user affirmatively chooses to enter a swarm, he does not then choose which particular members of the swarm with whom he will connect.

the file as quickly as possible from whoever may be in the swarm.[149] The swarm is essentially the overarching infrastructure that allows the swarm members to connect to one another.[150] Therefore, evidence of entering a particular swarm should satisfy the "same transaction" or "occurrence" prong. Additionally, because the question of whether the defendant committed copyright infringement will be a question of law "common to all defendants," the second prong should be satisfied, since all that is required is that there be *any* common question of law or fact. Therefore, proof that each defendant entered a particular swarm should satisfy both elements of Rule 20(a)(2) for discovery purposes.

Where judges can flex their discretionary muscle, however, is under Rule 20(b). Rule 20(b) states that even if the Rule 20(a)(2) conditions are met, the court may order separate trials to protect against "embarrassment, delay, expense, or other prejudice . . . ."[151] Judge Baylson, presiding in the Eastern District of Pennsylvania, neatly summarized the various reasons courts have given for denying joinder of Doe defendants in BitTorrent cases:

> (i) the likelihood that each John Doe defendant will assert different defenses, thereby adding factual and legal questions that are not common among all defendants, (ii) many John Doe defendants are proceeding pro se, and will therefore incur significant expense serving papers and attending depositions of all other parties to the lawsuit, (iii) the likelihood that many of the John Doe defendants are not the actual individuals who illegally downloaded the motion pictures in question, (iv) the likelihood that joinder will facilitate coercive settlements among the John Doe defendants; and (v) plaintiff's avoidance of paying filing fees by pursuing mass actions.[152]

These are generally practical reasons for denying joinder, all of which fall within the discretionary "embarrassment, delay, expense, or other

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[149] *Cf.* Brown, *supra* note 102.

[150] *Id.*

[151] FED. R. CIV. P. 20(a)(2). Additionally, the court is permitted to sever improperly joined parties at any time, as long as the severance is on just terms and the entire action is not dismissed outright. FED. R. CIV. P. 21.

[152] Bellwether Trial Memo, *supra* note 71, at 15–16 (citations omitted). As noted above, I believe that the first ground for severing defendants—"each John Doe defendant will assert different defenses, thereby adding factual and legal questions that are not common among all defendants"—is an incorrect reading of FED. R. CIV. P. 20(a)(2)(B), which only requires "*any* question of law or fact common to all defendants . . . ." (emphasis added). Nevertheless, it is a valid reason for severing under Rule 20(b).

prejudice" bounds of Rule 20(b). As a result, judges are increasingly growing wary of copyright trolls trying to use the federal courts as a one-stop-shop to gain names and addresses to thereafter send threatening settlement offers.[153]

b. Because Personal Jurisdiction Can Only Be Based on Domicile, Joinder Must be Similarly Limited

At the very least, joinder should be limited to only those defendants who are domiciled in the judicial district in which the lawsuit is pending. This requirement is in line with 28 U.S.C. § 1400(a), the statute that governs venue for claims asserted under the Copyright Act, which states that "Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found."[154] More fundamentally, limiting joinder in this manner comports with the co-principles of personal jurisdiction and "traditional notions of fair play and substantial justice."[155] As mentioned in Part III.A.1.a *supra*, generally, in order for a court to have personal jurisdiction over a defendant, the defendant must: consent to or waive personal jurisdiction;[156] be physically present or domiciled in the jurisdiction;[157] have certain minimum contacts with the jurisdiction;[158] or have a reasonable expectation of facing suit in the jurisdiction.[159] Personal jurisdiction—for purposes of joinder and discovery—in BitTorrent copyright cases can only be based off of presence or domicile within the jurisdiction.

First, it is reasonable to assume that a Doe defendant would not consent to or waive personal jurisdiction in these circumstances. Second, "certain minimum contacts" and "reasonable expectation of

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[153] *See* IO Group, Inc. v. Does 1–435, No. 10-4382-SI, 2011 U.S. Dist. LEXIS 14123, at *9 (N.D. Cal. Feb. 3, 2011) ("Plaintiff's motive for seeking joinder, therefore, is to keep its own litigation costs down in hopes that defendants will accept a low initial settlement demand. However, filing one mass action in order to identify hundreds of Doe defendants through pre-service discovery and facilitate mass settlement, is not what the joinder rules were established for."); Order at 6, Malibu Media, LLC v. John Does 1–10, No. 2:12-cv-03623-RGK-SS (C.D. Cal. June 27, 2012), ECF No. 7 ("The federal courts are not cogs in plaintiff's copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.").

