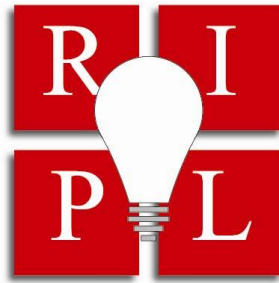


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THE NEW PONZI SCHEME: BITTORRENT & Hardcore PORNOGRAPHY

TIFFANY ALBERTY

ABSTRACT

The purpose of this article is to shed light on the recent issues facing the ongoing BitTorrent copyright infringement litigation, by reflecting on district court decisions over the past ten years and analyzing two recent circuit court decisions. More specifically, this article focuses on how pornography trolls abuse the principles of copyright infringement by forcing John Doe litigants in BitTorrent to settle without fully exercising their right by trial. By using sociological tactics and pseudo-moral standards, these trolls coerce John Does to pay over thousands of dollars in settlement out of embarrassment and fear for watching the pornography that these trolls create. The article explains that there is no consistency among federal courts in this niche area of both technology and law. Therefore, there is a serious need for change due to the abusive tactics being used by copyright trolls nationwide. By limiting communication between copyright trolls and John Does, revising the statutory damages in the Copyright Act, and imposing harsher sanctions and penalties, the law can change the business model of these pornography and copyright trolls, while maintaining more control and ethical behavior in this industry.

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THE NEW PONZI SCHEME: BITTORRENT & hardcore PORNOGRAPHY

TIFFANY ALBERTY*

I. INTRODUCTION

Imagine waking up one morning, turning on the “Today” show, and sipping coffee as you get ready to head to work. You look out the window and realize that your car is missing out of the driveway. You call the police immediately, only to be informed that your car was stolen and involved in a six-car pileup on the interstate. No one was seriously injured, but the damage to the vehicles well exceeds \$100,000. The suspect who stole your car is at large, however you will be held civilly liable for the suspect’s actions, even though you are clearly the victim.¹ Needless to say, the authorities never find the suspect. Thus, instead of fighting to prove your innocence and pursue the real suspect, you are coerced to settle due to the costs and time associated with litigation and the possible fear of public humiliation.

This scenario is exactly what is happening with copyright infringement cases within the world of BitTorrent. Federal courts were first introduced to the BitTorrent copyright infringement issue in 2006,² and courts have been flooded with these types of claims ever since.³ However, there has been no standard set forth by either the Circuit Courts of Appeals or the Supreme Court in addressing this type of unique IP claim.⁴ Similar to the stolen car analogy, copyright plaintiffs have a need

* © Tiffany Alberty 2016. J.D. Anticipated May 2017, The John Marshall Law School; M.A. Communications, Webster University. Thank you to all RIPL editors for your guidance and instruction during this arduous process. Special thanks to the late Michelle Williams from UIC who introduced me to this topic, the Honorable Andrea R. Wood who encouraged my research in this area and Attorney Jeffrey Antonelli, who gave me great insight into this problem. Lastly, thanks to all my friends and family for always encouraging me to take risks and for their constant overwhelming love and support.

¹ Kenneth Chiu, *If Someone Steals Your Car After You Leave Your Keys in It...*, Legal Blog (Dec. 8, 2011), <https://www.quora.com/Is-it-true-that-if-someone-steals-your-car-after-you-leave-your-keys-in-it-that-you-are-liable-for-his-or-her-actions>. See *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991) (car theft is not necessarily an intervening criminal act breaking the chain of causation). There is no case law that directly parallels this scenario. However, depending on the state or jurisdiction, the jury could still hold a car owner liable if the jury decides that the damages were foreseeable and therefore, negligent. For example, if that car owner accidentally left his keys in the car. However, most juries should not find the person liable, especially by intervening causes such as criminal actions by third parties. The issues of foreseeability and intervening causes are typically left for the jury to decide.

² See *Columbia Pictures v. Bunnell*, 2006 WL 5383789 (C.D. Cali. 2006) (holding that the defendants did not download copyrighted material on BitTorrent *per se*, but instead facilitated users to locate and download authorized copies of the copyrighted works). This case does not address the specificity as to expedited discovery, IP/ISP subpoenas, pieces, swarms, joinder, and public policy issues addressed in today’s BitTorrent cases.

³ Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1131 (2015). From 2001-2014, courts have seen over 106,379 BitTorrent copyright infringement cases. This number would be modified if joinder was broken and only accounts for the top 20 copyright John Doe plaintiffs.

⁴ *Killer Joe Nevada, LLC v. Does 1-20*, 807 F.3d 908 (8th Cir. 2015); see also Jeffrey Antonelli, *It is Up! – 8th Circuit Court of Appeal Oral Argument in BT Copyright Troll Case, (Killer Joe NV v.*

for expedited discovery, but their need must be balanced against their own proof of actual copyright infringement, and the options for John Doe defendants—specifically the ones who have been coerced into settlement by egregious statutory damages and the fear of public embarrassment for their connection with the pornography industry.⁵ Therefore, due to all of these variables that have yet to be addressed by a Circuit or Supreme Court, BitTorrent copyright infringement claims function like the “Wild West.”⁶ Because technology has consistently outpaced the rate at which courts function, judges and courts have been constantly playing catch-up with the correlation between technology and the law.⁷ This is precisely the issue with BitTorrent copyright infringement in the pornography industry.⁸

Part I of this comment provides background of anonymous BitTorrent protocol and the process of suing for copyright infringement. It explains how some pornography companies are copyright trolling as a business model and analyzes how many BitTorrent users have become more diligent in their privacy protection. Additionally, it introduces the theory that innocent parties have been subjected to litigation due to additional privacy protection of the actual infringer. Part II analyzes the current issues with copyright infringement cases and the discrepancies of our court system with current copyright laws. It details the problems with the Copyright Act of 1976 statutory damages provision, issues with copyright plaintiffs’ requests for expedited discovery, coercive elements in copyright infringement cases and lack of accountability to regulate pornography copyright trolls. Lastly, Part III proposes a forum where the court will have a forensic software specialist prior to granting any motion for expedited discovery and will limit the communication between the plaintiff and the defendant. In addition, Part III proposes significant ways that Congress can implement and revise the statutory damages section of the Copyright Act to protect both copyright infringers and innocent parties who have

Leaverton, 14-3274, (Sept. 2, 2015) <http://dietrolldie.com/2015/09/02/pending-8th-circuit-court-of-appeal-oral-argument-in-bt-copyright-troll-case-killer-joe-nv-v-leaverton-14-3274/>. This case was one of the first BitTorrent copyright infringement cases to be seen by any appellate court. Although this case was one of the first for an appellate court to decide, the primary focus was on attorney’s fees when an alleged copyright infringer was found to be innocent. This case did not decide whether an IP address associated with copyright infringement explicitly meant that the IP address holder was the actual infringer.

⁵ *TCYK, LLC v. Does 1-87*, No. 13 C 3845, 2013 WL 3465186, at *1 (N.D. Ill. July 10, 2013). Most BitTorrent defendants are listed as “John Doe” because the plaintiff only has their IP addresses at the start of filing their complaint.

⁶ *Wild West*, DICTIONARY.COM, <http://dictionary.reference.com/>. “Wild West refers to the western frontier region of the U.S., before the establishment of stable government (1800-1850), especially with reference to its lawlessness.”

⁷ Vivek Wadhwa, *Laws and Ethics Can’t Keep Pace with Technology*, (Apr. 15, 2014) <http://www.tech-nologyreview.com/view/526401/laws-and-ethics-cant-keep-pace-with-technology/>.

There is a public outcry today [due to gaps in privacy laws]—as there should be about NSA surveillance which data that Google, Apple and Facebook are collecting. Our smartphones track our movements and habits. Our Web searches reveal our thoughts. Where do we draw the line on what is legal and ethical? . . . The problem is that the human mind itself can’t keep pace with the advances that computers are enabling.

⁸ *Bait Productions Pty Ltd. v. Does 1-73*, 2013 WL 450638 at *1, at Footnote 1 (M.D.Fla. Feb. 6, 2013). Lawsuits like this involve “technology that has outpaced the ability of the courts to deal with it.” *Id.*

been coerced into settlement by copyright trolls. Moreover, it suggests uniform sanctions and penalties to attorneys, firms and companies who abuse their power to sue for copyright infringement in BitTorrent cases.

II. BACKGROUND

Copyright law allows individuals to protect and promote the progress of science and the arts by securing rights under their creations.⁹ Through this power, copyright holders have a right to pursue civil litigation whenever a person attempts to infringe on their copyright by retaining, reproducing or distributing their works.¹⁰ A copyright holder can sue a potential infringer for \$750-\$150,000.¹¹ Modern Copyright law was established in 1976 and went into effect in 1978.¹² Congress has attempted to keep The Copyright Act current with technology through the introduction of the Digital Millennium Copyright Act (DMCA) in 1996 and Section 115 of the Reform Act of 2006.¹³ But with the rampant usage of peer-to-peer networks and BitTorrent, it seems that the Copyright Act has been taken advantage of by pornography copyright trolls with deceptive tactics and an eye for “sophisticated forensic software.”¹⁴

A. Functionality of Anonymous BitTorrent Protocols

BitTorrent is a software protocol that allows peer-to-peer file sharing over the Internet at faster rates than the original peer-to-peer file sharing introduced in the early 1990s.¹⁵ BitTorrent is not a program like the former Napster or Limewire; it is simply a mechanism for transferring information and files.¹⁶ And while the

⁹ U.S. CONST. art 1, § 8, cl. 8, Intellectual Property Clause.

¹⁰ 17 U.S.C. § 504. However, the language of the Act is not explicit; there is no clear distinction in the act that specifies the difference between downloading copyrighted material in a single instance versus downloading copyrighted material multiple times with intent to distribute (pirating).

¹¹ *Id.* \$750 is the minimum amount a copyright holder can sue in any copyright infringement case, with up to \$30,000 dependent upon what “the court considers just.” But if the court finds that the infringement was committed willfully, the court can increase the damages amount up to \$150,000 per infringer.

¹² *Id.*

¹³ 17 U.S.C. § 512; see *Section 115 Reform Act of 2006: Subcomm. on Cts., the Internet, and Intell. Prop. of the Comm. On the Judiciary*, 109th Cong. (2006) (statement of the United States Copyright Office), <http://copyright.gov/docs/regstat051606.html>.

¹⁴ *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 993 (D.C. Cir. 2014). “Sophisticated . . . forensic software” is the language used for copyright infringement litigants who caught infringers downloading their pornography.

¹⁵ See *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233, 235 (E.D.N.Y. 2012). BitTorrent is a open-source software protocol.

¹⁶ *Id.* See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010-11 (9th Cir. 2001). Napster and Limewire are different peer-to-peer devices because it was an Internet service that facilitated the transmission and retention of full audio files, in which Napster was found contributory and vicariously liable because the company was on notice about the infringement. On the contrary, BitTorrent is only a filtering system where miniscule pieces of a file are gathered from many users.

