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Joinder of Anonymous Defendants in BitTorrent Copyright Litigation:
The Potential for Abuse and Possible Reform

Gregory S. Mortenson*

I. Introduction.

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.¹ The letter contained a settlement offer, informing Ms. Neal that she was being sued along with 4,576 other defendants in federal court for allegedly illegally downloading the copyrighted film *Far Cry*.² She was informed that the plaintiff would be willing to settle the matter out of court for a few thousand dollars.³ 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, more significantly, could not afford to hire an attorney to fight the charges.⁴ In response, the U.S. Copyright Group sought a default judgment against her for over \$30,000.⁵ Stories such as these are becoming more common as BitTorrent/P2P⁶ copyright litigation flourishes across the country.

Copyright law is derived from Article I, Section 8 of the Constitution, which gives Congress the power: “To promote the Progress of Science and useful Arts, by securing for

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¹ Nate Anderson, *Far Cry P2P defendant pens a heartfelt “not guilty” plea*, ARS TECHNICA (March 3, 2011), <http://arstechnica.com/tech-policy/news/2011/03/far-cry-p2p-defendant-pens-a-heartfelt-not-guilty-plea.ars>.

² *Id.*

³ *Id.* The exact amount of money requested from Ms. Neal was undisclosed but in another case the plaintiff copyright holder sought \$3,400 to settle. *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.

⁴ Anderson, *supra* note 1.

⁵ *Id.*

⁶ Part II will provide an explanation of the technology at issue.

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷

The United States Copyright Act⁸ outlines the types of works eligible for copyright protection⁹ and enumerates the potential remedies¹⁰ for copyright holders if their exclusive rights¹¹ are violated.¹² The Act explicitly states that infringers of copyright 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, if actual damages are difficult to calculate.¹³ 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.”¹⁴

A 2001 amendment to the Federal Rules of Civil Procedure made those rules unequivocally applicable to copyright litigation.¹⁵ Rule 20(a)(2) allows a plaintiff to join multiple defendants in one action if: “(A) they assert any right to relief 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

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ 17 U.S.C § 101 *et seq.* (1976).

⁹ 17 U.S.C § 102.

¹⁰ 17 U.S.C § 501 *et seq.*

¹¹ 17 U.S.C § 106.

¹² 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).

¹³ 17 U.S.C § 504.

¹⁴ 17 U.S.C § 504(c)(2).

¹⁵ The Advisory Committee Note for Fed. R. Civ. P. 81 states: “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.”

arise in the action.”¹⁶ Under Rule 20(b), however, joinder is not mandatory.¹⁷ 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.”¹⁸ Furthermore, 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.¹⁹ A decision to sever may be made on the court's own motion or on a party's motion.²⁰

The advent of the Internet has drastically changed the scope and nature of copyright considerations.²¹ Digital piracy of copyrighted works has had a profound effect on the media industry worldwide.²² The music industry was the first to truly feel the effects of digital piracy. For example, in 1999 total revenue from U.S. music sales and licensing was \$14.6 billion; the 2009 figure was only \$6.3 billion.²³ The International Federation of the Phonographic Industry (IFPI), a recording industry trade group, blames digital piracy for thirty percent of the decline in global music sales from 2004 to 2009,²⁴ and further claims that in 2008 ninety-five percent of all

¹⁶ Fed. R. Civ. P. 20(a)(2).

¹⁷ Fed. R. Civ. P. 20(b).

¹⁸ *Id.*

¹⁹ Fed. R. Civ. P. 21.

²⁰ *Id.*

²¹ See, e.g., Kaiser Wahab, *How the Web Has Changed Our Perception of Copyright Law*, MASHABLE, (March 24, 2011), <http://mashable.com/2011/03/24/copyright-law-enforcement/> (“The web (and mobile) have all forced the aging [copyright] statute to evolve in ways that were never anticipated in a world of digital everything.”).

²² *Illegal downloading and media investment: Spotting the pirates*, THE ECONOMIST (Aug. 20, 2011), <http://www.economist.com/node/21526299> (discussing how consumer attitudes towards piracy around the world have a direct effect on the amount of money spent by companies in creating media).

²³ 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/.

²⁴ Eric Pfanner, *Music Industry Counts the Cost of Piracy*, THE NEW YORK TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/business/global/22music.html>. But see Ken Fisher, *Study: P2P effect on legal music sales “not statistically distinguishable from zero”*, ARS TECHNICA (Feb. 12, 2007), <http://arstechnica.com/old/content/2007/02/8813.ars>; Sean Michaels, *Study finds*

music downloaded online was downloaded illegally.²⁵ Other sectors of the media industry are also feeling the effects. A study by the Motion Picture Association of America (MPAA), a film industry trade group, warned that digital film piracy was set to rise with the dissemination of broadband Internet connectivity.²⁶ Three-quarters of the video games released in late 2010 and early 2011 were shared illegally.²⁷ Even computer software is being pirated at an alarming rate, with one study claiming that in 2009 over forty percent of software programs installed on computers around the world were obtained illegally.²⁸ Although new business models such as Hulu are emerging to help monetize digital content, piracy is still attractive to some Internet users.²⁹ To make matters worse for copyright holders, the underlying file-sharing technology that many use to illegally download copyrighted works³⁰ has become more advanced over the years—it is now easier for users to download copyrighted works while, at the same time, harder to simply shut down an illegal service in the hopes of stemming the tide of digital piracy.

pirates 10 times more likely to buy music, THE GUARDIAN (Apr. 21, 2012), <http://www.guardian.co.uk/music/2009/apr/21/study-finds-pirates-buy-more-music>.

²⁵ *Legal downloads swamped by piracy*, BBC NEWS (Jan. 16, 2009), <http://news.bbc.co.uk/2/hi/technology/7832396.stm>.

²⁶ *Online film piracy 'set to rise'*, BBC NEWS (July 9, 2004), <http://news.bbc.co.uk/2/hi/technology/3879519.stm>.

²⁷ Editorial, *Going After the Pirates*, THE NEW YORK TIMES (Nov. 26, 2011), <http://www.nytimes.com/2011/11/27/opinion/sunday/going-after-the-pirates.html>.

²⁸ Business Software Alliance, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, available at <http://portal.bsa.org/piracyimpact2010/index.html>.

²⁹ 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 consumers have in the digital age).

³⁰ File-sharing is not the only way to illegally obtain copyrighted works on the Internet but the legal issue discussed is exclusive to it.

Effectively enforcing copyright in the digital age is difficult if not futile.³¹ The 1999 release of Napster, a file-sharing application geared towards digital music, was a watershed moment for copyright law; it has been said that Napster helped bring digital piracy into the mainstream.³² 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 2003.³³ These lawsuits were largely designed to dissuade potential illegal downloaders via the threat of possible litigation and to raise awareness of the illegality of most file-sharing.³⁴ 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 2008.³⁵ 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.³⁶ 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.³⁷ Indeed,

³¹ Peter S. Menell, *Internet Freedom, Freedom of Expression, and Copyright Enforcement*, THE MEDIA INSTITUTE (Feb. 23, 2011), http://www.mediainstitute.org/new_site/IPI/2011/022311.php (“Private enforcement has not been able to quell Internet piracy.”).

³² Tom Whipple, *Napster set music piracy ball rolling*, THE TIMES (Oct. 7, 2006), <http://www.timesonline.co.uk/tol/news/world/article664191.ece>.