[154] 28 U.S.C. § 1400(a) (2012).

[155] Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[156] FED. R. CIV. P. 12(h)(1).

[157] *Milliken*, 311 U.S. at 463–64.

[158] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[159] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

facing suit in the jurisdiction" should not be deemed satisfied based solely on a defendant's BitTorrent interaction with another defendant in a particular jurisdiction. A hypothetical best explains this point. Assume, for example, that a plaintiff files a BitTorrent copyright suit in the District of New Jersey, alleging that he observed two defendants in a particular BitTorent swarm illegally downloading his client's copyrighted film. Based on the IP addresses, the plaintiff knows that Doe CA is located in California while Doe NJ is from New Jersey.[160] The plaintiff argues that New Jersey has personal jurisdiction over Doe CA because Doe CA swapped bits of data with Doe NJ while in the swarm, such that Doe CA had minimum contacts with New Jersey or reasonably expected to face suit there.

This minimum contacts argument is particularly belied by *Hanson v. Denckla* in which the Court held that in addition to minimum contacts, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[161] Entering a BitTorrent swarm from a computer in California and then unintentionally being connected to a swarm member in New Jersey can hardly be characterized as personal availment to the extent that the California resident is "invoking the benefits and protections" of New Jersey laws. It should not be presumed for discovery and joinder purposes that a defendant specifically directed BitTorrent activity to a particular jurisdiction, i.e., that Doe CA specifically directed his BitTorrent client to download the file only from other swarm members who are located in New Jersey. Instead, the court should presume that a BitTorrent user does not care where the other members of the swarm are located, so long as he can download the file. For these reasons, it also cannot be said that a BitTorrent user reasonably expects to face suit in all of the jurisdictions where the other members of the BitTorrent swarm are located.

This is especially true when dealing with anonymous Doe defendants at the earliest stages of litigation because it is not certain that the person associated with the IP address—the person who is potentially being dragged into court hundreds of miles away—committed the act at all.[162] Indeed, as one judge pointed out, "it is no

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[160] *See, e.g.*, *Geolocation Service,* INFOSNIPER, http://www.infosniper.net (last visited Mar. 20, 2013) (showing on a map where a particular IP address is located).

[161] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[162] *See* Order & Report & Recommendation at 6–8, *In re* BitTorrent Adult Film Copyright Infringement Cases, No. 2:11-cv-03995-DRH-GRB (E.D.N.Y. May 1, 2012),

more likely that the subscriber to an IP address carried out a particular computer function . . . than to say an individual who pays the telephone bill made a specific phone call."[163] The risk of "false positives"—even when the subuscriber information is known—is very real and must not be downplayed.[164]

c. Joinder of Even Defandants Residing in the Judicial District can be Denied if the Judge Suspects the Plaintiff of Being a Copyright Troll

Even if the ceiling of those who can be joined are those defendants residing in the judicial district in which the action is filed because of personal jurisdiction, judges can limit joinder even further via Rule 20(b).[165] Thus, judges should use a "smell test" when ruling on such motions. Part of this "smell test" should include looking to dockets across the country to see if the plaintiff or their counsel is a repeat filer, and if so, determining how many defendants have actually been served with a complaint for purposes of litigating the claim. Additionally, if the plaintiff before the judge cannot formulate a bona fide discovery plan that will enable the lawsuit to proceed, the judge should err on the side of severance. Under such circumstances, plaintiffs should be required to file individually against each defendant and not be allowed to skip out on the $350 filing fee they would otherwise pay. Judges must be wary of plaintiffs who do not have a good faith interest in using the federal courts as a forum to fairly litigate a dispute and who instead view the courts and the rules of civil procedure as devices to be manipulated in an extortive manner.

B. John Doe Defendants Should Remain Anonymous During Early Stages of Litigation

As described in Part II, the most crucial element of copyright trolls' settlement letter factory business model is finding out the true identities of the anonymous IP addresses, as this allows plaintiffs to

ECF No. 39 (outlining reasons why an IP address alone is insufficient to identify the infringer).