BitTorrent application itself is not illegal, it has been exceedingly abused¹⁷ for downloading copyrighted material.¹⁸

With BitTorrent file sharing, the initial file-provider, “the seeder,” voluntarily shares an initial file “seed” with the network.¹⁹ Then, BitTorrent software breaks the large “seed” file into smaller “pieces.”²⁰ Each “piece” has a unique identifying number, known as the “hash checksum or identifier.”²¹ The data is not stored on a “central server”; BitTorrent software simply facilitates distribution between the users.²² However, there is a tracker-server through the software that has information about the ISP (internet service provider)²³ addresses that are downloading and uploading files.²⁴

A user must have the BitTorrent software installed on his computer to download or upload material. Once the user finds what he or she wants to download, BitTorrent automatically connects them with “peers” who have that material.²⁵ Once that user downloads any piece of material, he or she now becomes a peer and other users can download that piece from him or her.²⁶ As long as a peer continues to run BitTorrent (which can be automatic once a computer is turned on), the sharing will continue, which makes it a “cooperative endeavor.”²⁷ The group of seeders and peers uploading and downloading identical files are called a “swarm.”²⁸ While connected to

¹⁷ Hendrik Schulze, *Ipoque: Internet Study 2008/2009*, <http://www.webcitation.org/6OVSh9hZ0>. Since 2009, “peer-to-peer file sharing still generates by far the most traffic in all monitored regions—ranging from 43 percent in Northern Africa to 70 percent in Eastern Europe.”

¹⁸ U.S. COSNT. art 1, § 8, cl. 8; In re BitTorrent Copy Infringement Cases, No. 12-1188, 2013 WL 501443, at *2 (C.D. Ill. Feb. 11, 2013). Under the United States Constitution, “Congress has the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” A copyright grants a creator of original work exclusive rights for its use and distribution. Anything that was created after 1977 is protected by the 1976 Copyright Act. But the Copyright Act does not specify the differences between copyright infringement and copyright infringement with the intent to distribute (piracy) regarding statutory damages.

¹⁹ Sean B. Karunaratne, *The Case Against Combating BitTorrent Piracy through Mass Joe Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 290 (2012).

²⁰ *Collins*, 288 F.R.D. at 235. Every file can be broken into hundreds of thousands of pieces. See *Karunaratne*, 11 MICH. L. REV. at 289. Typically, the more pieces, the easier the material is to download.

²¹ *TCYK*, 2013 WL 3465186, at *1-2. The hash checksum (also known as hash identifier) is “a string of alphanumeric characters generated by applying a mathematical algorithm to a digital file.” See also *Patrick Collins, Inc. v. Does 1-21*, 282 F.R.D. 161, 162 (E.D. Mich. 2012).

²² *Id.* See also *Karunaratne*, 11 MICH. L. REV. at 289.

²³ *ISP*, DICTIONARY.COM, <http://dictionary.reference.com/>; *United States v. Cameron*, 699 F.3d 621, 648, 656 (1st Cir. 2012). ISPs are companies that provide services for accessing and using the Internet. These companies provide Internet access, Internet transit, domain names and web hosting. A person must go through an ISP in order to access the Internet. Many times for child pornography cases, prosecutors will subpoena the ISP to determine that the IP address given (with a specific number like 76.179.26.185) was assigned to the actual defendant, who in turn was the account holder or was located at the residence. Typically, the evidence from the ISP companies is admitted into evidence as “chain of custody evidence.”

²⁴ *Id.* Some of the most common ISPs are: Time Warner, AT&T, and Comcast.

²⁵ *Karunaratne*, *supra* note 19, at 289.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at footnote 84. “In reality, swarms can include hundreds or thousands of users and may continue for months.”

the swarm, users continuously download pieces of the file, until complete.²⁹ More peers in a given swarm make for faster downloads “because there are more sources of each piece of the file.”³⁰ Therefore, this provides a larger incentive for the users to stay within a swarm (because users will enjoy faster download rates in the future as long as they are participating in the swarm), which could last for months or years.³¹

Over recent years, users (actual infringers) have become more diligent in their privacy protections due to the likelihood of copyright infringement litigation. Instead of users leaving their IP addresses³² open to track who is specifically using BitTorrent illegally, users started to become anonymous by using either a Virtual Private Network (VPN) or proxy service to act as a shield.³³ VPN and proxy service providers are similar, because each program makes the user’s IP address anonymous. These providers then work as a third party to allow their user to ping off a shared IP address.³⁴ By accessing another’s shared IP address, it hides the user’s “true” identity.³⁵ Essentially, shared IP addresses are any IP addresses that are not protected by a VPN or proxy service.³⁶ Most VPN providers will take the user’s personal information (including the user’s personal IP address) to protect itself from copyright infringement litigation, however a few VPN providers keep no connection logs and/or discard the logs frequently.³⁷ Ironically, that is many of the VPN companies’ main marketing tactic, “no logging, ever.”³⁸ Many of these non-logging VPN providers are located in the United States, but a majority of their servers are stored overseas, hence the international pinging of shared IP addresses.³⁹ For double protection, users can run their BitTorrent software through a proxy service and then

²⁹ *Id.*

³⁰ Karunaratne, *supra* note 19, at 289.

³¹ *Id.* at footnote 84.

³² See *How to Use Utorrent Anonymously*, (Oct. 1, 2015, 6:50 P.M.) <http://www.best-bittorrent-vpn.com/how-to-use-utorrent-anonymously.html>. An IP (internet protocol) address is a unique series of numbers that is provided to the user by his ISP.

³³ *Id.*

³⁴ *Id.* For example, a shared IP address is one that is not shielded by a VPN or proxy service.

³⁵ See *Find the Best Torrent VPN*, (Oct. 1, 2015, 7:00 PM), <http://www.best-bittorrent-vpn.com>. VPNs are legal and a majority of large companies use them to protect against anonymous users attempting to break through security firewalls.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Cyrus Farivar, *How One Small American VPN Company is trying to Stand-Up for Privacy*, (Oct. 27, 2013) <http://arstechnica.com/tech-policy/2013/10/how-one-small-american-vpn-company-is-trying-to-stand-up-for-privacy/>. Private Internet Access (PIA) has said it would comply [by providing account information] if it were a “legit governmental body and that organization has the jurisdiction to even attempt to ask.” Regardless, PIA claims that it does not log, “period.”

³⁹ See generally *Protect Your Privacy with a VPN Tunnel*, available at <https://www.privateinternetaccess.com>; U.S. COPYRIGHT OFFICE SUMMARY, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (DMCA). For example, the company Private Internet Access (PIA) provides non-logging VPNs at a low monthly rate and will connect to the Internet through various IP address located in over 20 countries and 31 regions worldwide. Under the legal tab on PIA’s website, it claims the company “respects and abides by the Digital Millennium Copyright Act” (DMCA) and “does not condone copyright infringement.” The DMCA is a 1996 copyright law (in effect in 2000) that criminalizes production and dissemination of technology, devices, or services intended to facilitate measures that control access to copyrighted work.

route the proxy through a VPN.⁴⁰ In addition, because BitTorrent users take their anonymity seriously, these users will pay for their monthly VPN membership using Bitcoin,⁴¹ therefore leaving no paper trail to be traced back to the actual infringer.

B. Suing the Copyright “Infringer”

Because of the widespread use of BitTorrent over the past ten years, copyright infringement cases have been flooding the federal courts. Copyright owners typically pursue infringers through the BitTorrent software itself. Copyright plaintiffs will retain a forensic investigator to identify the ISP or IP addresses of the users who were participating in the downloading and uploading of their copyrighted material.⁴² These investigators use forensic software to isolate swarms of peers or users “pirating” the material.⁴³ In addition, these investigators verify that each downloaded file was identified through the same hash identifier.⁴⁴ However, despite investigators being able to identify IP addresses, copyright plaintiffs are not able to obtain the name or address of the users to whom the IP addresses belong, and consequently file suits against defendants identified only as “John Does.”⁴⁵

To identify the users,⁴⁶ copyright plaintiffs will file a motion for expedited discovery⁴⁷ after filing a complaint. Under Federal Rule of Civil Procedure 26(d)(1), a

⁴⁰ See *Totally Anonymous BitTorrent in 3 Easy Steps*, (Oct. 1, 2015, 7:05 PM) <http://www.best-bittorrent-vpn.com/totally-anonymous-bittorrent-in-3-easy-steps.html>. The rationale for double protection is that every time a user accesses a website, the computer will ask for a DNS (domain name system), which is attached to the computer’s IP address. The DNS functions automatically, and keeps track of the IP addresses accessing the websites. Some of the VPNs like “Torguard” provides DNS leak protection into their software, thus the user cannot be tracked by any website he or she visits.

⁴¹ See *U.S. v. Ulbricht*, 31 F.Supp. 3d 540, 547, 569 (S.D.N.Y. 2014). Bitcoin is a decentralized type of digital currency, which can be used to pay for specific things or can act as a medium of exchange for later conversion into non-digital currency.

⁴² See *In re BitTorrent*, 2013 WL 501443, at *3 (C.D. Ill. Feb. 11, 2013); See *Patrick Collins*, 282 F.R.D. at 162. A copyright infringement action can include a person who only downloaded a copyrighted material once or someone who copied with intent to distribute or distributed.

⁴³ *TCYK*, 2013 WL 3465186 at *2. But there is no specific standard set forth by the courts for the forensic software to prove that the John Does downloaded one-piece or entire copyrighted file.

⁴⁴*Id.* This same identifier can be used within a few hours, days, or months at a time.

⁴⁵*Id.* Karunaratne, *supra* note 19, at 284-85. These defendants are named “John Does” because the plaintiff only has their IP addresses or ISP identity as a way to track their use of BitTorrent.

⁴⁶ *Id.* Because copyright plaintiffs only have the IP address affiliated with the downloading of their material.

⁴⁷ *Id.* Fed. R. Civ. P. 26; Fed. R. Civ. P. 45; Fed. R. Civ. P. 68. Rules 26 and 45 allow for a broad range of discovery, including expedited discovery of contact information by a third-party provider. Because discovery processes can be arduous and time-consuming, many copyright plaintiffs move for expedited discovery because there is no other option for them to gather information about the John Does; they only have the IP addresses. Thus, identification of the John Does is a major step in the copyright infringement process and courts find that motions for expedited discovery are appropriate in BitTorrent cases. The faster the Does are identified, the faster copyright plaintiffs can send all Does a Rule 68 settlement letter. Under Rule 68, a party may make an offer of judgment to the opposing party on specified terms within 14 days before the date set for trial. Settlement letters are very common among BitTorrent copyright infringement cases.

party can move for expedited discovery prior to a Rule 26(f) conference,⁴⁸ which is appropriate in some cases.⁴⁹ If expedited discovery is granted, it allows copyright plaintiffs to subpoena network providers.⁵⁰ This type of discovery includes the identifying information of the account holder to a specific IP address.⁵¹ As the name and address are highly relevant to the copyright plaintiff's claim, courts typically grant these motions.⁵² A primary concern is that because the "Does" are not identified *per se*, "Does" cannot contest the motion for expedited discovery.⁵³

Once the Doe has been identified as the account holder, copyright plaintiffs immediately send out settlement letters.⁵⁴ Here is the hook: one of the main reasons why copyright infringement litigation in the pornography industry is so lucrative is because copyright plaintiffs can generate up to \$150,000 in damages per "John Doe" defendant.⁵⁵ But a more serious concern is whether the account holder is actually the infringer, or someone who has a shared IP address where another person is accessing it through a VPN.⁵⁶

⁴⁸ Fed. R. Civ. P. 26(f). Rule 26(f) states that parties must confer as soon as practicable to arrange a scheduling order of discovery.

⁴⁹ Peter Meier & Elizabeth Dorsi, *Using Expedited Discovery with Preliminary Injunction Motions* (Mar. 3, 2014), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/winter2014-0227-using-expedited-discovery-with-preliminary-injunction-motions.html>. "The text of Rule 26 does not specify what standard the court should apply before granting a motion for expedited discovery under Rule 26(d)(1)." From case law over the past ten years in BitTorrent copyright infringement cases, expedited discovery is subject to judicial discretion and typically has a low threshold.

⁵⁰ See Fed. R. Civ. P. 45.

⁵¹ *Id.*; Fed. R. Civ. P. 26.