³³ *RIAA v. The People*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/wp/riaa-v-people-five-years-later>.

³⁴ Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. JOURN., (Dec. 19, 2008), <http://online.wsj.com/article/SB122966038836021137.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Nate Anderson, *The RIAA? Amateurs. Here’s how you sue 14,000+ P2P users*, ARS TECHNICA, (June 1, 2010), <http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars>.

since the beginning of 2010, over 200,000 individual defendants have been sued in the United States for allegedly sharing copyrighted material online and this number continues to grow.³⁸

In addition to having no discernible effect on curbing illegal downloading, the single biggest flaw in the RIAA's litigation strategy was that it was extraordinarily unprofitable and therefore unsustainable.³⁹ Instead of the drawn out and expensive courtroom-oriented strategy employed by the RIAA,⁴⁰ the recent crop of mass BitTorrent copyright litigation relies almost exclusively on pre-trial settlements and thereby completely avoids litigation.⁴¹ The logic of what has been dubbed the "settlement letter factory" business model 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.⁴² The adult movie industry, for example, views this innovative litigation strategy as a potentially lucrative new revenue stream.⁴³

Part II of this Comment will give an explanation of the BitTorrent/P2P technology that is often used to illegally obtain copyrighted works from the Internet and is the focus of these types of lawsuits. Part III will provide a general overview of the business model and processes behind BitTorrent copyright litigation and explain how the Federal Rules of Civil Procedure are

³⁸ 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/>.

³⁹ Ray Beckerman, an attorney who fought many of the RIAA's lawsuits, claims that the RIAA's return on investment between 2006 and 2008 was an abhorrent -97.9%. *RIAA paid \$64m in piracy lawsuits to recover \$1.4m*, ELECTRONISTA, (July 14, 2010), <http://www.electronista.com/articles/10/07/14/riaa.paid.64m.over.three.years.to.get.14m/>.

⁴⁰ Nate Anderson, *5 years later, first P2P case to be tried still chugging along*, ARS TECHNICA (Mar. 27, 2011), <http://arstechnica.com/tech-policy/news/2011/03/5-years-later-first-p2p-case-to-be-tried-still-chugging-along.ars>.

⁴¹ Nate Anderson, *The "legal blackmail" business: inside a P2P settlement factory*, ARS TECHNICA (Sep. 29, 2010), <http://arstechnica.com/tech-policy/news/2010/09/amounts-to-blackmail-inside-a-p2p-settlement-letter-factory.ars>.

⁴² *See, e.g., id.*

⁴³ 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/>.

implicated. Part IV will look at three representative judicial decisions discussing the appropriateness of joinder in BitTorrent copyright litigation, highlighting splits in approach and judicial opinion. Part V will argue that wholesale joinder is not appropriate in BitTorrent copyright litigation and that legislation which requires that plaintiffs have a “good faith” belief that the putative defendants reside in the district where the lawsuit is being filed is necessary. Finally, Part VI will conclude by stating that while it is important that copyright holders have remedies to recover from actual infringers, judges and legislators must be wary of abusive practices designed to shake down alleged infringers.

II. The Evolution of File-Sharing and an Explanation of the BitTorrent Protocol.

File-sharing began as a comparatively simple interaction between two computers, but has evolved over time to become more convoluted yet more efficient. Since the early 1980s, the “traditional” client-server model has disseminated data across networks.⁴⁴ 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.⁴⁵ Other computers on that network can send messages to the host server, letting it know that it would like to copy the stored file.⁴⁶ When a connection is established between the host server and the requesting computer, the requesting computer becomes what is known as a “client” and copies the file from the host server.⁴⁷ 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.⁴⁸ Even though an individual client may only consume a small amount of bandwidth⁴⁹ in

⁴⁴ WEIJIA JIA & WANLEI ZHOU, *DISTRIBUTED NETWORK SYSTEMS: FROM CONCEPTS TO IMPLEMENTATIONS*, 6 (2004).

⁴⁵ Michael Brown, *White Paper: How BitTorrent Works*, MAXIMUMPC (July 10, 2009), http://www.maximumpc.com/article/features/white_paper_bittorrent.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ JIA & ZHOU, *supra* note 44, at 7.

this traditional scenario, the host server can consume extraordinary amounts of bandwidth if many clients attempt to obtain the file from the host.⁵⁰ 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.⁵¹ 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.⁵² 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 photos or videos.⁵³

Peer-to-peer (P2P) sharing eliminates the need for a central server to host files.⁵⁴ Instead, the files are stored on the individual users' computers; when one downloads a file on a P2P network, they download the file from another user of the P2P network instead of downloading the file from a central location.⁵⁵ 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).⁵⁶ Napster is one of the earliest and most influential examples of P2P

⁴⁹ "Bandwidth is a term used to describe how much information can be transmitted over a connection." It is usually expressed as "bits per second" and so the greater the bandwidth, the greater the data transfer. *What is Bandwidth?*, WISEGEEK, <http://www.wisegeek.com/what-is-bandwidth.htm>.

⁵⁰ JIA & ZHOU, *supra* note 44, at 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Jeff Tyson, *How the Old Napster Worked*, HOW STUFF WORKS, <http://www.howstuffworks.com/napster.htm>.

⁵⁵ *Id.*

⁵⁶ COL PERKS & TONY BEVERIDGE, *GUIDE TO ENTERPRISE IT ARCHITECTURE*, 190 (2003).

technology.⁵⁷ In a typical Napster transaction, Peer A would request a file from Peer B, who stored the file on his own computer.⁵⁸ Peer B would respond by sending the file; Peer A would assist by contributing a portion of its resources to the transaction.⁵⁹ Napster, however, suffered from a large limitation because it required a central server to keep track of connected computers and the files available on them.⁶⁰ Napster's central server was its downfall—a court construed the central server as evidence that Napster knowingly facilitated copyright infringement.⁶¹

BitTorrent, developed in 2001 by Bram Cohen, does not rely on a central server to establish download connections for users—a distinct advantage over earlier P2P software such as Napster.⁶² Instead, it decentralizes data among the users.⁶³ This decentralized approach makes it virtually impossible to shut down BitTorrent, since no central server maintains a comprehensive index of active users.⁶⁴ Furthermore, BitTorrent overcomes the speed limitations associated with the traditional client-server method; it breaks down a larger file into smaller parts, which can then be shared by each user, or peer.⁶⁵ Specifically, BitTorrent breaks a large file into many small component pieces.⁶⁶ Once all of the components have been downloaded to a user's computer, they are reassembled back into the large file.⁶⁷ Practically speaking, the more popular

⁵⁷ See generally, HILLARY J. MORGAN, NAPSTER'S INFLUENCE ON INTERNET COPYRIGHT LAW (2002).

⁵⁸ Tyson, *supra* note 54.

⁵⁹ *Id.*

⁶⁰ Brown, *supra* note 45.

⁶¹ A&M Records, Inc. v. Napster, Inc., 2001 US Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001), *aff'd*, 284 F. 3d 1091 (9th Cir. 2002).