[163] *Id.*

[164] Digital Sin, Inc. v. John Does 1–176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (plaintiff conceded that approximately thirty percent of Doe defendants were likely misidentified—i.e., the person associated with the IP address was not the one who committed the copyright infringement). Furthermore, it is unclear how the plaintiff arrived at this number, and so the rate of misidentification could be even higher still.

[165] *See* discussion in Part III.A.3.a *supra*.

send settlement offers. Until the plaintiffs convince the court that they intend to actually litigate the claim of copyright infringement—and are not simply fishing for names and addresses to send settlement offers—the court should keep the true identities of the alleged infringers hidden from the plaintiffs.

Allowing a defendant to proceed anonymously in the court proceedings is substantively different from allowing a defendant to remain anonymous entirely. Although the First Amendment protects anonymous speech,[166] and its protections extend to the Internet,[167] the First Amendment does not allow citizens to commit copyright infringement on the Internet simply by labeling the action "anonymous speech."[168]

Therefore, once the plaintiff has stated a prima facie case of copyright infringement in the complaint, the court should allow for expedited discovery to uncover the true identities behind the IP addresses. Importantly, however, under Rule 26(c)(1) of the Federal Rules of Civil Procedure, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[169] Allowing Doe defendants to remain anonymous throughout the proceedings is proper even though the public has a "legitimate interest" in knowing the identities of parties involved in litigation in the federal courts.[170] Keeping the defendants' identities anonymous for the initial stages of litigation will protect them from being harassed by overzealous copyright trolls merely hoping to extract quick settlement dollars. Although there is a "presumption of openness in judicial proceedings,"[171] the court, in its discretion, can grant the "rare dispensation" of anonymity, so long as the court inquires into the circumstance of the particular case before doing so.[172]

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[166] *See* Buckley v. Am. Constitutional Law Found. Inc., 525 U.S. 182, 199–200 (1999).

[167] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

[168] Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 562–63 (S.D.N.Y. 2004) ("The First Amendment . . . does not protect copyright infringement, and the Supreme Court, accordingly, has rejected First Amendment challenges to copyright infringement actions.") (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555–56 (1985)).

[169] FED. R. CIV. P. 26(c)(1).

[170] Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

[171] Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. 1981); *see also* United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) ("[P]arties to a lawsuit must typically openly identify themselves in their pleadings . . . .").

[172] United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995) (quoting James v. Jacobson, 6 F.3d 233, 238 (4th Cir.1993)).

Balancing the public interest against fairness to the parties shows that anonymity is proper in BitTorrent copyright cases. First, the public interest in learning whose IP address was used to allegedly download pornography illegally from the Internet is presumably low. Second, because at the early discovery stage it is far from clear that the person whose name is associated with the IP address is the person who actually committed the illegal download,[173] it is reasonable to keep the IP account holder's identity private, particularly when embarrassing content such as pornography is the basis of the lawsuit. Finally, the "smell test" is also of use here. If the court has reason to believe that the plaintiff has no intention of actually litigating the copyright claim, it is reasonable to keep the identities anonymous in order to frustrate the "settlement letter factory" business model. Therefore, the court should err on the side of granting protective orders for all Doe defendants.

To reiterate, allowing the defendant to remain anonymous for purposes of the early stages of litigation is not the same as allowing copyright infringement to go unpunished.[174] That is why courts who decide to allow Doe defendants to remain anonymous should still grant subpoenas on the ISPs in order to obtain the true identities of the account holders. Once identified, though, this information should be kept confidential and be known to the court only. From there, the court can act as arbiter between the plaintiff and the anonymous defendant to make sure that the settlement offers are accurate and that undue harassment does not occur. If the plaintiff shows a good faith interest in actually wanting to litigate the case, the court could, at its discretion, lift the protective order as the litigation progresses. Thus, allowing defendants to remain anonymous while still subpoenaing the ISPs is an effective way to eliminate copyright trolling while still keeping proper avenues of relief open and available.

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[173] *See supra* notes 162–64 (outlining reasons why an IP address alone is insufficient to identify the infringer).