⁵² *Malibu Media, LLC v. Doe*, No. 1:14-CV-02744, 2015 WL 1291458, at *2 (N.D. Ohio Mar. 23, 2015).

⁵³ See *Zambezia Film Pty, Ltd. v. Does* 1-65, No. 13 C 1321, 2013 WL 4600385, at *2 (N.D. Ill. Aug. 29, 2013) (out of 65 John Does, only one (Doe #55) contested joinder issues); *Patrick Collins, Inc. v. John Does* 1-21, 282 F.R.D. 161 (E.D. Mich.) report and recommendation adopted, 286 F.R.D. 319 (E.D. Mich. 2012) (out of 55 John Does, only one contested for expedited discovery and joinder); *Third Degree Films v. Does* 1-36, No. 11-CV-15200, 2012 WL 2522151, at *3 (E.D. Mich. May 29, 2012) (out of 36 John Does, no one contested the motion for expedited discovery).

⁵⁴ Fed. R. Civ. P. 68; *Digital Sin, Inc. v. Does* 1-176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

⁵⁵ See 17 U.S.C. § 504 (2011), Copyright Act of 1976:

A) In General. —Except as otherwise provided by this title, an infringer of copyright is liable for either—1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection b); or 2) statutory damages, as provided by subsection c).

Id. *Malibu Media LLC v. Schelling*, 31 F.Supp.3d 910 (E.D. Mich. 2014) (copyright plaintiff was entitled to at least a minimum of statutory damages amount for each and every infringement but not allowed to receive attorney's fees).

⁵⁶ Adam Klasfeld, *Judge Raps Pornography Troll's Knuckles*, (July 8, 2015, 7:51 AM), <http://www.courthousenews.com/2015/07/08/judge-raps-pornography-trolls-knuckles.html>. Lawyers for Digital Sin (another well-known copyright troll in the pornography industry) "acknowledged in court that 30 percent of the IP addresses collected for copyright infringement cases were bystanders: children, relatives, lovers or neighbors of the IP holders."

C. Mass Joinder & Copyright Trolling

Because a swarm of users can be quite large, copyright plaintiffs have been known to join over 200 defendants to one copyright infringement action.⁵⁷ Copyright plaintiffs claim that such joinder is necessary because the swarms are a “concerted action by many people to disseminate files.”⁵⁸ However, other copyright plaintiffs have attempted to join defendants that did not necessarily participate in the same swarm, but downloaded the same piece or file.⁵⁹ District courts all over the United States are split as to whether the “concerted” requirement was either met or whether there should be a “concerted” requirement at all.⁶⁰

Because copyright plaintiffs can enjoin over 200 defendants in one single action, many of these copyright plaintiffs have started copyright trolling.⁶¹ A copyright troll is an owner or attorney with a valid copyright who brings an infringement action “not to be made whole, but rather as a primary or supplemental revenue stream.”⁶² Because many copyright trolls realize that the company can generate hundreds or thousands from litigation,⁶³ trolling has now evolved into a business model.⁶⁴ For

⁵⁷ See *W. Coast Prods., Inc. v. Does 1-5829*, 275 F.R.D. 9, 15 (D.D.C. 2011). Fed. R. Civ. P. 20(a) states that defendants may be joined in a single 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.”

⁵⁸ *Id.*

⁵⁹ *Site B, LLC v. Does 1-51*, No. 13 C-5295, 2014 WL 902688, at *3 (N.D. Ill. 2014) (no “concerted” action required, only needs a logical relationship); *Zamberzia Film Pty*, 2013 WL 4600385, at *2-4. Defendants do not need to be apart of the same swarm to be joined in a single action). In *both* cases, Judge Leinenweber & Judge St. Eve agreed with the copyright plaintiffs’ claim that a series of transactions (Fed. R. Civ. P. 20(a)) is broad enough to encompass transactions occurring at different times and among different parties.

⁶⁰ Examples of splits amongst same courts on the joinder issue between New York and Illinois. Concerted Requirement: *Zero Tolerance Entm’t Inc. v. Does 1-45*, No. 12 Civ 1083, 2012 WL 2044593 (S.D.N.Y. June 6, 2012)(permissive joinder not met because there is no evidence that the “Does” conspired or coordinated activities in any way); *contra Sunlust Pictures, LLC v. Does 1-75*, No. 12 C-1546, 2012 WL 3717768 at *4 (N.D. ILL. 2012) (permissive Joinder is appropriate where plaintiffs allege that the defendants participated in the same swarm at the same time).

No Concerted Requirement: *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 244(S.D.N.Y. 2012), Judge Alison J. Nathan stated:

It is difficult to see how the sharing and downloading activity alleged in the Complaint – a series of individuals connecting either directly with each other or as a part of a chain or ‘swarm’ of connectivity designed to illegally copy and share the exact same copyrighted file—could not constitute a ‘series of transactions’ for the purposes of Rule 20(a).

Id.; *contra Hard Drive Prods., Inc. v. Does 1-55*, No. 11-2798, 2011 WL 4889094 (N.D. Ill. 2011) (“Does” use of BitTorrent is sufficient (alone) to satisfy Rule 20(a)(2)).

⁶¹ 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, 86 (2012).

⁶²*Id.* John Doe, *Sued for Downloading Porn? One Victim’s Answer*, (March 10, 2012) <http://ctwatchdog.com/finance/sued-for-downloading-porn-one-victims-answer>. The most notorious of these copyright trolls are pornography copyright holders.

⁶³ Sag, *supra* note 3, at 1118, 1131 (2015); David Kravets, *Biggest BitTorrent Downloading Case in U.S. History Targets 23,000* (May 09, 2011 at 5:15PM) <https://www.wired.com/2011/05/biggest-bittorrent-case/>. For example, one of the largest pornography copyright infringement cases sued 15,551 John Does for downloading *Big Dick Glory Holes* and *Spin on My Cock* in one single action. If the copyright plaintiff could prove his burden seeking \$50,000 per infringer, he could potentially be making millions off one case (roughly \$777 million minus minimal court costs).

example, one of the most notorious copyright trolls is pornography company⁶⁵ Malibu Media.⁶⁶ Currently, Malibu Media is responsible for 38% of all copyright infringement lawsuits filed in the United States and has filed more than 1,500 lawsuits since 2014.⁶⁷ But, ironically, Malibu Media does not produce any well-known pornography,⁶⁸ in comparison to porn-powerhouse Vivid Entertainment,⁶⁹ which generates 100 million annually.⁷⁰

Every time Malibu Media files a complaint, it provides the identified Does with a settlement letter that claims over \$150,000 in monetary damages, but gives the Does' an option to settle for anywhere between \$1,000-\$25,000.⁷¹ Because settlement

⁶⁴ Jeffery Antonelli, *Torrent Wars: Copyright Trolls, Legitimate IP Rights, and the Need for New Rules Vetting Evidence and to Amend the Copyright Act* (Oct. 2013) http://antonellilaw.com/Torrent_Wars_article.php; see generally *Killer Joe Nevada, LLC v. Does 1-31, No. 2:13-cv-441*, 2013 WL 3270384 (S.D. Ohio 2013); *Cobbler Nevada LLC v. Does 1-15, No. 2:15-CV-11871*, 2015 WL 4276082 (E.D. Mich. 2015). This business model is not to necessarily help the owners of copyrighted material “stop online piracy, but to recoup lost income for movies that bombed at the box office.” For example, both *Killer Joe* and *The Cobbler* had high profile celebrity actors: Matthew McConaughey and Adam Sandler. But both movies tanked in the box office. *Killer Joe* (2011) grossed \$3.6 million and had a \$10 million budget. *The Cobbler* (2015) only generated \$24,000 in its opening weekend. *Killer Joe*., IMDB, <http://www.imdb.com/title/tt1726669/business>; *Adam Sandler: Is the Cobbler his Biggest flop Yet?*, <http://www.telegraph.co.uk/culture/film/film-news/11475903/Adam-Sandler-is-The-Cobbler-his-biggest-flop-yet.html>.

⁶⁵ *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 171, Footnote 5 (S.D.N.Y. 2012) (case law is unsettled regarding whether pornography may be legitimately copyrighted); *Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F. Supp.2d 444, Footnote 2 (D. Mass. 2011) (whether pornography is in fact entitled to protection against copyright infringement is unsettled in many circuits); see 17 U.S.C. § 504 (2011). Congress has never addressed the pornography standards for protections in copyright law. Likewise, The Copyright Act neither explicitly nor implicitly prohibits protection of “obscene material” such as hardcore pornography. However, “obscene material” is a “community standard” that varies by state and is a fact left to the jury.

⁶⁶ See Sag, *supra* note 3, at 1132.

⁶⁷ *Id.* See Klasfeld, *supra* note 56; U.S. District Judge Albin Hellerstein told his esteemed colleagues on the federal bench to approach these BitTorrent copyright infringement cases with “increasing caution” because of the dangers of copyright trolls, especially in the context of the pornography industry. Additionally, Malibu Media has been leading the pack since 2012 and setting a business model based off infringement.

⁶⁸ Malibu Media online search, GOOGLE, <https://www.google.com/> (enter “Malibu Media” into search field and retrieve results). No names, images, company information about Malibu Media surfaces from the search.

⁶⁹ Brett Pulley, *The Porn King*, FORBES, (March 7, 2005), http://www.forbes.com/2005/03/07/cz_bp_0307vivid.html. Vivid Entertainment started in 1975 and is one of the largest pornography studios in the United States. Vivid is famous for parody porn and celebrity porn.

⁷⁰ *Id.* Vivid Entertainment legal database search, WESTLAW, www.westlawnext.com (enter “Vivid Entertainment” into search field and retrieve results). Vivid has only been involved in 16 cases and three of which were related to copyright infringement. However, those three cases dealt with co-producers who were suing as well.

⁷¹ See Bill Donahue, *Porn Co. Malibu Faces High Court Challenge Over Attorney’s Fees*, LAW360, (Oct. 19, 2015, 9:18 PM), <http://www.law360.com/articles/715505/porn-co-malibu-faces-high-court-challenge-over-atty-fees>.

agreements are typically sealed,⁷² it is unknown how many Does actually settle rather than fight through the litigation process.⁷³

Litigation should not be used as a business model for generating revenue.⁷⁴ As University of Chicago Law Professor Geoffrey Stone states:

The American judiciary exists, first and foremost, to protect the constitutional rights of those who are not in the majority. It exists to ensure that our government treats *all* of us with respect. It exists to protect the rights of the disadvantaged, the oppressed, the powerless and the despised, even when disadvantaging them advantages the rest of us.⁷⁵

Therefore, copyright trolls are taking advantage of the use of BitTorrent in copyright infringement by suing hundreds or thousands in John Doe litigation, when the company can generate upwards of \$150,000 per defendant.⁷⁶ Clearly, copyright trolls are abusing the judicial process for financial gain.

Some district judges have been keen on recognizing, shaming, and sanctioning copyright trolls. Judges have the authority to sanction attorneys for coercive litigation tactics and award damages and attorney's fees to wronged innocent defendants.⁷⁷ Additionally, judges can force a party to pay fees for "unreasonable or "bad faith" arguments, thus deterring this type of behavior in the future.⁷⁸ In 2013, Prenda Law, a Chicago-based law firm, was characterized by a California court as a "porno-trolling collective," that relied on deceptive legal practices and antiquated copyright laws.⁷⁹ The California court ordered three attorneys from Prenda Law to

⁷² Fed. R. Evid. 408. Evidence of compromise offers and negotiations are no admissible to either prove or disprove the validity or to impeach a prior inconsistent statement.