⁶² Brown, *supra* note 45.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *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

a file, the faster it will download because additional “peers” increase the ability to download all the component pieces.⁶⁸ As a result, some in the content industry believe that BitTorrent is to stealing movies what “bolt-cutters are to stealing bicycles.”⁶⁹ A Princeton student’s 2010 study bolstered this observation, finding that eighty-five to ninety-nine percent of files distributed by BitTorrent infringed copyright.⁷⁰

BitTorrent requires that one person act as an initial “seed” and make the entire file available to the network.⁷¹ In order to share a file via BitTorrent, the person offering the initial file, the “seeder,” must first create a .torrent file,⁷² which contains information about the “tracker”⁷³ and metadata⁷⁴ about the underlying file, such as the size of the underlying pieces.⁷⁵

chunks, it matches its checksum to the checksum recorded in the torrent file to verify its integrity.”)

⁶⁸ Brown, *supra* note 45.

⁶⁹ *Targeting Websites Dedicated To Stealing American Intellectual Property: Hearing Before the Senate Committee on the Judiciary*, 112th Cong. (2011) (statement of Scott Turow, Authors Guild president), available at <http://judiciary.senate.gov/pdf/11-2-16%20Turow%20Testimony.pdf>.

⁷⁰ ROBERT LEVINE, *FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS AND HOW THE CULTURE BUSINESS CAN FIGHT BACK* 55 (2011).

⁷¹ Brown, *supra* note 45.

⁷² The .torrent file may be come a thing of the past with the dissemination of “magnet links” on index sites such as The Pirate Bay. This is designed to make index sites such as The Pirate Bay 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 here.

⁷³ “A Bit Torrent tracker centrally coordinates the P2P transfer of files among users.... The tracker maintains information about all BitTorrent clients utilizing each torrent. Specifically, the tracker identifies the network location of each client either uploading or downloading the P2P file associated with a torrent. It 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>.

⁷⁴ “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?*, INDIANA UNIVERSITY: UNIVERSITY INFORMATION TECHNOLOGY SERVICES (Oct. 22, 2010), <http://kb.iu.edu/data/aopm.html>.

Someone wishing to download the underlying file (known as a “leecher”) will browse an index site such as The Pirate Bay⁷⁶ and locate the desired file.⁷⁷ Once the .torrent file is downloaded, the leecher opens the .torrent file with a BitTorrent client,⁷⁸ which establishes a connection between the leecher and the tracker.⁷⁹ 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.⁸⁰ 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.⁸¹ Accordingly, once a peer has fully downloaded the entire file, he also becomes a seed.⁸² All of the peers (including the initial seed) actively engaged in sharing a particular file are collectively known as a “swarm.”⁸³ It is not guaranteed, however, that every member of a swarm will interact with every other member—the tracker determines the most efficient way for each peer to obtain the component parts.⁸⁴

⁷⁵ Brown, *supra* note 45.

⁷⁶ 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 70, at 203.

⁷⁷ 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, 96 (4th ed., 2006).

⁷⁸ 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/>.

⁷⁹ Brown, *supra* note 45.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

III. The Business Model Behind BitTorrent Copyright Litigation.

Law firms that specialize in BitTorrent copyright litigation⁸⁵ are often referred to as “settlement factories” that use a “payup or we’ll getcha” method designed to induce alleged infringers to settle outside of court.⁸⁶ 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),⁸⁷ with the threat of litigation and its associated hassle and expenses hanging over the defendant’s head.⁸⁸ 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.⁸⁹ To further maximize the effectiveness of this business model, embarrassing films, such as pornography, are often the basis of the lawsuit.⁹⁰ The logic is that the more embarrassing the film, the more willing the alleged infringer will be to settle because the defendant would not want to be associated with such questionable content.⁹¹

⁸⁵ The U.S. Copyright Group, registered by the Virginia-based law firm Dunlap, Grubb & Weaver is a key player in this area along with a few others.

⁸⁶ See, e.g., Anderson, *supra* note 41; Julianne Pepitone, *50,000 BitTorrent users sued for alleged illegal downloads*, CNNMONEY (June 10, 2011), http://money.cnn.com/2011/06/09/technology/bittorrent_lawsuits/.

⁸⁷ In one example, the plaintiff copyright holder sought \$3,400 from the alleged illegal downloader. Matyszczyk, *supra* note 3.

⁸⁸ Anderson, *supra* note 41.

⁸⁹ *Id.*

⁹⁰ Nate Anderson, *Settle up: voicemails show P2P porn law firms in action*, ARS TECHNICA (Apr. 20, 2011), <http://arstechnica.com/tech-policy/news/2011/04/settle-up-voicemails-show-p2p-porn-law-firms-in-action.ars>.

⁹¹ Nate Anderson, *Lawyer can’t handle opposition, gives up on P2P porn lawsuit*, ARS TECHNICA (Feb. 1, 2011) (quoting Electronic Frontier Foundation Intellectual Property Director Corynne McSherry as saying, “When adult film companies launch these cases, there is the added pressure of embarrassment associated with pornography, which 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.”).

After identifying which copyrighted work or works will serve as the basis for the lawsuit, the plaintiff must find alleged infringers.⁹² To expedite that process, copyright holders utilize companies that specialize in monitoring and tracking P2P networks and illegal downloads.⁹³ These companies, like GuardaLey,⁹⁴ use proprietary software to identify defendants. This software will identify and record the Internet Protocol (IP) addresses⁹⁵ of the suspected infringers and other pertinent data, such as the date and time the alleged infringement took place.⁹⁶

The second step is to identify the people behind the IP addresses. Internet Service Providers⁹⁷ (ISP) are the most logical source of this information.⁹⁸ An ISP can match a particular IP address with the name, address, telephone number, email address and Media Access Control (MAC) address⁹⁹ of the subscriber assigned to it when the alleged illegal downloading

⁹² Anderson, *supra* note 41.

⁹³ *Id.*

⁹⁴ 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.”)

⁹⁵ An IP address is a unique identifying number which every network-connected device must have in order to communicate with other devices on that network. For internet users using a computer to connect to the internet, their Internet Service Provider (ISP) will provide them with an IP address. *What is an IP address?*, HOW STUFF WORKS, <http://computer.howstuffworks.com/internet/basics/question549.htm>. 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. Marcia Hoffman, *Why IP Addresses Alone Don't Identify Criminals*, ELECTRONIC FRONTIER FOUNDATION (Aug. 24, 2011), <http://www.eff.org/deeplinks/2011/08/why-ip-addresses-alone-dont-identify-criminals>.

⁹⁶ Anderson, *supra* note 41.

⁹⁷ An ISP is “any organization through which you can arrange Internet access.” They are typically commercial in nature and some examples include Time Warner, Comcast, and Verizon. *What is an Internet service provider?*, INDIANA UNIVERSITY: UNIVERSITY INFORMATION TECHNOLOGY SERVICES (May 17, 2011), <http://kb.iu.edu/data/ahoz.html>.

⁹⁸ Since the ISP supplies the IP address, it makes the most sense to obtain the information from the source.

⁹⁹ 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* –

took place. ISPs, however, often hesitate to comply because of the time and financial costs,¹⁰⁰ as well as the privacy concerns.¹⁰¹ Thus, copyright holders are increasingly filing lawsuits against the anonymous IP addresses and then seeking the court's permission, via an *ex parte* motion for expedited discovery, to subpoena the ISPs to compel them to turn over the identifying information.¹⁰² This is often necessary because ISPs retain logs of the activity of IP addresses for only a limited time.¹⁰³

After obtaining the names and addresses of the associated IP addresses from the ISP, the third step is to send settlement letters to the alleged infringers.¹⁰⁴ As described above, these letters will give the defendants the opportunity to settle the case for a relatively inexpensive

An Introduction to MAC Addressing, ABOUT.COM, <http://compnetworking.about.com/od/networkprotocolsip/1/aa062202a.htm> (last visited Oct. 11, 2011).