[174] To be sure, I agree that Doe defendants have "no cognizable claim of privacy in their subscriber information." Order at 3, Achte/Neunte Boll Kino Beteiligungs GMBH & Co KG v. Adrienne Neal and Does 1–139, No. 1:10-cv-00453-RMC (D.D.C. Sept. 16, 2010), ECF No. 91 (holding that Does could not remain anonymous). The crucial distinction that courts need to be aware of, however, is that there is a difference between claims of privacy in the subscriber information in and of itself, and that same subscriber information used in the context of "settlement letter factory" copyright trolls. As is indicative of judicial response to copyright trolls in general, the trend is thankfully moving towards recognizing such a distinction. *See* Bellwether Trial Memo, *supra* note 71, at 14.

C. Awarding of Statutory Minimum

The Copyright Act explicitly states that copyright infringers can be held liable for either: (1) the copyright holder's actual damages and the infringer's profits, or (2) statutory damages ranging from $750 to $30,000 per infringement, if actual damages are difficult to calculate.[175] If a copyright holder requests statutory damages, the court can increase the maximum award to $150,000 if the court finds that "infringement was committed willfully . . . ."[176] Although statutory damages thus have a very broad range of $750 to $150,000, it is within a judge's discretion to decide how much to actually award.[177]

The availability of statutory damages has undoubtedly enabled copyright trolls to flourish.[178] For example, copyright trolls often make reference to the $150,000 per infringement upper limit when sending settlement offers to alleged infringers.[179] This is undoubtedly included to frighten recipients into settling without putting up a fight. As a result, there is a growing call for change regarding the availability of statutory damages. For example, one commentator believes that the best way to eliminate copyright trolls is to eliminate statutory damages altogether.[180] Another contends that statutory damages should be available only if some compensable harm can first be shown.[181] While there is certainly merit to both of these

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[175] 17 U.S.C. § 504 (2012).

[176] *Id.* at § 504(c)(2).

[177] Determination of the amount of statutory damages should be "as the court considers just." *Id.* at § 504(c)(1); *see also* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 502 n.313 (2009) (noting that "there is nothing that prevents courts from refusing to award more than the statutory minimum without an offering of proof that an amount in excess of the minimum is justified" and that this approach is in line with the legislative history surrounding passage of the statutory damages provision).

[178] Balganesh, *supra* note 38, at 13 (noting the "real inducement" for the existence of copyright trolls is statutory damages, "which render its business model not just viable, but also potentially lucrative").

[179] *See* Offer Letter, *supra* note 4.

[180] James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 108 (2012) ("Removal of statutory damages is the best remedy for both compensating copyright holders and protecting individuals from copyright troll suits . . . .").

[181] Balganesh, *supra* note 38, at 50. Balganesh offers a solution that "introduces a heightened rule of standing for non-author plaintiffs," in order to ensure that "the basis of their legal claims, in theory, tracks those of actual authors/creators, who copyright law is primarily designed to serve." *Id.* (emphasis omitted). Ultimately, Balganesh's solution "would make the availability of statutory damages for non-author plaintiffs depend on their establishing the existence of some *compensable*

suggestions, both would require Congressional action and thus would take time to implement.[182] In the meantime, the best course of action to curb copyright trolling is to award the statutory minimum, especially for default judgments.[183] This course of action is even more effective if the judge also denies joinder, requiring a separate filing fee for each plaintiff. This will help handicap copyright trolls until Congress chooses to act on altering statutory damages.

D. Remedies for Defendants to Encourage Them Not to Settle

One of the most problematic elements of BitTorrent copyright litigation is that often the defendants simply do not have the money to fight the charges in court, even if they are factually innocent. The court should make defendants aware of certain remedies[184] which mitigate these concerns. First and foremost, the Copyright Act specifically allows courts to award attorney's fees.[185] This in itself should encourage factually innocent defendants to come forward and fight false claims in court. Additionally, defendants can file motions under Rule 54(d)[186] in conjunction with 28 U.S.C. § 1927[187] for costs

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harm." *Id.* (emphasis in original). The problem with this solution on its face, however, is that authors of the copyrighted works are increasingly filing as plaintiffs.