⁷³ Interview with Jeffrey Antonelli, Attorney specializing in BitTorrent Copyright Infringement Defense in Chicago, IL (Sept. 2015). Mr. Antonelli stated that out of the 1,100 BitTorrent cases he has defended, none have proceeded to trial and the majority have settled.

⁷⁴ Geoffrey R. Stone, *Stop-and-Frisk: Why We Have Courts*, (Aug. 13, 2013 at 12:27 AM.) http://www.huffingtonpost.com/geoffrey-r-stone/stop-and-frisk-why-we-hav_b_3746856.html.

⁷⁵ *Id.*

⁷⁶ *Id.* See Copyright Act of 1976, 17 U.S.C. § 504.

⁷⁷ Fed. R. Civ. P. 11; 28 U.S.C. § 1927; *Wisconsin court sanctions Malibu Media, says that the Exhibit C's intent was to harass and intimidate*, <http://fightcopyrighttrolls.com/2013/09/10/wisconsin-court-sanctions-malibu-media-says-that-the-exhibit-cs-intent-was-to-harass-and-intimidate/>. Judge Conley of the Western District of Wisconsin sanctioned Malibu Media's counsel, requiring the company to pay \$200 per case to each John Doe IP holder listed in the original complaint, for a total of \$2,200 in damages.

⁷⁸ See *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216 (9th Cir. 2010).

⁷⁹ *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-8333-ODW, 2013 WL 1898633 (C.D. Cali. 2013). Judge Otis Wright eloquently stated:

Plaintiffs do have a right to assert their intellectual property rights, so long as they do it right. But Plaintiffs' filing of cases using the same boilerplate complaint against dozens of defendants raised the Court's alert. It was when the Court realized Plaintiffs engaged their cloak of shell companies and fraud that the Court went to battlestations.

Id. See *AF Holdings*, 752 F.3d at 990 (plaintiffs who "manipulate judicial procedures to serve their own improper ends . . . calls [the court] to evaluate and put a stop" to their attempt).

pay one “John Doe” defendant⁸⁰ \$81,000.⁸¹ But this sanction was put in place after years of John Doe abuse.

In the majority of BitTorrent copyright infringement cases, courts seem to be hesitant to impose such restrictions.⁸² For example, one of the first BitTorrent copyright infringement cases on appeal in the Eighth Circuit addressed this precise issue.⁸³ In *Killer Joe*, after the defendant was offered a settlement letter, her counsel asked for evidence of admission and production from the plaintiffs. Due to the copyright plaintiff’s failure to respond, the court dismissed the lawsuit.⁸⁴ Defendant requested attorney’s fees due to the embarrassment and recklessness of being alleged as an infringer. The District Court failed to apply the standard ruling on fee awards and the Eighth Circuit affirmed.⁸⁵

Although some districts have frowned upon copyright trolls, judges are still timid to shun copyright trolls from moving forward in litigation.⁸⁶ Likewise, there are districts unfamiliar with BitTorrent pornography copyright trolling and

⁸⁰ Fed. R. Civ. P. 26(c); *Malibu Media, LLC v. Doe*, No. 8:14-CV-874-T-36AEP, 2014 WL 5599105, at *6 (M.D. Fla. Nov. 3, 2014); *Malibu Media, LLC v. John Does 1-23*, No. 5:12-CV-04442, 2013 WL 1389763, at *2 (E.D. Pa. Apr. 3, 2013). John Does’ actual names are identified through ISP account information, however some John Does move for a protective order through FRCP 26(c), to seal their names from disclosure on court proceedings. The John Doe must show that disclosure of his or her name would protect them from annoyance, embarrassment, oppression, undue burden or expense. However, many courts are reluctant to grant the protective orders without good cause, which is a high threshold for these Does.

⁸¹ *Ingenuity*, 2013 WL 1898633 at *4. See *Steele v. IARDC*, Commission No. 2015PR00068, Count I, (August 20, 2015) <http://www.iardc.org/15PR0068CM.html>. Mike Masnick, *Illinois Attorney Discipline Board Finally Moves Against Prenda Mastermind John Steele*, (Aug. 21, 2015, 10:38 A.M.), <https://www.techdirt.com/blog/?company=prenda+law>. Additional sanctions subject to investigation were triggered by the state’s bar associations nearly two years after the final judgment by Judge Wright of the Central District Court of California against the Prenda headhunters John Steele and Paul Duffy. Steele was found guilty by the California court on seven counts from fraud to bad faith litigation and improper use of the judicial system. As of fall 2015, Steele is still legally allowed to practice law in Illinois until the IARDC makes recommendations for discipline. Duffy is significantly mentioned in Steele’s complaint, however died two weeks prior to the filing date due to heart and alcohol-related complications.

⁸² *Malibu Media Defendant Petitions the Supreme Court*, <http://fightcopyrighttrolls.com/2015/10/08/after-prevailing-party-fees-were-denied-malibu-media-defendant-petitions-the-supreme-court/>. After plaintiff’s claim was dismissed, Magistrate Judge Simonton recommended a \$6,800 sanction against a copyright troll, but then withdrew her recommendation because she found that the troll’s motivation was “proper” and the lawsuit was not “frivolous.” Defendant filed a Petition for a Writ of Certiorari to the Supreme Court in October 2015, however it was not granted.

⁸³ *Killer Joe*, 807 F.3d at 908. See also Antonelli, *supra* note 4. Oral arguments were made in September 2015 and the decisions were made in December 2015. This case only dealt with the issue of attorney’s fees and not whether an IP address caught copyright infringing is sufficient evidence to prove that the ISP account holder is the actual infringer.

⁸⁴ *Killer Joe*, 807 F.3d at 908.

⁸⁵ *Id.*

⁸⁶ *Zambezia Film Pty, Ltd. v. Does 1-65*, No. 13 C 1321, 2013 WL 4600385, at *2 and *5 (N.D. Ill. Aug. 29, 2013); *Hard Drive Prods., Inc. v. Doe*, 283 F.R.D. 409, 410 (N.D. Ill. 2012). Defendant claimed that Plaintiff was a copyright troll, who has filed a “multitude of copyright suits solely to extort quick settlements.” The judge did not agree or disagree that the plaintiff was a troll. However, the judge still granted the request for expedited discovery because the plaintiff established a “good cause.” However in *Hard Drive*, the court said that it should evaluate “the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances.”

associated business tactics.⁸⁷ Thus, many districts use basic standards and parameters set by outdated laws that do not sync with the BitTorrent copyright infringement world.⁸⁸

III. ANALYSIS

In order to fix the problems with the mass “John Doe” BitTorrent litigation, it is important to analyze whether the Copyright Act of 1976 is still appropriate for the technology mechanisms of today. Additionally, we need to address if motions for expedited discovery are being abused when there is no standard or required forensic analysis brought in conjunction with an original complaint. Because there is an abundance of copyright infringement cases dealing with pornography, it is also essential to examine whether copyright trolls are using sociological tactics to force settlement on innocent parties or infringers who enjoy the copyright plaintiffs’ work product in the privacy of their own home. Lastly, it is imperative to analyze whether these litigation tactics are extreme enough to sanction attorneys and impose restrictions on businesses.

A. Copyright Act of 1976

Under the Copyright Act of 1976, copyright laws protect copyright holders over actual infringers, which is precisely what the act was intended to accomplish.⁸⁹ However, because the language of the Act is not explicit, these same copyright laws can be taken advantage of by copyright trolls. Because the statutory damages provision is so high and can be used as a scare tactic, many innocent parties settle.⁹⁰ As stated previously, a copyright holder can sue a potential infringer for up to \$150,000.⁹¹ There is no clear distinction in the act that specifies the difference between downloading copyrighted material in a single instance versus downloading copyrighted material multiple times with intent to distribute (pirating). Either way,

⁸⁷ Sag, *supra* note 3, at 1131-33. From 2001-2014, Wisconsin District Courts have only decided on 56 John Doe pornography copyright infringement cases, compared to Illinois District Courts deciding on 647 cases. “Pornography is uniquely well suited to exploit the litigation incentives of our current copyright system.”

⁸⁸ Quick Recap of filing a BitTorrent John Doe copyright infringement suit:

- (1) Plaintiff files complaint against 200 John Does, joinder under FRCP 20;
- (2) Plaintiff moves for expedited discovery under FRCP 26(b)(1);
- (3) Typically no information about Doe is available (only IP address), thus Doe cannot contest;
- (4) Under FRCP 45, Plaintiff subpoenas ISP for IP address holder information;
- (5) Plaintiff sends FRCP 68 settlement letter;
- (6) Doe can: settle, move for protective order under FRCP 26(c), fight the case.

⁸⁹ 17 U.S.C. § 504 (2011).

⁹⁰ See *Id.* Within the Copyright Act, there is no explicit language as to prevent copyright trolls.

⁹¹ *Id.* \$750 is the minimum amount a copyright holder can sue in any copyright infringement case, with up to \$30,000 dependent upon “as the court considers just.” But if the court finds that the infringement was committed willfully, the court can increase the damages amount up to \$150,000 per infringer.

both parties could potentially be subjected to \$150,000 in statutory damages, depending on how active the user is in the swarm.⁹²

An analogous situation would be if a person driving five miles per hour over the speed limit were subjected to a speed ticket carrying the same fine as if that person were driving 95 miles per hour over the speed limit. Thus, the damages for copyright infringement are disproportionate to the copyright holder's actual harm.⁹³ This damages/harm theory is predominantly true when dealing with low-budget pornography.⁹⁴ And because, ideally, a pornography copyright holder could be generating more revenue with BitTorrent cases than sales in the porn itself, it would make sense why companies like Malibu Media troll aggressively.⁹⁵ Ironically, in contrast, pornography has never been claimed nor denied copyright protection under the Copyright Act.⁹⁶ However, the issue of whether pornography is copyrighted is rarely before any court dealing with BitTorrent cases.⁹⁷

A copyright holder has every right to sue against alleged infringers, but the overwhelming concern within the past few years has been whether the alleged infringer is actually an innocent party. As mentioned previously, many infringers themselves will bury their IP address through proxy servers and VPNs.⁹⁸ Thus, at times, the people who are the account holders are not necessarily the actual infringers.⁹⁹

B. Motion for Expedited Discovery

Through the Copyright Act and Federal Rules of Civil Procedure, copyright holders are allowed to subpoena third-party ISP holders.¹⁰⁰ However, the motions for

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Voltage Picture, LLC v. Does 1-5,000*, 818 F.Supp.2d 28 (D.C. 2011); Bryn Pryor, *How the Porn Industry Set the Stage for Micro-Budget Filmmaking*, <http://www.indiewire.com/article/how-the-porn-industry-set-the-stage-for-micro-budget-filmmaking-20150206>. In *Voltage*, copyright holders were suing infringers for downloads of *Hurt Locker*, which had a budget of 11 million. In comparison, the average budget for a "five-scene, two-hour" porn costs around \$25,000. If a copyright troll can sue upwards of \$150,000 per download, that company is expecting four times the amount it took to even produce the pornography itself per case. That is a profit of \$100,000 per IP address; now imagine the potential gains from mass joinder BitTorrent cases with over 100 alleged defendants.

⁹⁵ See generally *Defendant's Expert Witness Report Suggests that Malibu Media's Investigators Doctored Evidence*, <https://fightcopyrighttrolls.com/2015/10/25/defendants-expert-witness-report-suggests-that-malibu-tampered-with-evidence/>.

⁹⁶ See *Liberty Media Holdings* at Footnote 2.

⁹⁷ *Id.*

⁹⁸ See *How to Use Utorrent Anonymously*, (Oct. 1, 2015, 6:50 P.M.), <http://www.best-bittorrent-vpn.com/how-to-use-utorrent-anonymously.html>.