¹⁰⁰ Time Warner Cable (TWC) claims it currently receives an average of 567 IP address lookup requests per month, nearly all of them coming from law enforcement. The proliferation of mass copyright lawsuits threatens to dramatically increase this number. TWC claims there is no way it can comply with more than 1000 requests per month without taking on additional expenses. In response, some judges have limited the number of IP lookups per month required by ISPs. *See, e.g.*, Nate Anderson, *P2P plaintiffs to get just 28 Time Warner IPs each month*, ARS TECHNICA (July 7, 2010), <http://arstechnica.com/tech-policy/news/2010/07/judge-limits-time-warners.ars>; *DigiProtect USA Corp. v. Doe*, 2011 U.S. Dist. LEXIS 109464 (S.D.N.Y. Sept. 26, 2011) (holding that ISPs did not have to provide information on account holders located outside of the forum state).

¹⁰¹ *See, e.g.*, Rick Sanders, *The First Amendment Right to Speak Online Anonymously*, AARON SANDERS, PLLC BLOG (July 20, 2011), <http://www.aaronsanderslaw.com/blog/the-first-amendment-right-to-speak-online-anonymously>; *but see Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562-63 (S.D.N.Y. 2004) (holding that the First Amendment does not protect copyright infringement).

¹⁰² Anderson, *supra* note 41.

¹⁰³ *See, e.g.*, *Data Retention*, ELECTRONIC PRIVACY INFORMATION CENTER (last accessed Feb. 11, 2012), http://epic.org/privacy/intl/data_retention.html.

¹⁰⁴ Anderson, *supra* note 41.

fee.¹⁰⁵ At the same time, the letter will remind the defendant of the risks associated with appearing in court, including time, money, and reputation costs.¹⁰⁶

The most crucial element of the business model, however, is that which makes it most profitable. Along with the expedited discovery request, the Plaintiff will also seek permissive joinder of the anonymous defendants under Rule 20(a)(2).¹⁰⁷ Joining the defendants together allows the plaintiff to seek damages from all alleged infringers simultaneously rather than having to file separate suits against the alleged infringers individually.¹⁰⁸ Plaintiffs realize astronomical cost savings when courts join all of the alleged infringers together. In one example, a West Virginia court denied joinder, which increased the plaintiff's filing fee from \$350 to \$1.8 million.¹⁰⁹

Very few, if any, of these actions reach the trial stage.¹¹⁰ But this is not surprising since trial is not the true goal of this litigation.¹¹¹ The goal is to obtain the true identities of the anonymous IP addresses in the least expensive way possible, to maximize the return on investment in the settlement letters.¹¹²

IV. Representative Judicial Decisions Discussing Joinder of Anonymous Defendants in BitTorrent Copyright Litigation.

¹⁰⁵ Anderson, *supra* note 90.

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.*, cases cited *infra* Part IV.

¹⁰⁸ *Id.*

¹⁰⁹ Nate Anderson, *Judge kills massive P2P porn lawsuit, kneecaps copyright troll*, ARS TECHNICA, (Dec. 17, 2010), <http://arstechnica.com/tech-policy/news/2010/12/judge-kills-massive-p2p-porn-lawsuit-kneecaps-copyright-troll.ars>.

¹¹⁰ Anderson, *supra* note 90.

¹¹¹ *Id.*

¹¹² *Id.*

Judicial opinion on whether joinder of anonymous defendants is appropriate at the discovery stage is mixed.¹¹³ Many judges have allowed joinder at this stage¹¹⁴ but many, even in the same district, have denied joinder.¹¹⁵ There are essentially four reasons why a request for joinder for discovery purposes may be denied: (1) lack of personal jurisdiction/improper venue;¹¹⁶ (2) failure to show that the defendants engaged in the same “transaction or occurrence” as required by Rule 20(a)(2)(A);¹¹⁷ (3) failure to show that “any question of law or fact common to all defendants” will arise in the action as required by Rule 20(a)(2)(B);¹¹⁸ and (4) discretionary judicial determination that joinder would result in “embarrassment, delay, expense, or other prejudice” as outlined in Rule 20(b).¹¹⁹ Naturally, judges who allow joinder conclude that

¹¹³ Compare *Call of the Wild Movie, LLC v. Does 1-1062*, 770 F. Supp. 2d 332, 2011 WL 996786 (D.D.C. March 22, 2011), with *On the Cheap, LLC v. Does 1-5011*, 2011 U.S. Dist. LEXIS 99831 (N.D. Cal. Sept. 6, 2011).

¹¹⁴ See, e.g., *Call of the Wild Movie, LLC v. Does 1-1062*, 770 F. Supp. 2d 332, 2011 WL 996786 (D.D.C. March 22, 2011); *First Time Videos, LLC v. Does 1-500*, Case No. 10-6254-RC, 2011 U.S. Dist. LEXIS 89044 (N.D. Ill. Aug. 9, 2011); *Voltage Pictures, LLC v. Does 1-5000*, 2011 U.S. Dist. LEXIS 50787, 2011 WL 1807438 at (D.D.C. May 12, 2011); *MCGIP, LLC v. Does 1-18*, Case No. 11-1495-EMC, 2011 U.S. Dist. LEXIS 64188 (N.D. Cal. June 2, 2011).

¹¹⁵ See, e.g., *On the Cheap, LLC v. Does 1-5011*, 2011 U.S. Dist. LEXIS 99831 (N.D. Cal. Sept. 6, 2011); *Nu Image, Inc. v. Does 1-23322*, 2011 U.S. Dist. LEXIS 83293, 2011 WL 3240562 (D.D.C. July 29, 2011); *Pacific Century Int'l, Ltd. v. Does 1-101*, Case No. 11-2533-DMR, 2011 U.S. Dist. LEXIS 73837 (N.D. Cal. July 8, 2011); *VPR Internationale*, Case No. 11-2068, 2011 U.S. Dist. LEXIS 64656 (C.D. Ill., filed Apr. 29, 2011); *Diabolic Video Productions, Inc. v. Does 1-2099*, Case No. 10-5865-PSG, 2011 U.S. Dist. LEXIS 58351 (N.D. Cal. May 31, 2011).

¹¹⁶ See *Nu Image, Inc. v. Does 1-23322*, 2011 U.S. Dist. LEXIS 83293, 2011 WL 3240562 (D.D.C. July 29, 2011); *DigiProtect USA Corp. v. Doe*, 2011 U.S. Dist. LEXIS 109464 (S.D.N.Y. Sept. 26, 2011).

¹¹⁷ *Hard Drive Productions, Inc. v. Does 1-188*, Case No. 11-1566-JCS, 2011 U.S. Dist. LEXIS 94319 (N.D. Cal. Aug. 23, 2011).

¹¹⁸ *IO Group, Inc. v. Does 1-435*, Case No. 10-4382-SI, 2011 U.S. Dist. LEXIS 14123 (N.D. Cal. Feb. 3, 2011).