[182] *Reselling Media Content: Seconds to Go*, ECONOMIST, Mar. 23, 2013, at 71 ("Congress could intervene and rejig the Copyright Act of 1976 . . . . But that would require Washington to get its act together—a plotline so implausible that it would make J.K. Rowling blush.").

[183] *See, e.g.*, Order Granting Default Judgment, K-Beech, Inc. v. Does 1–54, No. 2:11-cv-01604-NVW (D. Ariz. Feb. 10, 2012), ECF No. 46; *see also* Samuelson & Wheatland, *supra* note 177, at 501 (advocating for the awarding of the statutory minimum when "the plaintiff lost no profits and the defendant made no profits from the infringement, or when damages and profits are nominal or minimal") (citation omitted).

[184] Although limited in scope, it is worth noting here that when the plaintiff filing a John Doe BitTorrent copyright action is a foreign corporation, the defendant may be able to require that plaintiff post an undertaking. Simply put, when an unlicensed foreign corporation files suit in United States court, they may be required to post a bond with the clerk of the court to ensure that defendant will recover its statutorily entitled costs if plaintiff loses. *See, e.g.*, Order Granting Motion to Post Undertaking, AF Holdings, LLC v. David Trinh, No. 3:12-cv-02393-CRB (N.D. Cal. Nov. 9, 2012), ECF No. 23.

[185] 17 U.S.C. § 505 (2012) ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.").

[186] *See* FED. R. CIV. P. 54(d) ("[C]osts . . . should be allowed to the prevailing party.").

[187] "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case

to help defray any expenses they incur.

For particularly egregious conduct by copyright trolls, sanctions under Rule 11 may be appropriate[188] along with filing a complaint to the state bar association. Additionally, defendants who feel they have been unduly harassed could file a lawsuit against the plaintiff for abuse of process.[189] Although underused, the tort of abuse of process is recognized by the United States Supreme Court, all fifty states, and the District of Columbia.[190] The exact requirements vary from state to state, but generally the claim requires three elements: (1) wrongful use of process; (2) to achieve an ulterior purpose; (3) with damages resulting.[191] As this Comment has shown by describing the common practices of copyright trolls, there is a strong argument for finding them liable under this standard.

IV. CONCLUSION

Courts should be cognizant of copyright's Constitutional goals of promoting the useful arts[192] and creation of new works.[193] Schemes designed to simply wring money from alleged defendants do not comport with these goals. Furthermore, allowing copyright trolls to exist unchecked could fundamentally alter copyright protection by encouraging creation of works solely to generate settlements. As the digital revolution continues to transform industry and society, it is imperative that copyright holders be allowed to protect their rights.

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unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2012).

[188] Sanctions under Rule 11 "may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." FED. R. CIV. P. 11(c)(4).

[189] "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." RESTATEMENT (SECOND) OF TORTS § 682 (1977).

[190] Jeffrey J. Utermohle, *Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 U. BALT. L. REV. 1, 7 (2002).

[191] *Id.* at 8.

[192] U.S. CONST. art. I, § 8, cl. 8. Some question whether pornography "promotes the useful arts" and thus whether it can be copyrighted at all. *See* Chris Matyszczyk, *Copyright defendant: Porn may be, um, unprotected*, CNET (Feb. 6, 2012), http://news.cnet.com/8301-17852_3-57372240-71/copyright-defendant-porn-may-be-um-unprotected.

[193] Balganesh, *supra* note 9, at 1577 ("Copyright law is thus thought to exist primarily to give authors (that is, creators) an incentive to create and thereafter disseminate their works publicly.").

Pirating copyrighted material on the Internet is illegal and must not be allowed to flourish unchecked. There is a fine line, however, between protecting rights and extortion. In the end, courts should be respected as places where actual disputes are resolved; they should not be exploited as a mere tool in a "settlement letter factory" business.

This Comment has argued that the most effective way to rein in copyright trolls is to use a "smell test" in conjunction with other safeguards. In particular, judges in their discretion should limit joinder of anonymous Doe defendants, allow such defendants to remain anonymous throughout the early stages of litigation, and award only the statutory minimum of damages if a defendant defaults. Additionally, remedies exist that should encourage defendants not to settle if they are wrongly targeted by a copyright troll. Copyright trolls are a blight on the federal judiciary and judges should be proactive in restricting their abusive practices.