⁹⁹ See Klasfeld, *supra* note 56. Lawyers for Digital Sin (another well-known copyright troll in the pornography industry) "acknowledged in court that 30 percent of the IP addresses collected for copyright infringement cases were bystanders: children, relatives, lovers or neighbors of the IP holders."

¹⁰⁰ See 17 U.S.C. § 504 (2011); Fed. R. Civ. P. 45; *KJN v. Doe*, 5:13-cv-04036 (N.D. Iowa 2015); Antonelli, *supra* note 4. In *KJN*, the only issue raised on appeal was, "Whether it is reasonable to file a copyright infringement claim against an innocent person just because they pay for Internet service?" This oral argument did not address the VPN or proxy option; it primarily addressed

expedited discovery that copyright plaintiffs' file are repetitious copies of other motions for expedited discovery, with the same convoluted, unintelligible language.¹⁰¹ Additionally, because judges and clerks may not be savvy in the field of intellectual property,¹⁰² there has been a lack of consistency on how to address expedited discovery.¹⁰³ It would be challenging for judges to question the forensic software and applications copyright plaintiffs are using and/or claiming for expedited discovery of IP address holders' information without a set standard or superior knowledge in this field.

Therefore, these motions are typically granted because there is no other way to proceed through the litigation process for copyright infringement cases.¹⁰⁴ In addition, because no Circuit Court has addressed this issue, it is highly dependent on what the judge believes or knows about BitTorrent when deciding to grant the motion itself.¹⁰⁵ One of the most popular threshold defenses raised is that the copyright holder must be acting in "good faith."¹⁰⁶ But some courts seem to forget the good faith standard, because it is such a low threshold.¹⁰⁷ The rationale is that infringers should have a minimal expectation of privacy since their information is

attorney's fees at the discretion of the district court, since the District Court granted the defendant's motion to dismiss.

¹⁰¹ See *Yet Another New York Judge, Not Happy about Malibu Media's Predatory Conduct*, <https://fightcopyrighttrolls.com/2015/09/14/yet-another-new-york-judge-is-not-happy-about-malibu-medias-predatory-conduct/>. The language in most of the motions is that the company's (in this instance – Malibu Media) forensic examiner "discovered wiping software," to show that the infringer was attempting to cover-up his or her activity. However, in these motions, it does not explain the science, data, or evidence to prove what [wiping software] really is or how it was actually used.

¹⁰² *Voltage Pictures, LLC v. Does 1-31*, No. CV413-037, 2013 WL 1339724, at *3 (S.D. Ga. Apr. 1, 2013); *Cobbler Nevada, LLC v. Does*, No. CV 15-12771, 2015 WL 7732026, at *2 (E.D. Mich. Dec. 1, 2015); *TCYK, LLC v. Does 1-87*, No. 13 C 3845, 2013 WL 3465186, at *1 (N.D. Ill. July 10, 2013); *Malibu Media, LLC v. John Does 1-49*, No. 12-CV-6676, 2013 WL 4501443, at *1 (N.D. Ill. Aug. 22, 2013). Specific cases that have relied on Sean Karunaratne's Michigan Law Review article, "*The Case against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*," because judges and courts were unfamiliar with the intricacies of BitTorrent protocol.

¹⁰³ See *BKGTH Prods., LLC v. Does 1-20*, No. CIV.A. 13-5310, 2013 WL 5507297, at *8 (E.D. La. Sept. 30, 2013)(LA court granting motion for expedited discovery); *Malibu Media LLC v. Doe*, No. 1:14-CV-0166, 2014 WL 575305, at *1 (M.D. Pa. Feb. 11, 2014) (PA court granting the motion for expedited discovery); *Vision Films, Inc. v. John Does 1-24*, No. CIV.A. 12-1746-LPS, 2013 WL 1163988, at *1 (D. Del. Mar. 20, 2013) (DE court granting motion for expedited discovery); see *contra*, *AF Holdings LLC v. Doe*, No. 2:11-CV-03076 LKK, 2012 WL 974933, at *4 (E.D. Cal. Mar. 21, 2012)(CA court denying motion for expedited discovery); *Guava, LLC v. Does 1-5*, No. 1:12-CV-8000, 2013 WL 3270663, at *6 (N.D. Ill. June 27, 2013) (IL court denying motion for expedited discovery); *W. Coast Prods., Inc. v. Does 1-169*, No. 2:12-CV-5930-WHW-SCM, 2013 WL 3793969, at *3 (D.N.J. July 19, 2013) (NJ court granted in part and denied in part motions for expedited discovery).

¹⁰⁴ *TCYK*, 2013 WL 5567772, at *3 (citing *Malibu Media, LLC v. John Does 1-6*, 85 Fed. R. Serv.3d 1187 (N.D. Ill. 2013)).

¹⁰⁵ Antonelli, *supra* note 4. *KJN* is the first case brought to any circuit court, which can help solidify, "Whether it is reasonable to file a copyright infringement claim against an innocent person just because they pay for Internet service?" An answer should be given by the end of 2015 or early 2016.

¹⁰⁶ *Id.* *TCYK*, 2013 WL 5567772 at *3; *Dallas Buyers Club, LLC v. Does 1-28*, No. 14 C 4927, 2014 WL 3642163, at *2 (N.D. Ill. July 22, 2014). Good cause exists when the need for expedited discovery outweighs the prejudice to the defendants.

¹⁰⁷ *Dallas Buyers Club, No. 14 C 4927, 2014 WL 3642163* at *2.

already exposed to a third party.¹⁰⁸ Thus, without some type of universal standard for the courts to analyze whether the copyright plaintiff has produced enough evidence in their motion that (1) the infringer is not only the IP address holder but (2) the actual infringer, many innocent defendants will still be swept up in these John Doe BitTorrent cases.

C. Settlements & Coercion

Since the motion for expedited discovery will likely be granted, the IP address holder's information will now be attached to the complaint and will receive the standard settlement letter. But this still does not resolve the main issue: whether the account holder is actually the infringer. As previously stated, if the actual infringer is smart enough, that person will have his personal IP address encrypted once, twice, or three times through a proxy or VPN with no paper trail to a bank account paying for the encryption service.¹⁰⁹ Thus, the named person in the complaint may be completely innocent, which proves that this process is inherently flawed and can result in gross misidentification.¹¹⁰

Since copyright plaintiffs can send a settlement letter to the Does once they have been identified,¹¹¹ it has been theorized that Does' typically cave into the low settlement amount,¹¹² compared to the \$150,000 copyright plaintiffs are claiming in their settlement letters.¹¹³ This "minimum" amount makes Does' think that they are receiving a deal, regardless if they actually participated in BitTorrent software.¹¹⁴ Unfortunately, the majority of defendants are focused only on the costs associated with litigation and where the \$150,000 in monetary damages is going to come from.

¹⁰⁸ *Id.* Malibu Media, LLC v. John Does 1-13, No. CV 12-1156 JFB ETB, 2012 WL 1020243, at *2 (E.D.N.Y. Mar. 26, 2012). The third party here would be the ISPs.

¹⁰⁹ See generally Ernesto Van der Sar, *5 Ways to Download Torrents Anonymously*, <https://torrentfreak.com/5-ways-to-download-torrents-anonymously/>. Basically, the "actual" infringer is abusing shared IP networks.

¹¹⁰ James Temple, *Lawsuit Says Grandma Illegally Downloaded Porn*, 3:35 PM), <http://www.sfgate.com/business/article/Lawsuit-says-grandma-illegally-downloaded-porn-2354720.php>; See also, *Copyright troll Keith Lipscomb "acknowledges" his mistake . . . by continuing to twist arms of an undeniably wrongly accused . . .*, <https://fightcopyrighttrolls.com/2013/07/02/copyright-troll-keith-lipscomb-acknowledges-his-mistake-by-continuing-to-twist-arms-of-an-undeniably-wrongly-accused/> [hereinafter "*Copyright Mistake*"]. The first case is an example of an innocent bystander of a shared IP address. 70-year-old grandmother was enjoined in a BitTorrent case and through evidence, it revealed she actually did not participate in the BitTorrent application; it was revealed through evidence that her teenage neighbors participated in the copyright infringement. The second case is an example of a man who was on-business, out of the country for seven months, but owned an apartment complex that offered internet subscription with its monthly utility fees. Through the preponderance of evidence, the defendant was not guilty of copyright infringement and it was one of his tenants who downloaded pornography illegally.

¹¹¹ See Fed. R. Civ. P. 68.

¹¹² *Id.* This amount is anywhere between \$1,000-\$25,000, depending upon specific factors.

¹¹³ *AF Holdings*, 752 F.3d at 993. Attorney acknowledged at oral argument that out of over 100 copyright infringement cases filed by plaintiff (AF), none proceeded to trial. In addition, the firm admitted to making \$15 million in less than three years.

¹¹⁴ Jay Hamilton, Sample Settlement Letter, https://dietrolldie.files.wordpress.com/2014/02/hamipl_set11_01020ia1.pdf.

From the initial settlement letter, there is a drastic unequal bargaining power between the Doe and the copyright troll, but it is unfortunately much larger than just money.

In addition, if the copyright infringement allegation circulates around pornography, then that defendant is more enticed to settle because of the negative connotation with the pornography industry.¹¹⁵

Typically when thinking about pornography in a sociological sphere, immorality, obscenity, and negativity encompass this industry.¹¹⁶ This stems from “religious perspectives regarding sexuality” and local community standards that can drastically vary from state to state.¹¹⁷ Additionally, there is a basic concept that pornography degrades women.¹¹⁸ And the threshold of degradation is becoming significantly more offensive with the rampant availability of online pornography.¹¹⁹ Recent pornography studies have shown that: 88% of scenes included choking, spanking, and bondage; 41% of trends lead to vomiting and excrement; and 99% of bestiality images are of women only.¹²⁰ In addition, the majority of those persons shelling out the violence were male and the targets are overwhelmingly female.¹²¹ Thus, there is a theory that pornography viewers adopt similar habits and social norms as to the pornography they are watching.¹²² This can include aggression toward women as well as violence, which has been theorized to potentially transition into a viewer’s life/work balance.¹²³

¹¹⁵ Malibu Media, LLC v. John Does 1-6, 291 F.R.D. 191, 197 (N.D. Ill. 2013); Malibu Media LLC v. John Doe subscriber assigned IP address 24.183 .51.58, No. 13-CV-205-WMC, 2013 WL 4821911, at *1 (W.D. Wis. Sept. 10, 2013); Kasischke v. State, 991 So. 2d 803 (Fla. 2008). There are few cases that cite to the sociological aspect of watching pornography, especially within the spectrum of copyright infringement. Of these few cases, the issue is on whether pornography can be copyrighted or the relationship between sex offenders and child pornography.

¹¹⁶ Lihi Yona, *Politicizing Health, Medicalizing Porn: Rethinking Modern Pornography*, 16 MARQ. ELDER’S ADVISOR 113, 119 (2014) (citing Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 48-49 (2007)).

¹¹⁷ *Id.* at 119, 123, (citing *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); *Williams v. Attorney General of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004)). Community standards in Hartford, Connecticut may be drastically different from those in Las Vegas, Nevada. Community standards are typically a question left to the jury and not a question of law. For example, in the past, some states have banned: contraceptives, sex toys and homosexual images.

¹¹⁸ Yona, *supra* note 116, at 124. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 803-804 (2008) (describing how pornography websites advertise, “ONE OF THE BIGGEST WHORES EVER! Bridgette Kerkove will probably go down in the **** of porn history as one of the most filthy, disgusting . . .”).

¹¹⁹ Yona, *supra* note 116, at 129. Catharine A. Mackinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1962 (1995).