¹¹⁹ *On the Cheap, LLC v. Does 1-5011*, 2011 U.S. Dist. LEXIS 99831 (N.D. Cal. Sept. 6, 2011) (Judge Zimmerman determined that “joinder of about 5000 defendants will not promote judicial efficiency and will create significant case manageability issues” and that joinder would violate the “principles of fundamental fairness”).

plaintiffs satisfy the requirements of Rule 20.¹²⁰ Judges who allow joinder generally concede that personal jurisdiction may eventually be found to be lacking, but that at the discovery stage this question is premature since discovery is necessary to make this determination.¹²¹

Perhaps the most well known case allowing joinder of anonymous defendants is *Call of the Wild*.¹²² The U.S. Copyright Group filed three separate mass copyright actions in the District Court for the District of Columbia against a total 5,583 unnamed defendants.¹²³ After applying for expedited discovery in each case, the plaintiffs were given permission to subpoena the ISPs of the alleged infringers; Time Warner Cable was subpoenaed in order to provide identifying information for their share of the IP addresses implicated in the lawsuits.¹²⁴ Time Warner Cable, however, responded by submitting motions to quash or modify the subpoenas, claiming it would suffer undue burden or expense in complying.¹²⁵ Time Warner, along with amici including the Electronic Frontier Foundation and the American Civil Liberties Union Foundation, argued that joinder of defendants was improper under Rule 20 of the Federal Rules of Civil Procedure and

¹²⁰ See, e.g., *Call of the Wild Movie, LLC v. Does 1-1062*, 770 F. Supp. 2d 332, 2011 WL 996786 (D.D.C. March 22, 2011) (hereinafter referred to as “Call of the Wild”).

¹²¹ *Id.*

¹²² See, e.g., Eriq Gardner, *Mass-Suing of Pirates Gets Shot In Arm Thanks to DC Judge (Exclusive)*, THE HOLLYWOOD REPORTER (Mar. 23, 2011), <http://www.hollywoodreporter.com/thr-esq/mass-suing-pirates-gets-shot-170403> (discussing *Call of the Wild*).

¹²³ 1,062 unnamed Doe defendants were accused of infringing the copyright of the motion picture “Call of the Wild”; 4,350 unnamed Doe defendants were accused of infringing the copyright of the motion pictures “13 Hours in a Warehouse,” “A Numbers Game,” “Border Town,” “Deceitful Storm,” “Fast Track No Limits,” “He Who Finds a Wife,” “Hellbinders,” “Locator 2,” “Smile Pretty” (aka “Nasty”), “Stripper Academy,” “The Casino Job,” “The Clique,” (aka “Death Clique”), and “Trunk”; 171 unnamed Doe defendants were accused of infringing the copyright of the motion picture “Familiar Strangers.” *Call of the Wild*, 770 F. Supp. 2d at 339.

¹²⁴ *Call of the Wild*, 770 F. Supp. 2d at 340.

¹²⁵ Time Warner was subpoenaed in order to provide identifying information for a total of 1,028 IP addresses implicated in the three lawsuits. *Call of the Wild*, 770 F. Supp. 2d at 340.

sought severance under Rule 21.¹²⁶ Judge Beryl A. Howell¹²⁷ combined all three actions solely for the purpose of ruling on Time Warner Cable’s motions.¹²⁸ Judge Howell granted the motion to quash for one of the three cases simply because the plaintiff there failed to follow the subpoena requirements of Rule 45(b); in the other two cases, however, Judge Howell denied Time Warner’s motions on the merits.¹²⁹

Judge Howell found that joinder of the anonymous defendants at the discovery stage was appropriate under Rule 20(a)(2).¹³⁰ With respect to the first prong that requires that defendants have engaged in the same transaction or occurrence, Judge Howell stressed that this was a flexible test and that the claims against each defendant need only be logically related in order to satisfy this first element.¹³¹ Judge Howell found that given the nature of BitTorrent, “each putative defendant is a possible source for the plaintiff’s motion pictures” and that the mere possibility that each defendant may be responsible for distributing the copyrighted work was enough to show that the claims were logically related, thus satisfying 20(a)(2)(A).¹³² Regarding the second requirement, a common question of law or fact for the joined defendants,¹³³ Judge Howell found that this requirement was easily satisfied since the plaintiff would have to establish “the same legal claims concerning the validity of the copyrights in the movies at issue and the infringement of the exclusive rights reserved to the plaintiffs as copyright holders” against each

¹²⁶ *Call of the Wild*, 770 F. Supp. 2d at 341.

¹²⁷ Some have questioned Judge Howell’s impartiality in ruling on copyright issues since she is a former lobbyist for the RIAA. See Amar Toor, *Judge Ruling on Copyright Law Used to Be a Lobbyist for RIAA*, SWITCHED (Mar. 29, 2011), <http://www.switched.com/2011/03/29/judge-beryl-howell-used-to-be-riaa-lobbysit/>.

¹²⁸ *Call of the Wild*, 770 F. Supp. 2d at 338.

¹²⁹ *Id.* at 338-39.

¹³⁰ *Id.* at 343.

¹³¹ *Call of the Wild*, 770 F. Supp. 2d at 342 (citing *Disparte v. Corporate Exec. Bd.*, 223 F.R.D. 7 (D.D.C. 2004)).

¹³² *Call of the Wild*, 770 F. Supp. 2d at 343.

¹³³ Fed R. Civ. P. 20(a)(2)(B).

putative defendant.¹³⁴ Furthermore, because each defendant was alleged to have used the BitTorrent protocol to obtain the works, “factual issues related to how BitTorrent works and the methods used by plaintiffs to investigate, uncover and collect evidence about the infringing activity will be essentially identical for each putative defendant.”¹³⁵

But perhaps the most significant finding was the determination that joinder of the anonymous defendants would neither result in prejudice to any party nor needless delay.¹³⁶ Indeed, Judge Howell found that joinder would be beneficial to the putative defendants, by allowing each to see the defenses of the others.¹³⁷ Judge Howell made it clear that her decision to allow joinder was heavily influenced by the fact that the lawsuit was in its “nascent” stage and that perhaps severance would still be available later in the proceedings.¹³⁸ Judge Howell also reasoned that if joinder were not allowed at the discovery phase of litigation, plaintiff copyright holders would “face significant obstacles in their efforts to protect their copyrights from illegal file-sharers” which would result in needless delay.¹³⁹ It was further noted that if joinder were not allowed for discovery purposes, the cost of filing fees alone could be prohibitively expensive and would thus “further limit [copyright holders’] ability to protect their legal rights.”¹⁴⁰

Not all judges agree with Judge Howell’s reasoning.¹⁴¹ In fact, Judge Robert L. Wilkins, also sitting in the District Court for the District of Columbia, relied on the exclusive venue

¹³⁴ *Call of the Wild*, 770 F. Supp. 2d at 343.

¹³⁵ *Id.*

¹³⁶ *Id.* at 344.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Call of the Wild*, 770 F. Supp. 2d at 344.

¹⁴¹ *See, e.g., On the Cheap, LLC v. Does 1-5011*, 2011 U.S. Dist. LEXIS 99831 (N.D. Cal. Sept. 6, 2011).

statute for copyright infringement actions¹⁴² to find joinder of over 23,000 defendants at the discovery stage inappropriate in *Nu Image, Inc. v. Does 1-23322*.¹⁴³ Unlike Judge Howell, who never discussed the venue statute, Judge Wilkins relied heavily on its provisions to find that jurisdictional discovery¹⁴⁴ is inappropriate in the District of Columbia in copyright actions unless the plaintiff has a “good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant.”¹⁴⁵ Judge Wilkins then held that plaintiffs would have to use geolocation services¹⁴⁶ to determine which IP addresses were within the bounds of the District of Columbia, that he would only allow discovery related to these IP addresses, and that he would sever all other defendants.¹⁴⁷ Judge Wilkins expressed his sympathy for the difficulties copyright holders face in protecting their rights in the digital age and made clear that he understood the convenience and expense-saving logic behind trying to join all 23,322 defendants together for discovery purposes, but he ultimately agreed with the Supreme Court’s holding that

¹⁴² 28 U.S.C. § 1400(a).

¹⁴³ *Nu Image, Inc. v. Does 1-23322*, 2011 U.S. Dist. LEXIS 83293, 2011 WL 3240562 (D.D.C. July 29, 2011) (hereinafter referred to as “Nu Image”). Plaintiff, California-based Nu Image, Inc., purportedly owned the copyright to the motion picture “The Expendables” and sought expedited discovery in order to obtain the true identities of the anonymous IP addresses named as defendants in the suit; Plaintiff alleged that Defendants has used BitTorrent to illegally obtain the film.

¹⁴⁴ Jurisdictional discovery is defined as “any preliminary discovery to establish whether a U.S. federal court has jurisdiction over the person, the res or the subject matter of the dispute.” S.I. Strong, *Jurisdictional Discovery in United States Federal Courts* (University of Missouri School of Law Legal Studies Research Paper No. 2009-26, 2009), available at <http://ssrn.com/abstract=1474026>.

¹⁴⁵ *Nu Image, Inc.*, 2011 U.S. Dist. LEXIS 83293, at *4 (quoting *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)).

¹⁴⁶ Services such as NetAcuity can associate a particular IP address with a zip code. David Hamilton, *NetAcuity Edge Offers Hyper-local IP Targeting*, WEB HOST INDUSTRY REVIEW (July 28, 2009), <http://www.thewhir.com/web-hosting-news/netacuity-edge-offers-hyper-local-ip-targeting>.

¹⁴⁷ *Nu Image*, 2011 U.S. Dist. LEXIS 83293, at *14-15.

“when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied.”¹⁴⁸

Other judges have found joinder inappropriate based on the merits. Faced with similar facts as Judge Howell, Judge Bernard Zimmerman of the Northern District of California reached the opposite conclusion in *On the Cheap, LLC v. Does 1-5011*,¹⁴⁹ holding joinder of anonymous defendants improper for discovery purposes.¹⁵⁰ Much like *Call of the Wild*, the *On the Cheap* proceedings began when the plaintiff filed suit against 5,011 anonymous defendants for allegedly using BitTorrent software to illegally download the adult film “Danielle Staub Raw.”¹⁵¹ Plaintiff then requested expedited discovery to subpoena the ISPs and sought joinder of the defendants in the action.¹⁵² Judge Zimmerman initially granted both requests, but after receiving multiple motions to quash the subpoenas, sua sponte ordered plaintiff to show cause as to why joinder was proper.¹⁵³

As a threshold issue, Judge Zimmerman found that the plaintiff failed to satisfy 20(a)(2)(A).¹⁵⁴ Merely alleging that all defendants were engaged in the same transaction or occurrence because they all joined the same BitTorrent swarm did not satisfy this element according to Judge Zimmerman.¹⁵⁵ Although it was possible that all defendants could have

¹⁴⁸ *Id.* at *17-18 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)).

¹⁴⁹ *On the Cheap, LLC v. Does 1-5011*, 2011 U.S. Dist. LEXIS 99831 (N.D. Cal. Sept. 6, 2011) (hereinafter referred to as “*On the Cheap*”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *1.

¹⁵² *Id.* at *2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at fn.4, *5-6 (citing *Boy Racer v. Does 2-52*, 2011 U.S. Dist. LEXIS 86746 (N.D. Cal. Aug. 5, 2011)); see also *Hard Drive Productions, Inc. v. Does 1-188*, 2011 U.S. Dist. LEXIS 94319, at *38 (N.D. Cal. Aug. 23, 2011) (“Under the BitTorrent Protocol, it is not necessary that each of the Does 1-188 participated in or contributed

interacted with one another within the swarm, Judge Zimmerman pointed to the seven-week identification timeframe plaintiff used in assembling its list of defendants and found that the defendants may not have been cooperating with one another.¹⁵⁶ Significantly, the mere possibility that all defendants may not have interacted was enough to find that the first element was not met, suggesting that Judge Zimmerman reads 20(a)(2)(A) as requiring strict proof of cooperation among the defendants in contrast with Judge Howell’s “flexible” interpretation.

Judge Zimmerman went further and said that even if the plaintiff had satisfied both elements of Rule 20(a) he still would have severed the defendants using his discretionary powers.¹⁵⁷ Judge Zimmerman reached the exact opposite conclusion of Judge Howell, holding that joining over 5000 defendants would not promote judicial efficiency and instead would “create significant case manageability issues.”¹⁵⁸ Judge Zimmerman also found that joining all 5,011 defendants together would violate the “principles of fundamental fairness” and be prejudicial to the defendants.¹⁵⁹ He noted that in cases such as these, “defendants are left with a decision to either accept plaintiff’s [settlement] demand or incur significant expense to defend themselves.”¹⁶⁰ Judge Zimmerman also expressed his concern at plaintiff’s refusal to file a copy of its settlement letter and related information about its settlement practices with the court.¹⁶¹ Judge Zimmerman interpreted this refusal in tandem with the other issues raised to describe this

to the downloading of each other's copies of the work at issue—or even participated in or contributed to the downloading by any of the Does 1-188. Any ‘pieces’ of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm.*”) (emphasis in original).

¹⁵⁶ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at fn.4, *5-6.

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *Id.* at *7.

¹⁵⁹ *Id.* at *10.

¹⁶⁰ *Id.* at *11.

¹⁶¹ *Id.* at *12, *16

new breed of mass copyright litigation as “a massive collection scheme” that is “perverting the joinder rules” in order to make defendants more likely to pay settlement money.¹⁶²

V. Courts Should Heavily Scrutinize Joinder Motions in BitTorrent Copyright Litigation and Congress Should Act to Ensure Such Scrutiny is Consistent.

In 1966 the Supreme Court wrote that the “impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged.”¹⁶³ While this underlying principal may still hold true today, it is doubtful that the Supreme Court ever could have imagined it would be used to justify joining thousands of anonymous defendants together accused of illegally downloading copyrighted material from the Internet.¹⁶⁴ Nevertheless, Judge Howell quoted this passage when outlining the legal framework for granting joinder in *Call of the Wild*.¹⁶⁵ Although the general rule is to encourage joinder, the Supreme Court wisely hedged its statement by noting that the impulse for joinder must remain “consistent with fairness to the parties.”¹⁶⁶

Judge Howell’s analysis of fairness to the parties in *Call of the Wild* only focused on fairness to the plaintiff copyright holders, since they were the only named parties in the lawsuit

¹⁶² *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at *12, *16; *see also* IO Group, Inc. v. Does 1-435, Case 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.”)

¹⁶³ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

¹⁶⁴ The *United Mine Workers* case “grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields,” about as far as you can get from protecting copyright on the Internet. *United Mine Workers of Am.*, 383 U.S. at 718.

¹⁶⁵ *Call of the Wild*, 770 F. Supp. 2d at 342.