¹²⁰ Yona, *supra* note 116, at 129.

¹²¹ *Id.* at 130 (citing Stacy Gorman et al., *Free Adult Internet Web Sites: How Prevalent are Degrading Acts?* 27 GENDER ISSUES 131, 137-38 (2010)).

¹²² See *id.* at 133-134. This theory is one of many theories and studies that have been conducted on the relationship of pornography viewers to social norms.

¹²³ *Id.* at 148 (citing Carlin Meyer, *Sex, Sin, and Women’s Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1101 (1994)).

Encompassing the national scope on pornography, this negative connotation can tarnish an individual's reputation, hurt relationships, and break families.¹²⁴ There is an even higher rate of settlement¹²⁵ if it is taboo or ultra-hardcore pornography.¹²⁶ This public embarrassment element is precisely what copyright trolls use to their advantage to entice settlement.¹²⁷ In addition, it is challenging to statistically track the rate of settlement to the rate of complaints or active cases.

Not surprisingly, settlement letters contain very minimal evidence as to proving the infringement aside from the aforementioned IP addresses.¹²⁸ Furthermore, copyright trolls even have admitted that the accuracy of information (e.g., whether IP address holders are the actual infringers) is "not that important."¹²⁹ For example, Prenda Law's settlement letter mentions: "Infringements can also result from an unsecured wireless network," meaning even if the IP holder did not infringe that person will still be held civilly liable.¹³⁰ In addition to the formalities listed through the Copyright Act, many settlement letters coerce, scare and berate Does into immediate settlement.¹³¹ But these scare tactics are not limited to letters; many Does have received multiple voicemail and text messages.¹³² Thus, all of these variables circulating in the Doe's head from \$150,000 in monetary damages,

¹²⁴ *Copyright Mistake*, *supra* note 110, (citing *Malibu Media, LLC v. Pelizzo*, Case No. 1:12-CV-22768-CIV-SEITZ/SIMONTON, Defendant's Verified Motion for Attorneys' Free and Costs (Fla. 2013), p. 12). "In addition to straining relationship with family and friends, the public filing of such an allegation—even if never proven—will adversely affect an individual's career, business and reputation."

¹²⁵ *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y.) report and recommendation adopted sub nom. *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012); *Malibu Media v. John Doe*, Nos. 13-cv-205-wmc, 2013 WL 4821911 (W.D. Wis. 2013); Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 818-19 (2008); *Third Degree Films, Inc. v. Does 1-53*, No. JFM 8:12-CV-00349, 2012 WL 1150811, at *1 (D. Md. Apr. 4, 2012). Examples of names of hardcore graphic pornographies in cases include: "Gang Bang Virgins," "Anal Fanatic," "[Bestiality] Young Blond . . . Dog," "Blonde Gets Slammed," ". . . Rips Small Chicks," "I Spit on Your Grave," "Big Butt Oil Orgy 2," and others.

¹²⁶ Tracy Clark Flory, *Internet Porn Has Gotten So Much Weirder Than You Could Possibly Imagine*, (Sept. 4, 2014), <http://www.menshealth.com/sex-women/internet-porn?slide=4>. Types of taboo or ultra-hardcore pornography: Lollipop (18-year olds acting as minors), simulated rape, simulated incest, vore (death of participants), guro (blood and mutilation).

¹²⁷ Catharine A. Mackinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1963 (1995). On trend, "the more violating the [pornography] material, the more it is wanted," which is disproportionate to the supply. Although it may be popular, pornography is still something viewed in a personal and private space; it is not something a person would necessarily like displayed in a courtroom, especially if it hard-core or fetish pornography.

¹²⁸ Jay Hamilton, Sample Settlement Letter, p. 2, https://dietrolldie.files.wordpress.com/2014/02/hamipl_setl1_01020ia1.pdf.

¹²⁹ *Copyright Mistake*, *supra* note 110.

¹³⁰ November 2012 Prenda Settlement Letter, *available at* <https://www.scribd.com/doc/113957135/Prenda>.

¹³¹ *Copyright Mistake*, *supra* note 110. Verbatim language from a settlement letter, "When [defendant] loses, he will lose everything he owns and owe my clients hundreds of thousands of dollars. Mark these words, your client's decision to reject and walk away will be the worst decision he will ever make."

¹³² *Settlement Letters, etc.*, <http://dietrolldie.com/settlement-letters-other-troll-correspondence/>. It has not been quantified whether this type of communication is legal, especially when it is time-sensitive, specific legal material over text or voicemail.

embarrassing and crippling allegations, and harassing communication, all adds to the rationale for settlement despite the copyright trolls' apparent violation of the Federal Rules of Civil Procedure and the Professional Rules of Responsibility.¹³³

D. Delays or Failure of Accountability

Because only some courts are keen to realize which repeat companies are copyright trolling, there has been no consistency on holding these copyright trolls accountable for their aggressive litigation strategies.¹³⁴ Typically, the course of action for a judge is to either deny expedited discovery or dismiss the case.¹³⁵ But because companies like Malibu Media are copyright trolling to generate revenue,¹³⁶ simply tossing a case out of court by means of involuntarily dismissing the case will not bother the company. Malibu Media filed 821 copyright infringement cases in 2014, 1,027 cases in 2013, and 333 cases in 2012.¹³⁷ Trolls such as Malibu Media can just re-file with another IP address because their operation is like a puppy-mill on autopilot.¹³⁸

Even though judges have the authority to sanction attorneys and award damages, they are still hesitant because they do not want to overstep their boundaries as a judge or are just unfamiliar with copyright trolls.¹³⁹ Therefore, these pornography copyright trolls that are getting away with these heinous litigation tactics, are well aware of their nefarious tactics, and are reaping the financial gain as a result.

Likewise, if courts find that companies are copyright trolling and impose penalties, these penalties are minimal in comparison to the millions of dollars that pornography companies are making from copyright infringement cases. Imposing fines of hundreds or thousands of dollars will not truly deter copyright trolls'

¹³³ Model Rules of Professional Conduct, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. All United States attorneys take an oath to abide by these rules.

¹³⁴ *Defendant asks Judge to Declare Malibu Media a Vexatious Litigant*, <http://fightcopyrighttrolls.com/2015/08/31/defendant-asks-judge-to-declare-malibu-media-a-vexatious-litigant/>. Some defense attorneys have requested that the court declare Malibu Media as a "harassing and vexatious litigator," requiring sanctions and restrictions.

¹³⁵ *Id.* Dismissal is either voluntarily (from the party) or involuntarily (from the court).

¹³⁶ Online Search of "Malibu Media LLC", GOOGLE, <https://www.google.com/> (enter "Malibu Media LLC" into search field and retrieve results). This search reveals no company address, information, or types of pornography the company produces. The only information about Malibu Media circulates around copyright infringement lawsuits.

¹³⁷ *Sag*, *supra* note 3, at 1132. These numbers do not include settlements.

¹³⁸ *Puppy-mill*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/mill>. "... is a commercial dog breeding facility that is operated with an emphasis on profits over the welfare of the animal." Under this analogy, the theory is that pornography companies are just copy and pasting new IP addresses to change a few details in their complaints and continuously filing regardless of whether the plaintiff has any evidence or if such evidence is in their favor.

¹³⁹ 28 U.S.C. § 1927; *See Killer Joe*, 807 F.3d at 908 (even though defendant was wrongly named in a BitTorrent case, when she requested attorney's fees, both the district and appellate courts denied her request.)

behavior and drive from pursuing copyright infringement litigation.¹⁴⁰ The penalties received need to affect pornography copyright plaintiffs' business model and compel the company to change its strategy, focusing more on making pornography than filing frivolous lawsuits.

In addition to the low fines and penalties given to the John Does, copyright troll attorneys can have their attorney licenses suspended or revoked. But due to how long the judicial process takes, some attorneys who abuse the system will either never see those sanctions in application or will still have the opportunity to practice law years after the sanction was put in place.¹⁴¹ For example, Prenda Law's attorneys' Paul Duffy and John Steele were sanctioned after years of judicial abuse and unethical business practices.¹⁴² The final judgment was finalized in 2013, however, the IARDC has yet to fully pursue its side of bar-eligibility sanctions, which could take additional years.¹⁴³ Even though John Steele has been publicly shamed, he is still allowed to practice law in Illinois.¹⁴⁴ In contrast, Paul Duffy will never see the judgment officially finalized because he died this year of heart and alcohol-related complications.¹⁴⁵ The inability for the courts and state bar associations to work efficiently and quickly, independently or together does not deter this behavior either.

IV. PROPOSAL

Because there is no standard set for expedited discovery,¹⁴⁶ IP address holders become John Doe litigants once copyright trolls subpoena ISP companies. Likewise, because there are no set standards, settlement letters coerce IP address holders (Does) into immediate settlement because of the high statutory damages and threat

¹⁴⁰ *Wisconsin Court Sanctions Malibu Media, Says that the Exhibit C's intent was to harass and intimidate*, <https://fightcopyrighttrolls.com/2013/09/10/wisconsin-court-sanctions-malibu-media-says-that-the-exhibit-cs-intent-was-to-harass-and-intimidate/>; see Klasfeld, *supra* note 56. Judge Conley sanctioned Malibu Media's counsel, requiring the company to pay \$200 per case to each John Doe IP address holder listed in the original complaint. In total, the sanction amounted to \$2200: pennies to these copyright trolls. After all, Malibu Media has filed over 1,500 suits since 2014 and this number does not account for the vast number of settlements across the United States.

¹⁴¹ *Ingenuity*, 2013 WL 1898633 at *4, *6; See *Steele*, Commission No. 2015PR00068, <https://www.iardc.org/15PR0068CM.html>, Mike Masnick, *Illinois Attorney Discipline Board Finally Moves Against Prenda Mastermind John Steele*, (Aug. 21, 2015, 10:38 A.M.), <https://www.techdirt.com/blog/?company=prenda+law>. In *Ingenuity*, the judge referred attorney sanctions to local committees on discipline. This case was in 2013 and these local committees have still not sanctioned attorneys.

¹⁴² *Ingenuity*, 2013 WL 1898633 at *4. The court found that Rule 11 sanctions were inappropriate, because the court already dismissed the case. The court awarded attorney's fees to the defendants, totaling \$81,319.

¹⁴³ *Id.* at 6. The court referred attorney discipline to local bar organizations.

¹⁴⁴ *Id.* See Steve Schmadeke, *Lawyer Cited for Threatening to Sue Thousands for Watching Porn*, CHICAGO TRIBUNE, (Aug. 24, 2015) <http://www.chicagotribune.com/news/local/breaking/ct-porn-lawyer-discipline-met-20150823-story.html>. He [John Steele] is "an ethics primer on all the things not to do. His methods were so outlandishly unethical that it took a while and lot of hard work to convince judges that wow, this is really happening." John Steele is no longer practicing in copyright law; he is currently practicing bankruptcy law.

¹⁴⁵ *Id.*

¹⁴⁶ See generally Fed. R. Civ. P. 26(d)(1).

to “out” the account holder for watching pornography that may have poor community standards with outrageous pornography titles and involved in taboo areas. Lastly, because we do not know how many IP address holders actually settle in comparison to moving forward in litigation, it is challenging to know how coercive these tactics truly are.

But there needs to be a systematic way to observe whether copyright trolls are using coercive elements to force settlement, as well as hold them accountable when they do. Without changing the way the courts handle BitTorrent cases, specifically in the pornography industry, it will continue to make copyright trolls millionaires at the hands of potentially innocent IP address holders. Thus, this comment proposes three standards courts can implement to protect innocent account holders or minimal, first-time copyright infringers and regulate the copyright trolling business model in the pornography industry: (1) set a standard for expedited discovery, (2) change the amount of statutory damages, and (3) impose harsher sanctions and penalties against companies and their attorneys.