¹⁶⁶ *United Mine Workers of Am.*, 383 U.S. at 724.

at the time the motion was filed.¹⁶⁷ Although this might make sense, the analysis is superficial. Judge Howell should have seized the opportunity to explore the issue from the perspective of an anonymous defendant such as Adrienne Neal. In fact, the biggest flaw in Judge Howell's opinion is the failure to discuss the settlement factory business model and how it can and should affect the analysis of granting joinder. By granting joinder to the plaintiffs in *Call of the Wild*, Judge Howell basically sanctioned the settlement factory business model. Judge Howell granted joinder in part to promote judicial efficiency.¹⁶⁸ In the long run, however, judicial efficiency can be greatly eroded if a flood of lawsuits are filed by plaintiffs hoping to exploit this business model for easy profit. While it is hugely important that copyright holders are able to protect their copyrights within the legal system, copyright law and the Federal Rules of Civil Procedure were never intended to be used as an instrument in extracting settlements from defendants in this manner.¹⁶⁹

Judge Zimmerman, on the other hand, goes too far by denying joinder altogether in *On the Cheap*. Judge Zimmerman initially denied joinder because he felt that the plaintiff had failed to prove that the putative defendants had all engaged in the same transaction or occurrence as required by Rule 20(a)(2)(A).¹⁷⁰ Judge Zimmerman's interpretation of this requirement is too strict. Given the nature of the BitTorrent protocol, if a plaintiff can provide proof to the court that all of the IP addresses were part of the same swarm, then that should satisfy the first prong. Judge Zimmerman pointed to the seven-week time-span of the swarm as reason why plaintiff

¹⁶⁷ *Call of the Wild*, 770 F. Supp. 2d at 342 (“Joinder will avoid prejudice and needless delay for the only party currently in the case, namely the plaintiff, and promote judicial economy.”).

¹⁶⁸ *Id.*

¹⁶⁹ *See, e.g., IO Group*, 2011 U.S. Dist. LEXIS 14123, at *9 (“[F]iling 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.”)

¹⁷⁰ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at fn.4, *5-6 (citing *Boy Racer*, 2011 U.S. Dist. LEXIS 86746).

failed to prove that the defendants had engaged in the same transaction or occurrence,¹⁷¹ but this interpretation is misguided. The benefit of BitTorrent for consumers is that it divides the work among all users within the swarm.¹⁷² The potential that all users within a swarm interacted with one another should be enough to join a defendant; plaintiffs should not be required to prove in their complaint that every defendant actually interacted with one another. To put it another way, proof that each defendant entered a particular swarm should satisfy Rule 20(a)(2)(A). Plaintiffs should not be required to prove that each member of the swarm actually swapped bits of data with each other.

Judge Zimmerman further stated that even if the plaintiff were to satisfy both elements of Rule 20, he would have denied joinder anyway because he did not think joining over 5,000 defendants together would promote judicial efficiency.¹⁷³ In particular, Judge Zimmerman feared that the different factual and legal defenses defendants would likely raise would create a logistical nightmare.¹⁷⁴ Furthermore, Judge Zimmerman felt that allowing joinder of the 5,000+ defendants would violate principles of fundamental fairness.¹⁷⁵ This is the most useful part of Judge Zimmerman's analysis because it gets to the heart of the settlement factory business model and reveals its most problematic element. As an example of how joinder would be prejudicial to the defendants, Judge Zimmerman referenced two separate motions to quash that were filed by anonymous defendants: one defendant was a "Virginia resident who claims never to have used BitTorrent" and the other "was an Oregon resident until he died in March 2010, according to his

¹⁷¹ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at fn.4, *6.

¹⁷² *Brown*, *supra* note 45.

¹⁷³ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at *7.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *10.

daughter.”¹⁷⁶ The plaintiff further conceded that it was likely 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.”¹⁷⁷ Judge Zimmerman took issue that so many of the putative defendants were outside of his district and knew that allowing joinder would subject them to significant logistical difficulties: in essence, the defendants would be “left with a decision to either accept plaintiff’s [settlement] demand or incur significant expense to defend themselves in San Francisco or hire an attorney to do so.”¹⁷⁸ Faced with this choice, it would make financial sense for most defendants simply to pay the settlement money to avoid the likely higher expenses associated with defending themselves in San Francisco, *even if the defendants were factually innocent*.¹⁷⁹ Judge Zimmerman further noted that the plaintiff had not served a single defendant even though the complaint had been filed eleven months previously.¹⁸⁰ As noted above, it is likely that it was never the intention of the plaintiff to actually serve the defendants but instead to simply obtain their names and addresses so they could send settlement letters.¹⁸¹

Judge Wilkins’ holding in *Nu Image* strikes the proper balance between the need copyright holders to protect their interests while at the same time preventing these rights holders from abusing the channels of relief. Judge Wilkins’ decision interprets 28 U.S.C. § 1400(a), the statute that governs venue for claims asserted under the Copyright Act, as requiring that plaintiffs have a “good faith” belief that putative defendants reside in the district where the suit is

¹⁷⁶ *Id.* at *7.

¹⁷⁷ *Id.* at *10.

¹⁷⁸ *Id.* at *11.

¹⁷⁹ Anderson, *supra* note 41.

¹⁸⁰ *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at *14-15.

¹⁸¹ Anderson, *supra* note 41.

being brought before jurisdictional discovery can be granted.¹⁸² There are many benefits to this approach. First and foremost, this requirement prevents plaintiffs from abusing the court and the Federal Rules of Civil Procedure as a one-stop shop for obtaining massive lists of names and addresses to send settlement letters throughout the United States. At the same time, however, it still allows for economic efficiency: plaintiffs can join together putative defendants from each district whom they have reason to believe reside in that district, by using IP geolocation technology, and then file individual lawsuits in each district as appropriate. While the cost-savings for plaintiffs naturally will be diminished, this method is still more efficient than having to file an individual lawsuit against each putative defendant. Second, this requirement is more in line with principles of fundamental fairness. It eliminates the most troublesome aspect of the settlement letter factory business model in which factually innocent people from opposite sides of the country without the means to defend themselves receive a settlement offer in the mail. These *factually innocent* defendants must then choose whether to incur a large expense to travel to the district where the lawsuit is pending or simply comply with the settlement demand. Judge Wilkins' approach makes it less likely that factually innocent defendants who cannot easily appear in court will be dragged into potentially embarrassing and expensive litigation. At the same time, the remaining threat of being named a defendant in a copyright suit will hopefully give pause to any potential illegal downloader.

Courts faced with similar lawsuits should follow Judge Wilkins' example and require that the plaintiff have a good faith belief that each putative defendant reside in the district where the suit is being filed. This threshold matter should be raised by the court itself and should not require a motion by a defendant. Once the defendants who are reasonably expected to reside in

¹⁸² *Nu Image, Inc. v. Does 1-23322*, 2011 U.S. Dist. LEXIS 83293 at *6-12.

the district where the lawsuit is pending are joined, expedited discovery should be granted so that the plaintiffs can obtain the necessary information to prosecute alleged infringers before the respective ISPs delete the data. Defendants at this stage could then theoretically file a motion opposing joinder, but courts should be more willing to grant joinder since the pool of putative defendants will be reasonably expected to reside within the judicial district, thus eliminating the most egregious affront to the principles of fundamental fairness in which a factually innocent defendant living across the country is faced with the difficult choice of settling or incurring greater expenses to defend themselves. Additionally, courts should be more willing to grant joinder at this point based on the “same transaction or occurrence” analysis outlined above—the standard should not be as strict as Judge Zimmerman believes and should be satisfied so long as the plaintiff has evidence that all putative defendants were a part of the same swarm. Naturally, a potential class of defendants in an example such as this would be less than potential numbers under the current system. A smaller number of defendants is more manageable for the court, allows the defendants to work together, and also presents a relative cost-savings for the plaintiffs. This is the most balanced reading of Rules 20 and 21 and is line with the case law, which encourages joinder so long as it remains fair.¹⁸³

Although Judge Wilkins’ approach is what courts *should* do when faced with these lawsuits, the inconsistent holdings around the country, arising from almost identical fact patterns, show that legislative action is needed to ensure consistency. Consistency in adjudicating mass copyright litigation is essential to prevent forum shopping by plaintiffs.¹⁸⁴ Preventing forum

¹⁸³ *United Mine Workers of Am.*, 383 U.S. at 724 (although at footnote 164 I argued that it was unforeseeable that the joinder concept as set forth by the Court would have been applied to copyright law in the digital age, the underlying concept is still valid precedent).

¹⁸⁴ Although there are both supporters and detractors of forum-shopping, “the concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the

shopping helps to ensure that factually innocent defendants are not faced with the choice of settling in order to avoid the greater costs associated of traveling and fighting the charges in a distant court. To this end, Congress should pass an amendment to 28 U.S.C. § 1400(a), specifically outlining District Courts' jurisdiction in causes of action predicated upon joining anonymous defendants who allegedly used peer-to-peer software to illegally obtain copyrighted works. In its current form, 28 U.S.C. § 1400 reads as follows:

§ 1400. Patents and copyrights, mask works, and designs

- (a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.
- (b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

The amended version should read as follows, with proposed text in italics:

§ 1400. Patents and copyrights, mask works, and designs

- (a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.
 - (i) *For actions in which a plaintiff seeks to join anonymous defendants under Rule 20(a) on the grounds that the putative defendants allegedly used peer-to-peer software to illegally obtain copyrighted works, plaintiff must have a good faith belief that the defendants reside in the district in which the action is pending before jurisdictional discovery may be granted.*
 - A. *Joinder of anonymous defendants shall be appropriate only to the extent that the potentially joined defendants all reside in the district in which the action is filed. All other defendants shall be severed from the action without prejudice.*

outcome of a case simply by choosing the forum in which to bring the suit.” *Sheldon v. PHH Corp.*, 135 F.3d 848, 855 (2d Cir. 1998) (citing *Olmstead v. Anderson*, 400 N.W.2d 292, 303 (Mich. 1987)).

- B. *The court shall raise this requirement sua sponte and shall only grant joinder to the extent that plaintiff offers good faith proof that the putative defendants he wishes to join all reside within the district in which the action is pending. Upon satisfaction of the court, jurisdictional discovery shall then be granted.*
 - C. *The good faith belief requirement set forth in (a)(i) can be satisfied by using geolocation technology to obtain the IP address furnished to a computer or other device when it accesses the Internet to show that all of the IP addresses which plaintiff hopes to join are located within the district in which the action is pending.*
 - (ii) *Section (a)(i) shall not apply to actions in which joinder of anonymous defendants is not sought by plaintiff.*
- (b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

This amendment to 28 U.S.C. 1400(a) will ensure that courts across the country apply the same standards in determining whether to grant joinder of anonymous defendants in BitTorrent copyright litigation. Consistency in this area is essential to ensure that justice is served both for plaintiffs seeking to protect their copyrights and for factually innocent defendants who should not settle merely because it makes economic sense.

Admittedly, one of the major limitations of the solution proposed is its focus on BitTorrent networks and its inapplicability to file lockers,¹⁸⁵ such as RapidShare, or streaming sites,¹⁸⁶ such as chanfeed.com. Illegal downloading of copyrighted works is shifting away from

¹⁸⁵ File locker services offer users cheap digital storage and the ability to share the stored data. Some estimates say that online lockers account for approximately seven percent of all online traffic and that more than ninety percent of the non-pornographic material stored on them is copyrighted. LEVINE, *supra* note 70, at 175-76.

¹⁸⁶ Streaming sites are similar to file lockers except that instead of just storing the data for future download a user can view the underlying file on the site. In addition to archived works, streaming sites focus heavily on broadcasting live television, especially sporting events. LEVINE, *supra* note 70, at 150-51.

BitTorrent networks, and is moving to file lockers and streaming sites.¹⁸⁷ Some commentators attribute this shift to the fact that these alternatives pose less risk to downloaders that they will be named in a lawsuit.¹⁸⁸ As a result, some may argue that the proposed solution does little to solve the overarching problem of digital piracy. But the proposed solution is not designed to fix all the problems associated with illegal file-sharing. Instead, it merely seeks to address the most problematic element of a specific type of file-sharing lawsuit.¹⁸⁹ Given the rapid speed with which technology changes, and the various stakeholders within the debate, it is difficult, if not impossible, for a single action to eradicate illegal file sharing.¹⁹⁰ Indeed, some commentators believe that the goal is not eradicating piracy, but making it inconvenient enough to encourage people to buy or rent from legitimate services.¹⁹¹ The proposed solution aligns with this goal.

VI. Conclusion.

¹⁸⁷ LEVINE, *supra* note 70, at 176.

¹⁸⁸ *Id.* It is worth noting, however, that file lockers and streaming sites are much easier to shut down than file-sharing sites. *Id.* at 210.

¹⁸⁹ Critics of the proposed solution, which limits joinder to only those defendants who reside in the district in which the lawsuit is filed, may argue that it does not go far enough and that joinder in BitTorrent copyright litigation should be abolished in general. The main support for such an argument is that given the nature of IP addresses, it is highly unlikely that every person associated with the IP addresses named in these types of lawsuits actually infringed the copyright of the Plaintiff. *See Hoffman, supra* note 95. Abolishing joinder altogether, however, would punish all copyright holders for the abuses of a minority of unsavory actors. Although wholesale abolition of joinder may be necessary at some point in the future to effectively shut down the “settlement letter factories,” the proposed solution attempts a more gradual approach to limit the worst offenders while preserving the Federal Rules of Civil Procedure for more legitimate copyright holders.

¹⁹⁰ *See, e.g.,* the massive and contentious debate surrounding the Stop Online Piracy Act (“SOPA”). *Rights and wronged: An American anti-piracy bill tries to stem the global theft of intellectual property*, THE ECONOMIST (Nov. 26, 2011), <http://www.economist.com/node/21540234> (outlining the bill and the two opposing “mighty coalitions” that have formed around it).

¹⁹¹ LEVINE, *supra* note 70, at 210.

Courts should be cognizant of the Constitutional goal of promoting the useful arts,¹⁹² and should be wary of schemes designed to extort money from defendants. As the digital revolution continues to transform industry and society, it is imperative that copyright holders be allowed to protect their rights. There is a fine line, however, between protecting rights and extortion. Congress needs to act to ensure that judges across the country consistently handle joinder of anonymous defendants in these very similar cases. Congress should amend 28 U.S.C. § 1400(a) to specifically address joinder of anonymous defendants in BitTorrent copyright litigation. Specifically, Congress must limit plaintiffs to joining only those putative defendants whom they have a good faith belief reside within the district in which the action is pending. 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.

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 Matyszczuk, supra* note 3.