A. Standards in Expedited Discovery

It is unfair to allow copyright trolls to move for expedited discovery when these companies do not provide any other information aside from the IP addresses through the BitTorrent software, especially through shared networks.¹⁴⁷ In 2011, the Honorable Harold A. Baker of the Central District of Illinois admitted that the “correlation” between the IP address holder and the actual infringer is “still far from perfect;”¹⁴⁸ but changes to implement the level of scrutiny needed to compel a motion for expedited discovery still do not exist.

Thus, in addition to the standard motion for expedited discovery and Rule 45 subpoena,¹⁴⁹ copyright trolls need to produce technical evidence that the IP address holder is actually the infringer. Since the wake of BitTorrent John Doe cases, only one court has introduced a higher standard to allow copyright trolls to move forward in their motions.¹⁵⁰ The District Court of Maryland stated that the court is aware of similar cases filed by Malibu Media in other jurisdictions in which concerns were raised “as to the sufficiency of the allegations” of IP addresses.¹⁵¹ Therefore,

¹⁴⁷ Jeffrey Antonelli, *Torrent Wars: Copyright Trolls, Legitimate IP Rights, and the Need for New Rules Vetting Evidence and to Amend the Copyright Act*, (October 2013), <https://www.isba.org/sections/ip/newsletter/2013/10/torrentwarscopyrighttrollslegitimate>; see, e.g. *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012). Thirty percent of the Does named in litigation, did not download the copyrighted material the plaintiff alleged in the complaint.

¹⁴⁸ *VPR Internationale v. Does 1-1017*, No. 11-02068, 2011 WL 8179128 at *2 (C.D. Ill. Apr. 29, 2011).

¹⁴⁹ Fed. R. Civ. P. 45. As explained earlier, copyright plaintiff’s subpoena ISP companies to give up the IP address holder’s information in order to learn who is allegedly responsible for downloading their copyrighted material.

¹⁵⁰ *In re Malibu Media Cases*, No. 8:12-cv-01195-PJM Legal Blog (S.D. MD May 16, 2013, *1-*2, http://www.antonellilaw.com/uploads/May_16_2013_Draft_Order_on_Malibu_Media_procedures.pdf).

¹⁵¹ *Id.* at 2.

pursuant to Federal Rule of Civil Procedure 53(a),¹⁵² the court designated a Special Master (“Master”)¹⁵³ to serve as an intermediary to determine whether sufficient facts exist to establish a claim for copyright infringement under the IP address holder’s information.¹⁵⁴ This Master oversees: (1) notices to ISP companies, (2) information from alleged infringer on specificity on their account, (3) settlement letters, and (4) protective orders.¹⁵⁵

These steps are essential to halting the abuse currently affecting potentially innocent defendants in copyright infringement litigation. As per rule 53(a) procedures, once the account holder’s information is disclosed, (1) the Master is the primary person who provides the account holder notice of the lawsuit¹⁵⁶ and (2) the account holder then has the opportunity to prove that they were not the actual infringer, which enables the Master to decide whether the case should proceed.¹⁵⁷ This second element is extremely important because instead of wasting judicial resources and pouring over discovery, it allows the account holder to provide his own evidence of innocence.¹⁵⁸ The Master also has the authority to send settlement letters, which no longer allows the copyright troll to have such a stronghold over coercive, one-sided settlement tactics.¹⁵⁹ As expressed, the coercive element is an even higher threshold when dealing with alleged pornography users and/or taboo pornography. Therefore, because Rule 53(a) can essentially strip the copyright trolls’ ability to craft their settlement letters and settlement amounts dependent upon the times downloaded, the name of the pornography title, or type of pornography, the Does should no longer feel automatically compelled to settle based on sociological stigmas circulated around pornography and coercive communication within the letter.¹⁶⁰ The coercive tactic is fundamentally eliminated by allowing the Master to be in sole communication with the alleged infringer. Ideally, this third element could

¹⁵² *Id.* at 3. See Fed. R. Civ. P. 53(a). A court may appoint a master only to: perform duties consented to by the parties, hold trial proceedings and make or recommend findings of fact on issues.

¹⁵³ *Id.* at 3. Professor William Hubbard, Background, <http://law.ubalt.edu/faculty/profiles/hubbard.cfm>. Professor William Hubbard is an Associate Professor of Law at University of Baltimore, who specializes in intellectual property and technology. The court found that he was the most suitable candidate to oversee the sufficiency of BitTorrent copyright cases, specially dealing with Malibu Media.

¹⁵⁴ *In re Malibu Media Cases*, *supra* note 150, at 3-4.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 4-5.

¹⁵⁷ *Id.* The account holder can prove that he was not the actual infringer by: failure to block IP address, shared networks, not primary location, lack of BitTorrent software on computer, etc.

¹⁵⁸ See *Malibu Media, LLC v. Pelizzo*, No. 12-22768-CIV, 2012 WL 6680387, at *1, *4 (S.D. Fla. Dec. 21, 2012); in conjunction with *MALIBU MEDIA, LLC, Plaintiff, v. Leo PELIZZO*, Defendant., 2013 WL 6490632, at pg. 2, 3 (S.D.Fla.). For example, in *Pelizzo*, it took over 18 months of motions and discovery for the defendant to finally clear his name of any copyright infringement. Malibu first filed in March 2012. After reiterating (by motions) that the defendant was innocent of any infringement because he was out of country during the alleged infringement dates, the plaintiff voluntarily dismissed its case in March 2013. But it took over 18 months, which could have been avoided using this Special Master role to pour over the evidence.

¹⁵⁹ *In re Malibu Media Cases*, *supra* note 150 at 3-4.

¹⁶⁰ See *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) *aff’d sub nom.* *Hudnut v. Am. Booksellers Ass’n, Inc.*, 475 U.S. 1001, 106 S. Ct. 1172, 89 L. Ed. 2d 291 (1986). Some sociological stigmas associated with pornography are obscenity and offensiveness, which are polar-opposite of what traditional standards of communities want.

change the business model mentality for all copyright and pornography trolls. Lastly, the Master has the authority (4) to decide whether the alleged infringer has proven they qualify for or if they should be granted a protective order.¹⁶¹

All courts can prescribe a Rule 53 motion to any BitTorrent John Doe cases dealing with the pornography industry.¹⁶² This Rule 53 motion can monitor frivolous cases that lack the evidence proving the IP address holders are the actual copyright infringers and be a game changer in the abusive strategies in the BitTorrent copyright infringement world.

B. Reforming Statutory Damages

As wonderful as a Special Master is in writing, it is still a theory that has yet to see widespread application.¹⁶³ Courts will likely maintain due diligence, but judges are not the only people in power that can remedy the BitTorrent pornography troll industry; Congress can improve the problem from the top.

There is much need to reform the damages provision of the Copyright Act of 1976.¹⁶⁴ This section is outdated and will continue to be so as new technology emerges. Although actual Doe defendants have participated in illegal activity by downloading copyrighted material, their activity should not automatically open them up to paying damages of \$150,000.¹⁶⁵ That would be a 6,000%¹⁶⁶ increase from what the cost of the pornography was to purchase outright or three times the amount more than it would have taken to actually film and produce the pornography itself.¹⁶⁷

Thus, the fear alone of paying \$150,000 plus litigation and attorney's fees makes Does want to settle for \$1,000-\$25,000 as hush money. Likewise, even when a Doe can prove his case and request attorney's fees from the copyright plaintiffs, courts likely will not grant the Does' request, which is an even larger deterrent to fighting the case.¹⁶⁸ The leverage that the copyright plaintiffs have over the Does in

¹⁶¹ Fed. R. Civ. P. 26(c).

¹⁶² Fed. R. Civ. P. 53(g). Courts and judges also have the authority to designate who pays the Master, whether it be by the court or attorneys. As a mechanism for deterrence of frivolous BitTorrent copyright infringement suits, judges can make the copyright plaintiffs pay for the Master's services if the preponderance of evidence analysis clearly fails.

¹⁶³ *In re Malibu Media Cases*, No. 8:12-cv-01195-PJM, (S.D. MD May 16, 2013) at *2-3. Only one court has ever applied a rule 53 Special Master to BitTorrent copyright infringement cases.

¹⁶⁴ Sag, *supra* note 3, at 1135-36; Brad Greenberg, *Copyright Trolls & the Common Law*, http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILRB_100_Greenberg1.pdf; Karunaratne, *supra* note 19, at 304; *see generally* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009). Other articles who have mentioned reformation of the statutory damages provisions.

¹⁶⁵ This article does not include infringers who are downloading with intent to distribute (pirating).

¹⁶⁶ Average Pornography Price Today, <http://www.adultdvdempire.com/adult-dvds.html>. To purchase an online or DVD pornography, it would cost between \$19.99-\$29.99.

¹⁶⁷ Brett Pulley, *The Porn King*, FORBES, (March 7, 2005), http://www.forbes.com/2005/03/07/cz_bp_0307vivid.html. Average cost of a Vivid Entertainment pornography varies from \$40,000-\$200,000. (These numbers do not consider amateur porn). This comparison is based off a \$40,000 budget.

¹⁶⁸ *Killer Joe*, 807 F.3d at 908. *Malibu Media, LLC v. Pelizzo*, 604 F. App'x 879 (11th Cir.) *cert. denied*, 136 S. Ct. 690, 193 L. Ed. 2d 520 (2015). For both *Killer Joe* and *Pelizzo*, at the trial court

monetary damages alone needs to change. However, the damages provision still needs to set a standard, which would force the actual infringers to question whether they should participate in BitTorrent again. After all, the purpose of damages is to restore an injured party to the position the party was in before being harmed by the defendant, but not to force the defendant to become bankrupt for making a poor decision.¹⁶⁹

The basis for changing the statutory damages is from years of public policy bounded by principles of judicial and fundamental fairness.¹⁷⁰ If it would be unfair to expect a person speeding five miles over the speed limit to pay \$5,000,¹⁷¹ it is unfair for a one-time copyright infringer who downloaded a piece of a file to pay \$150,000 in damages. My specific proposal under the theory of fundamental fairness is that a first-time John Doe found liable (by the preponderance of evidence¹⁷²) would have to pay ten times the amount the purchase of the pornography would be, not exceeding \$2,000. For multiple offenders, it should not exceed \$5,000. Once again, the court would need to factor the totality of the circumstances and use its best judgment to decipher how much the Does' should pay.¹⁷³

For example, if an 18-year-old first-time downloader were to be caught, he would likely have minimal assets and be working a minimum wage job. Additionally, his

level, the Plaintiffs voluntarily dismissed their bases. But when Does asked for the copyright plaintiffs to pay for their attorney's fees, their requests was denied. Both Does appealed, only to be denied again. These are the only two BitTorrent John Doe copyright infringement cases to have gone up on appeal. The Eighth and Eleventh Circuit Courts only assessed attorney's fees and did not address the underlying issue of whether an IP address alone is enough to prove copyright infringement on behalf of the IP address holder.

¹⁶⁹ *Damages*, USLEGAL, <http://damages.uslegal.com>.

¹⁷⁰ *Fundamental Fairness Doctrine*, USLEGAL, <http://definitions.uslegal.com/f/fundamental-fairness-doctrine/>; See *In re BitTorrent Copyright Infringement Cases*, 2013 WL 501443, at *5 (fundamental Fairness was applied to sever the joinder claims of copyright infringement in a BitTorrent case). Fundamental fairness doctrine is a rule that applies the principles of due process to a judicial proceeding. Due Process, guaranteed by the Fifth and Fourteenth Amendments, holds that the government shall not take a person's life, liberty or property without the due process of law.

¹⁷¹ Patrick E. George, *Average Cost of a Speeding Ticket*, <http://auto.howstuffworks.com/under-the-hood/cost-of-car-ownership/cost-of-speeding-ticket.htm>. The average cost of a speeding ticket is \$150, including court fees for speeding roughly 15 miles per hour over the speed limit. Costs vary from state to state.

¹⁷² *Preponderance of Evidence*, THE PEOPLE'S LAW DICTIONARY, <http://dictionary.law.com/default.aspx?selected=1586>. Preponderance of evidence is evidentiary standard in which the greater weight of the evidence in a civil lawsuit is required for the trier of fact to decide in favor of one side over the other. It is based on which evidence is more convincing and its probable truth or accuracy and not on the amount of evidence *per se*. In this scenario, the preponderance of evidence could be found through analyzing the totality of circumstance. Factors relevant to that analysis include (but are not limited to): who is the account holder?, who paid for the account?, was there more than one person in the home?, was there a shared device?, who was at home when the BitTorrent use or IP address was captured?, whose device was the downloaded material located on?, is the defendant an avid pornography watcher or a subscriber to specific websites?, etc. The key here is the understanding that the IP address holder is more probable than not.

¹⁷³ *Sag*, *supra* note 3, at 1139, footnote 152; see also Samuelson & Wheatland, *supra* note 164, at 509-10 (recommending that "[c]ourts should also have the power to lower statutory damages below the . . . minimum when an award based on this minimum would be grossly disproportionate to the harm caused").

cerebral cortex¹⁷⁴ is not fully developed, thus he may not have assessed the totality or ramifications of his actions. In comparison, if the infringer is a 45-year-old first-time downloader with a full-time salaried position, who is a recognized, upstanding citizen, he should have known that participating in this type of activity would have legal consequences and more than likely could have afforded the pornography outright.

Although getting Congress to reform and change laws can be painstaking and time-consuming, it is worth the effort to change the statutory damages provision to protect people from paying outrageous monetary damages on copyright infringement cases and shift the business model of copyright trolls who are making millions of dollars off potentially innocent John Does.

C. Harsher Penalties & Court/Commission Efficiency

Lastly, courts must impose harsher penalties against copyright trolls¹⁷⁵ and courts must work more efficiently with state bar attorney disciplinary commissions.¹⁷⁶ Under the American Bar Association, attorneys take an oath and duty to protect their clients.¹⁷⁷ Attorneys must conduct themselves with professionalism, honesty, and truthfulness; unfortunately those elements have been lacking in the world of BitTorrent copyright infringement litigation.¹⁷⁸ Therefore, deterrence and accountability is a primary goal in achieving due diligence and this can be achieved with instruction from the court and state bar associations.¹⁷⁹

First, courts need to impose harsher fines and penalties¹⁸⁰ against copyright trolls who repeatedly re-file the same BitTorrent copyright infringement suits against John Does with little to no direct evidence that the IP address holder is the actual copyright infringer.¹⁸¹ Courts are wary to impose sanctions, because they are

¹⁷⁴ Sarah Sprinks, *Adolescent Brains are Works in Progress*, PBS, (Mar. 4, 2000), <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html>. The cerebral cortex is part of the brain that is associated with reasoning, planning, and problem-solving. “Young adolescence brains are works in progress.”

¹⁷⁵ *Ingenuity*, 2013 WL 1898633 at *2, *4. Judges have the inherent authority to sanction and impose fines. Judges also have the authority to sanction attorneys under Fed. R. Civ. P 11(b)(3).

¹⁷⁶ See *Mission Statement*, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, https://www.iardc.org/mission_statement.asp. For example, in the state of Illinois, persons can report attorney misconduct to the Illinois Attorney Registration and Disciplinary Commission (IARDC). Their mission is to “promote and protect the integrity of the legal profession.”

¹⁷⁷ See ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

¹⁷⁸ See *Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Wenger*, 469 N.W.2d 678, 678 (Iowa 1991).

¹⁷⁹ *Id.* at 678. “Fundamental honesty is the case line and mandatory requirement to serve in the legal profession.”

¹⁸⁰ Stephen G. Bene, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907 (1991). Standards set forth by the ABA are silent as to address penalties on attorney misconduct, stating it depends on the specific facts and circumstances of the case.

¹⁸¹ *Id.* at 926. All sanctions and penalties have a component of deterrence.

an extreme measure.¹⁸² But judges have commented that copyright infringement cases “give off an air of extortion,”¹⁸³ because copyright trolls are generating so much revenue at the hands of John Doe defendants. Therefore, the best way to deter this type of behavior is to affect copyright plaintiff’s bank accounts.

Recently, some judges have started to impose penalties against copyright plaintiffs like Malibu Media.¹⁸⁴ But the fees are extremely low—\$200 per John Doe—which is not enough to discourage this type of behavior. Therefore, my proposal is for every frivolous suit,¹⁸⁵ copyright plaintiffs should compensate the Does for expenses incurred in the lawsuit including time, court costs, and attorney’s fees.

Time of each Doe defendant can include time away from education (paying for school), family (finding a nanny or sitter), or work (hourly rate), and should be compensated for having to defend themselves.¹⁸⁶ Attorney fees should cover the cost the Doe had to pay for out-of-pocket expenses.¹⁸⁷ For example, in *Ingenuity*, the court found that \$300 per hour was a reasonable rate for the defendant’s attorney based on his experience and work quality, thus compelling the plaintiff pay for the defendant’s attorney’s fees.¹⁸⁸

Likewise, if the court finds that the copyright plaintiff’s misconduct was blatant and brazen, the judge has the authority¹⁸⁹ to award punitive damages as well.¹⁹⁰ Repeat offenders, like Malibu Media, should be subjected to punitive damages because they have admitted to filing frivolous lawsuits and have been filing continuously for years.¹⁹¹

Second, courts and state bar attorney disciplinary commissions must work more efficiently to conduct investigations in a timely manor. Currently, there seems to be some type of disconnect between when a judge sanctions an attorney for misconduct

¹⁸² *Sanctions Order in Malibu Media Case*, ELECTRONIC FRONTIER FOUNDATION, (Sept. 10, 2013), available at <https://www.eff.org/Malibu-Sanctions-Order-Wisconsin>.

As the Seventh Circuit of Appeals explained in *FDIC v. Tekfen Construction and Installation Co., Inc.*, 847 F.2d 440 (7th Cir. 1988):

While the Rule 11 sanction serves an important purpose, it is a tool that must be used with utmost care and caution. Even where, as here, the monetary penalty is low, a Rule 11 violation carries intangible costs for the punished lawyer or firm. A lawyer’s reputation for integrity, thoroughness and competence is his or her bread and butter. We may not impugn the reputation without carefully analyzing the legal and factual sufficiency of the arguments.”

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 10. Two hundred dollars may seem like pennies for pornography companies like Malibu Media.

¹⁸⁵ *Frivolous lawsuit*, USLEGAL, <http://definitions.uslegal.com/f/frivolous-lawsuit/>. Frivolous lawsuits are those filed by a party who is “aware they are without merit because of a lack of supporting legal argument.” These may be filed for “purposes of harassment or coercion, such as to coerce the defendant into paying more or accepting less money that is rightfully due.” To label a case frivolous, it would be at the judge’s discretion and would be found by the totality of circumstances.

¹⁸⁶ *Ingenuity*, 2013 WL 1898633 at *5. Court awarded Doe \$40,659, but doubled his award to \$81,319 for other variables.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Fed. R. Civ. P. 11(c).

¹⁹⁰ *Ingenuity*, 2013 WL 1898633 at *5. Punitive damages are intended to deter the behavior of the copyright plaintiffs.

¹⁹¹ *Copyright Mistake*, *supra* note 110.

and when a commission investigates the attorney's misconduct. For example, the final judgment against Prenda Law's attorneys John Steele and Paul Duffy was released in May 2013.¹⁹² But there has been no final verdict on whether Steele is still eligible to practice law in Illinois due to his misconduct.¹⁹³ This means Steele is still practicing law in Illinois without being held fully accountable for his attorney misconduct, almost three years after Judge Otis shamed him in a California tribunal.¹⁹⁴ Because of how long the process takes for investigations, attorneys who have been in violation of misconduct still have the ability to practice law and use their abusive tactics on other potentially-innocent plaintiffs or defendants.

Therefore, I propose a process where the state bar receives a copy of the court order the day of the final judgment, which would automatically trigger an investigation. From the date of the order, the local state bar commission will notify the attorney of the investigation and the bar has up to 60 days to investigate the claims.¹⁹⁵ The largest factor that is a significant problem between the court and bar is time; thus by automatically compelling an investigation from a court order, it will dramatically change this dynamic. By promoting a faster investigation, it will deter the behavior as well because the cost of disbarment and suspension can have serious ramifications.¹⁹⁶

V. CONCLUSION

Copyright plaintiffs have the right to sue alleged infringers under the Copyright Act. However, with the proliferation of BitTorrent use, pornography copyright plaintiffs are copyright trolling, seeking damages as a business model to generate revenue rather than to be made whole. Because there is no set standard to prove that the IP address holders are the actual infringers, motions for expedited discovery are typically granted, giving copyright trolls unequal bargaining power.¹⁹⁷ Additionally, once copyright trolls obtain the contact information of the John Does, these companies use coercive tactics to berate Does into settlement using sociological stigmas about pornography and high statutory damages.

¹⁹² *Ingenuity*, 2013 WL 1898633 at *6.

¹⁹³ *Steele*, Commission No. 2015PR00068, <http://www.iardc.org/15PR0068CM.html>.

¹⁹⁴ *Ingenuity*, 2013 WL 1898633.

¹⁹⁵ *Regarding Complaints of Professional Misconduct Against Attorneys Licensed in Texas*, <https://www.law.uh.edu/libraries/ethics/attydiscipline/howfile.html>. After the two suggestions mentioned above, the typical bar investigation process would continue. The lawyer would have the option to: reach an agreement of appropriate punishment, pursue an evidentiary panel for final decision, or state district court for trial.

¹⁹⁶ *Bene*, *supra* note 180, at 933. Disbarment and suspension leads to a "loss of income due to a lowered reputation after a return to practice." Thus, disbarment and suspensions are viewed as monetary sanctions.

¹⁹⁷ See *High Statutory Damages for Copyright Infringement violate the Eighth Amendment*, (Oct. 31, 2014), <http://fightcopyrighttrolls.com/2014/11/18/federal-judge-high-statutory-damages-for-copyright-infringement-violate-the-eighth-amendment/>. This comment does not address other issues currently facing BitTorrent copyright infringement suits in the pornography industry: additional motions to stay, motions to quash, motions for ISP not wanting to comply because of an undue burden of producing information, whether porn is copyrighted due to obscenity, and aspects of the Copyright Act that could be in violation of Eighth Amendment.

But this can change. With the implementation of a Special Master, courts can effectively monitor the ability to grant motions for expedited discovery and limit the communication between the copyright infringer and the John Doe. The use of a Special Master can be a game changer in the abusive strategies in the BitTorrent copyright infringement world. Likewise, Congress can assist in maintaining this issue by lowering the statutory damages provision, giving John Does more leverage to settle without going bankrupt. Lastly, by imposing harsher penalties and sanctions, it will deter copyright trolls from continuing this unethical behavior and assist in maintaining more control in this industry. There are opportunities to protect both John Doe defendants and first-time copyright infringers by regulating copyright trolls, but it will take communication, implementation, and efficiency amongst courts, state bars, and attorneys alike.